Merger Working Group
Sub group Notification & Procedures

Defining "Merger" Transactions for Purposes of Merger Review

I. Introduction

The ICN's Recommended Practices for Merger Notification and Review Procedures ("RPs") provide considerable guidance on jurisdictional nexus and notification thresholds for purposes of defining transactions that are properly subject to merger notification and review requirements. As a matter of first principles, a merger review regime must also define the type of transactions that potentially qualify for notification as "mergers."[1] Although the definition of qualifying "merger" transactions is not expressly dealt with in the RPs, it is a critical issue from an enforcement policy perspective and it is fundamental to the transparency of the merger review process as set out in RP VIII (B) comment 1. While the precise technical terms may differ according to applicable local laws, the overriding aims of the definition of "covered transactions" are to capture those transactions that merit notification and review as "mergers" under applicable substantive merger legislation, while at the same time providing clear and easily understandable standards that enable merging parties to readily ascertain their notification obligations.

[1] As used herein, the term "merger" is intended to refer to various types of acquisitions and business combinations comprising "covered transactions" for merger control purposes, as opposed to a specific transactional structure under applicable business laws.

II. General Principles

As a general matter, merger review statutes and regulations are directed at business transactions in which two or more previously independent economic undertakings are combined in some fashion that involves a lasting change in the structure or ownership of one or more of the undertakings concerned.[2] The types of qualifying business transactions typically include some form of merger between two or more previously independent undertakings, by the acquisition of control or some degree of influence by one undertaking over the whole or part of another undertaking, or by some combination of all or part of the business operations of two or more undertakings to create a new business enterprise (e.g., consolidations, amalgamations and joint ventures).

The degree of economic integration between the parties and the duration of the relationship (both subsumed in the notion of a "lasting structural change" under the EC Merger Regulation) are often utilized to distinguish qualifying "merger" transactions from mere collaborative arrangements, which are normally reviewd under competition laws that are primarily directed at anticompetitive agreements between independent undertakings, such as Section 1 of the Sherman Act in the United States and Article 81 of the EC Treaty. Qualifying business transactions are termed "concentrations" under the ECMR and the German Act Against Restraints of Competition ("ARC"). In the United Kingdom, such transactions are referred to as a "relevant merger situation" in which two or more enterprises "cease to be distinct" under the Enterprise Act 2002.

Almost universally, merger review regimes cover outright acquisitions of one firm by another, whether the transaction is structured as an acquisition of 100% of the seller's shares or 100% of the seller's assets. Likewise, merger review regimes almost universally cover acquisitions of shares or assets falling short of the 100% threshold where the transaction nevertheless results in an acquisition of "control" of a business enterprise. Qualifying transactions may include both acquisitions of "sole control" by one firm over another, and acquisitions of "joint control" of a firm by two or more firms.[3] Many jurisdictions also cover acquisitions of shares that, while falling short of a controlling interest, nevertheless give rise to the potential ability of the acquiring firm to exert some degree of influence over the acquired company.

Set out below is a general discussion of how various jurisdictions address these issues in defining those types of business transactions that may be subject to merger review. Although specific terminology may vary by reference to the business laws of the

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[2] Because potential competitive concerns are normally limited to some form of combination between previously independent economic actors, restructurings and reorganizations that occur within the same group (i.e., a restructuring of two wholly-owned subsidiaries by their common parent or between two divisions of the same company) are typically not subject to merger review.

[3] "Joint control" may be achieved, for example, where a transaction results in a 50/50 equity split, such that mutual agreement is necessary for management decisions and/or where one party is capable of exercising veto rights over proposed actions. Transactions that involve shifts from "joint control" to "sole control" (or vice versa) may also give rise to a qualifying change in "control."

jurisdictions concerned, the discussion is divided into three sections, which correspond to the main categories of covered transactions: share acquisitions, asset acquisitions, and joint ventures. Representative exemplars of statutory and regulatory approaches to these issues in various jurisdictions are attached as annexes for further reference.

III. Types of Qualifying "Merger" Transactions

A. Share Acquisitions

Acquisitions of shares (or other equity interests such as partnership interests or LLC interests) typically qualify as "mergers" for merger review purposes whenever they result in an acquisition of "control" of the target. Thus, for example, a qualifying transaction arises whenever the buyer obtains a controlling equity interest in the target such that it can exercise "decisive influence" over the target's business operations. An acquisition of "control" presumptively arises whenever the purchaser acquires a majority of the target company's shares, such that the purchaser obtains voting rights that permit it to control the target company's board, management and/or business direction. In the EU, the requisite change in "control" may also be brought about by acquisitions of shareholdings falling short of an outright majority stake, where such holdings would nonetheless enable the acquirer -- alone or together with other shareholders -- to block the adoption of strategic decisions, for example, through the exercise of veto rights, or other arrangements which permit the acquirer to exercise *de facto* decisive influence over the target.

Many merger review regimes also cover share acquisitions that fall short of an outright majority of the target company's shares where the purchaser may nevertheless have the potential ability to exert significant influence over a company. In many jurisdictions, the relevant legislation sets out specified percentage levels that trigger a notification requirement. In Japan, for example, separate notifications are required for share acquisitions in excess of 10%, 25% and 50% shareholding levels. Under Canadian rules, notification is required for acquisitions of more than 20% of the shares of public companies and more than 35% of the shares of non-public companies.

Rather than using a test based solely on shareholding percentages, other jurisdictions examine additional factors in assessing whether minority interests may give rise to the requisite "ability to influence." In Germany, for example, the ARC not only requires notification of any acquisition of 25% or more of the capital or voting rights of another undertaking, but also acquisitions that fall below the specified 25% threshold to the extent that the transaction would enable the buyer to exercise "a competitively significant influence" over the target company. Similarly, the United Kingdom's OFT guidelines state that acquisitions of minority shareholdings of between 10% and 15% may be subject to merger review to the extent that such shareholdings may give rise to the ability to exercise "material" influence over the target company. The factors the OFT will take into account in making this determination include whether the minority shareholder is accorded special voting rights or veto rights, board representation and/or

financial interdependence. The acquisition of minority interests are likewise subject to notification requirements in South Africa if a shareholder agreement (or other similar agreements) gives the buyer the ability to "materially influence" the policy of the target company.

The United States generally requires premerger notification of any share acquisition that is valued in excess of $59.8 million (annually adjusted for inflation), irrespective of the resulting percentage shareholding. Acquisitions of minority stakes of 10% or less (15% or less by certain institutional investors such as banks and investment companies) are exempt under the Hart-Scott-Rodino Act ("H-S-R") notification requirements if made "solely for purposes of investment" (i.e., passive investments where the purchaser has no intention to seek to influence the business affairs of the target company). Share acquisitions by securities underwriters "in the ordinary course" of their business are also exempt from H-S-R notification requirements irrespective of the value of the transaction.

Other jurisdictions also set out special rules for "ordinary course" share acquisitions by financial institutions. In the EU, acquisitions of securities by a credit or financial institution with a view to resale within one year in the ordinary course of business benefit from an exemption from the notification requirements, as do any transfers in control of companies to liquidators in connection with insolvency proceedings. South Africa also provides exemptions for certain types of share acquisitions by financial institutions in the context of "ordinary course" financing arrangements.

B. Asset Acquisitions

Transactions in which the purchaser acquires all or substantially all of the seller's business assets are almost universally viewed as qualifying transactions for merger review purposes. Many jurisdictions also cover asset purchases even though they may not constitute all or substantially all of the seller's assets. Here, there is no question that there has been a change in control of the assets. Rather, the pertinent question is whether the acquired assets have sufficient economic significance to merit merger review coverage. Under the ECMR, for example, an acquisition of assets will only be considered a "concentration" if those assets constitute the whole or a part of an entity to which a market turnover can be attributed. Japan requires notification of asset acquisitions only if the turnover attributable to the acquired assets exceeds 1 billion yen.

It is typically not necessary, however, that the acquired assets represent an actual going concern or otherwise comprise a stand-alone business enterprise. The German ARC, for example, covers acquisitions of "a substantial part of the assets of another undertaking," and transactions may qualify as concentrations notwithstanding the fact that the acquired assets do not constitute a "substantial part" of the seller's assets in a quantitative sense. Rather, asset acquisitions may qualify as concentrations under the ARC whenever the assets have independent competitive significance in connection with

production or distribution in some relevant market. Thus, for example, qualifying transactions can include the acquisition of a single business establishment (e.g., a single food chain outlet), an unincorporated business unit (e.g., a manufacturing division), or intellectual property rights. The ECMR likewise covers acquisitions of intangible assets (*e.g.*, intellectual property rights) if those assets are the basis for an existing economic activity to which a market turnover can be attributed.

In the UK, a "relevant merger situation" arises whenever "two or more enterprises cease to be distinct." The term "enterprise" is defined as the activities, or part of the activities, of a "business." A qualifying "enterprise" does not need to be a separate legal entity; a qualifying transaction may arise whenever it involves the transfer of assets sufficient to carry on a business. Thus, while the acquisition of a business by another business as a going concern will inevitably give rise to a qualifying transaction, enterprises may also "cease to be distinct" if only part of the seller's business is acquired so long as the acquired assets include those components that are needed to carry on a business. However, an acquisition of assets does not in itself amount to "enterprises ceasing to be distinct" unless this minimal "business activity" test is met.

In the United States, the H-S-R Act and rules generally cover asset transactions whenever the acquired assets are valued in excess of $50 million (as adjusted) but then exempt from notification various categories of asset acquisitions that are likely to lack competitive significance. Importantly, acquisitions of assets "in the ordinary course of business" are exempted, and this exempts most acquisitions of new goods, current supplies and used durable goods. Acquisitions of "all or substantially all of the assets of an operating unit," however, are excluded from the definition of "ordinary course" transactions and are therefore subject to the H-S-R Act if the $50 million (as adjusted) threshold is met. Similarly, acquisitions of certain real property assets, such as undeveloped land, and office or residential property are also exempted under the H-S-R rules, as the agencies view such transactions as unlikely to raise competitive issues. In Canada, certain acquisitions of financial assets undertaken in the context of ordinary course financing arrangements (i.e., asset securitization transactions) are also exempt from notification.

C. Joint Ventures

Most merger review regimes also include the formation of joint ventures as qualifying merger transactions. Given the rather flexible notion of what constitutes a "joint venture", it is difficult to generalize in this area. As a general proposition, however, joint ventures involve some pooling of resources to create a new business enterprise on a more or less permanent basis. The distinguishing features of qualifying joint ventures – as opposed to mere collaborative arrangements – include economic integration of the parties' business activities (as, for example, through a contribution of productive assets to a new business undertaking), the elimination of competition between

the parties in the joint venture's field of activity through this contribution, and the relative permanence of the joint business activity.[4]

Where these basic criteria are met, joint venture transactions are often brought within the general scope of applicable merger review laws by reference to the fact that the creation of a qualifying joint venture will typically involve the transfer of voting securities or assets, by reference to the underlying combination of previously independent businesses and/or through specific definitional coverage in the jurisdiction concerned.

Under the U.S. H-S-R rules, for example, joint ventures are captured to the extent that one or more of the parties to the venture is deemed to be acquiring assets or voting securities that meet the general $50 million valuation test. The formation of a joint venture is likewise subject to merger notification requirements in Japan if it results in an acquisition of the new company's shares or the transfer of the parent companies' assets to the new company that meet the thresholds generally applicable to acquisitions of shares and assets, respectively.

In the UK, the formation of a joint venture may fall within the purview of the Enterprise Act 2002 whenever the operation gives rise to a situation in which two or more enterprises "cease to be distinct." In the EU, joint ventures are covered under the ECMR under the general definition of a "concentration," which includes transactions in which two or more undertakings participate in the creation of an autonomous economic entity – otherwise known as a "full function joint venture". The joint venture must represent more than a mere collaboration between companies. Rather, to qualify as a "concentration," the joint venture must constitute an autonomous economic entity that can operate on the market independently of its parent companies on a lasting basis.

[4] The collaborative features of joint venture arrangements may also be subject to review in the jurisdiction concerned under competition laws that are primarily directed at anticompetitive agreements, such as Section 1 of the Act Against Restraints of Competition in Germany.

IV. Concluding Observations

The themes advanced in the ICN's Guiding Principles and Recommended Practices for Merger Notification and Review Procedures include the development of notification procedures that promote effective enforcement of substantive merger review laws, efficient allocation of enforcement agency resources, clear guidance to merging parties vis-à-vis their reporting obligations, and the avoidance of unnecessary transaction costs associated with the merger notification process.[5] Achieving all of these objectives often requires a balancing of these sometimes competing interests. These same objectives – and potential tensions – are also relevant to the exercise of defining qualifying "merger" transactions for purposes of merger review laws.

Many jurisdictions have put in place a dedicated legislative framework specifically for merger notification and review, distinct from the framework for assessing the competitive impact of business conduct more generally, so as to ensure that changes of ownership which may have an impact on market structures can be scrutinized in a timely and speedy fashion. Such a specific legal framework, whether mandatory or voluntary, facilitates law enforcement and can increase legal certainty to investors. However, if the category of transactions that potentially qualify for notification as "mergers" is defined too broadly, the result may be to capture many types of ownership changes that are unlikely to have a material impact on competition, thus placing a greater burden on business and law enforcement resources than would seem justified. Conversely, a definition of "mergers" that is too narrow may mean that, in some jurisdictions, transactions raising potential competition concerns may not be challenged or can not be examined under a jurisdiction's merger review laws.[64] Jurisdictions must weigh these considerations in defining qualifying "merger" transactions for the purposes of their merger notification and review laws.

Clearly, transactions whereby one business enterprise acquires control of another or whereby two previously independent enterprises otherwise combine their operations merit coverage as qualifying mergers, consistent with generally prevailing international practice. At the same time, a definition which is limited to a "change in control" via the acquisition of a majority of a company's shares may be considered under-inclusive in the context of share acquisitions since it fails to capture minority acquisitions that, while falling short of control, nevertheless give the acquiring firm the ability to influence the management and operations of the target and thereby affect its competitive conduct.

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[5] **Ошибка! Только основной документ.**The Guiding Principles and Recommended Practices for Merger Notification and Review Procedures are available at:
http://www.internationalcompetitionnetwork.org/index.php/en/publication/294.
In particular, Recommended Practices I (nexus), II (thresholds), and VIII (transparency) may prove of assistance in defining merger transactions for purposes of merger review.

[6] Recommended Practice IV on Review Periods recognizes the importance of completing merger reviews in a reasonable and determinable period of time. By contrast, antitrust reviews that are not limited as to the duration of the review may involve protracted legal uncertainty for the businesses concerned.

With respect to acquisitions of assets, the main definitional issue – in contrast to share acquisitions – relates not to "control" or "ability to influence", but to whether the acquired assets have sufficient competitive significance so as to give rise to an appreciable economic concentration in the marketplace. This notion is often captured by reference to whether the assets comprise an "enterprise" or business activity to which turnover may be attributed. Here again, however, it should be borne in mind that a definition limited to acquisitions of an ongoing business enterprise – while relatively clear-cut – may fail to capture a wide range of transactions of potential competitive significance, i.e., transfers of intellectual property rights such as patents and trademarks.

In all events, the definition of qualifying "merger" transactions should provide clear and easily understandable standards that will enable merging parties to readily ascertain their notification obligations. With respect to share acquisitions, objective tests predicated upon specified shareholding percentages (e.g., 50%, 25%, 15%) have the advantage of providing clear and unambiguous guidance to merging parties. On the other hand, as many jurisdictions have recognized, absolute percentages may understate the extent to which the shareholder may influence the target's business as, for example, through special voting rights, shareholder agreements or veto rights which may give the acquiring person effective control of the target notwithstanding the fact that it may hold less than 50% of the target's shares. Likewise, as previously discussed, definitions of qualifying asset acquisitions that are confined to assets which comprise the entirety of an ongoing business enterprise, while more readily identifiable, may be considered unduly narrow.

Whether applied to acquisitions of shares or assets, more subjective tests, while perhaps appropriate from the standpoint of effective enforcement, need to be articulated in a clear and easily understandable manner that gives merging parties adequate guidance as to their notification obligations. Efforts to provide such guidance include, for example, the European Commission's "Notice," the UK Office of Fair Trading's "Mergers-Procedural guidance" publication, and the Bundeskartellamt's "Information leaflet on the German control of concentrations."

Finally, in considering these definitional issues, it is important to distinguish between the definition of "covered transactions" for purposes of merger notification requirements, on the one hand, and jurisdiction over transactions for purposes of substantive merger review, on the other. In many jurisdictions, such as the EU, most EU Member States and many other countries, these definitions are co-terminous. In other words, if a transaction does not qualify as a "concentration" for purposes of the merger notification and waiting period requirements, the enforcement agency lacks jurisdiction over the transaction altogether – at least under its merger review laws. In contrast, other jurisdictions, including the United States, Canada, Japan and Mexico, retain jurisdiction over - and, correspondingly, the ability to challenge - transactions that are not subject to pre-merger notification and waiting period requirements.

The preceding discussion is focused on how transactions are defined for purposes of merger notification coverage, without regard to whether the enforcement agency may have broader authority to review and challenge non-reportable transactions. It is recognized, however, that the scope of definitional coverage may be affected by substantive jurisdictional considerations.

ANNEX

Examples from ICN Member Jurisdictions

Australia: Definition of a Covered Transaction

In Australia, the *Trade Practices Act 1974* (the Act) does not expressly classify what transactions are reviewable under the section 50 merger provisions. Instead, section 50 contains a general prohibition against any direct or indirect acquisition of shares or assets that would have the effect, or be likely to have the effect, of substantially lessening competition[6] in a substantial market in Australia, a state, territory or region of Australia.

In the context of section 50, "acquisition" means "obtaining ownership of any legal or equitable interest in"[7] shares or assets.

While there is no compulsory notification of mergers required by the Act, the majority of mergers that may raise competition issues are voluntarily notified to the Australian Competition and Consumer Commission (ACCC) by the merging parties for the purposes of seeking 'informal' clearance.[8] Alternatively, the merging parties may decide to proceed with a transaction without seeking informal clearance and risk the possibility of the ACCC applying to the Federal Court for an injunction, divestiture, or penalties.

The merger provisions of the Act apply to both direct and indirect (for example by an agent or subsidiary) acquisitions by a corporation or person of:

- property within Australia including (but not limited to) shares in Australian companies, domestic businesses, local intellectual property such as trademarks, and local plant and equipment. The ACCC's approach is that an acquisition occurs (as distinct from the agreement or transaction) where the property is located; and
- property wherever situated if the acquirer is incorporated in Australia, carries on business in Australia, is an Australian citizen, or is an ordinary resident in Australia.

The merger provisions extend to joint acquisitions of shares or assets and acquisitions of equitable as well as legal interests in shares or assets. They are not limited to acquisitions by way of purchase but also include exchange, lease, hire or hire purchase where the interest purchased is of a proprietary nature and not merely possessory. However, the Act

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6 Substantial lessening of competition includes preventing or hindering competition.

7 *TPC v Australian Iron & Steel Pty Ltd* (1990) 22 FCR 305.

8 An informal clearance by the ACCC not to oppose a merger or acquisition does not provide merger parties with immunity or exemption from legal action by the ACCC or other parties under s. 50. It is, in essence, a "no action" letter. However, in practice, it is extremely rare for legal action to be taken under s. 50 in relation to an acquisition that was the subject of an ACCC informal review and was not opposed.

also provides that section 50 does not apply to an acquisition of assets by way of a charge only or an acquisition of assets in the ordinary course of business.[9]

The general prohibition against acquisitions that substantially lessen competition means that there is no shareholding threshold for the purposes of the application of section 50. When determining whether an acquisition involving a partial shareholding would be likely to have the effect of substantially lessening competition, consideration will be given to the level and nature of the shareholding, the incentives it provides for co-ordination and the constraints imposed on the firm's conduct by other suppliers, importers and potential entrants.[10] The ACCC will take into account the following factors when considering what level of control occurs by a partial shareholding:

- the ownership distribution of the remaining shares and securities, including ordinary and preference shares and any special shares;
- the distribution of voting rights, including any special voting rights;
- whether other shareholders are active or passive participants at company meetings;
- any restrictive covenants or special benefits attaching to shares;
- any pre-emption rights in relation to the sale of shares or assets;
- any other contracts or arrangements between the parties;
- the rights and influence of any significant debt holders;
- the composition of the board of directors; and
- the company's Articles of Association.

Acquisitions involving joint venture arrangements are assessed for coverage under section 50 in the same way as other acquisitions.

The limitation of section 50 only to acquisitions in a substantial market was introduced to remove *de minimus* matters from scrutiny. The Australian courts have not considered the meaning of 'substantial' in relation to a 'market' in the context of section 50, although by way of guidance, judicial consideration of the term "substantial" in other contexts in the Act has indicated that "substantial" means something more than trivial, minimal or nominal. The ACCC Merger Guidelines identify that both quantitative and qualitative factors will be taken into consideration in assessing whether a market is 'substantial'. For example, while a market may be small relative to the national economy, it may be substantial in the context of a state or regional economy, and the Act was amended in 2001 to extend the meaning of 'market' for the purposes of section 50 to a "region" of Australia. Alternatively, the pervasiveness of prices and outputs determined in a market may be critical to the assessment—for example, where a product is an essential but small

[9] These exemptions have United States equivalents in the Hart-Scot-Rodino Act (15 USC §18a(c)(1) on acquisitions in the "ordinary course of business" and 15 USC §18a(c)(2) as to acquisitions of non-voting security interests).

[10] Walker J, Chapter 7, Mergers, in Steinwall R *ed*. Butterworths Australian Competition Law (2000), Butterworths Sydney, p.365.

ingredient in the production of one or more other products with large markets, the market may be considered substantial.

European Union: Definition of a Covered Transaction

The EC Merger Regulation (the "Merger Regulation") applies to "concentrations". A concentration will arise pursuant to Article 3 of the Merger Regulation where a change of control on a lasting basis results from:

- the merger of two or more previously independent undertakings or parts of undertakings; or
- the acquisition of direct or indirect control, whether by purchase of securities or assets, of the whole or part of another company; or
- the creation of a full-function joint venture.

The Merger Regulation applies only to operations which bring about a lasting change in the control of the undertakings concerned and in the structure of the markets concerned.

Mergers and Acquisitions of Control

A merger will constitute a concentration when two or more independent undertakings amalgamate into a single undertaking and cease to be separate legal entities.

The acquisition of control will also give rise to a concentration. Article 3(2) of the Merger Regulation provides that control:

> "shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:
>
> (a) ownership or the right to use all or part of the assets of an undertaking;
>
> (b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking."

The key issue in assessing whether a transaction constitutes a concentration is whether or not the possibility of exercising decisive influence over an undertaking's strategic commercial behaviour is conferred. The Commission's *Notice on the concept of concentration*[11] ("Concentration Notice") summarises its approach with respect to

[11] Commission *notice on the concept of concentration under Council Regulation 4064/89* [1998] O.J. C66/5. The Commission has launched a public consultation on a draft consolidated Notice (enforcement guidelines) which deals with jurisdictional issues under the Merger Regulation. The draft Notice incorporates the existing Notice on the concept of concentration. That part of the draft Notice on the definition of a concentration seeks to update, clarify and expand upon the Commission's current guidance. The consultation

determining whether control, either sole or joint, legal or *de facto*, direct or indirect, is acquired for the purposes of the Merger Regulation. This depends on a number of legal and/or factual elements. Most commonly, control is acquired through the acquisition of shares, possibly combined with a shareholders' agreement in cases of joint control, or through the acquisition of assets. Control can also be acquired on a contractual basis, for example through long-term contracts which give the acquirer control over the management and resources of the target such that a lasting structural change in the market occurs. Purely economic relationships may also be important. Exceptionally, economic dependence, resulting, for example, from long-term supply agreements or credits coupled with structural links, may confer decisive influence.

Control may be acquired by one company acting alone (sole control) or by several companies acting jointly (joint control). Control may also be acquired by a person where that person already controls (solely or jointly) at least one other company, or alternatively, by a combination of persons (which control another company) and companies. The term "person" in this context extends to public bodies, private entities and natural persons where such natural persons carry out further economic activities on their own account or if they control at least one other company. The object over which control may be conferred may comprise one or more, or parts of, companies which constitute legal entities, or the assets of such entities, or only some of those assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of a company, *i.e.* a business with a market presence to which market turnover can be clearly attributed.

The Commission's Concentration Notice describes different situations of changes in control, both legal and *de facto*, resulting from different factual situations. Sole control is most often acquired on a legal basis where one party acquires a majority of the voting rights of a company. Sole control may also be acquired in the case of a minority shareholding where that shareholding is accompanied by specific rights allowing the shareholder to determine the strategic behaviour of the company, or where it can be shown by looking at the pattern of voting at previous shareholders' meetings that the minority shareholder is in fact highly likely to achieve a majority of the votes cast. Control may also be acquired jointly by two or more companies. Where two or more companies each have the ability to exercise decisive influence over another company, there is said to be joint control. Joint control exists if the shareholders must reach agreement on major decisions concerning the controlled company. Decisive influence in the case of joint control normally means the power to block actions which determine the strategic commercial behaviour of a company. Joint control is characterised by the possibility of deadlock. This includes the situation in which a minority shareholder has veto rights over decisions which are essential to the strategic commercial behaviour of the jointly controlled entity. These veto rights must go beyond the rights normally accorded to minority shareholders in order to protect their investment; for example they must relate to decisions concerning matters such as the budget, the business plan, major

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process closed on 1 December 2006 and the Commission intends to publish a final jurisdictional Notice in 2007.

investments or the appointment of senior management. The assessment of the creation of jointly controlled ventures is discussed below.

A concentration may also occur where there is a change in the nature of control. This includes changes from sole to joint control, from joint to sole control, and in some cases where changes to the composition of shareholders gives rise to a change in the nature of joint control.

Internal restructurings that do not involve a change of control of an undertaking are not concentrations under the Merger Regulation.

Joint Ventures

Article 3(4) of the Merger Regulation provides that the creation of a joint venture shall constitute a concentration where it performs on a lasting basis all the functions of an autonomous economic entity. Therefore, two key elements must be fulfilled in this regard: (i) there must be an acquisition of joint control by two or more independent undertakings and (ii) the joint venture must be "full-function".

The Commission has described the nature of a full-function joint venture in its *Notice on the concept of full-function joint ventures*.[12] According to this Notice, a joint venture will be full-function if it performs the functions normally carried out by an undertaking operating on the market in which the joint venture operates. To achieve this, a joint venture must:

- have sufficient assets, personnel and financial resources in order to operate its business activity independently;
- have access to and compete on a market such that it is not merely taking over a specific function of its parents' activities (for example, usually purely R&D, production, distribution or sales ventures are not full-function);
- be geared to play an active and autonomous role on the market in cases where one or more of its parents purchase from the joint venture;
- add significant value to products or services purchased from its parents; and
- be of a sufficiently long duration as to bring about a lasting change in the structure of the undertakings concerned.

While joint ventures that are not full-function (e.g., strategic alliances) do not constitute concentrations under the Merger Regulation, such joint ventures may still be caught by Article 81 of the EC Treaty which prohibits certain restrictive agreements.

[12] Commission *notice on the concept of full-function joint ventures under Council Regulation 4064/89* [1998] O.J. C66/1. This Notice is also incorporated into the draft Notice referred to in footnote 1.

Exceptions

Article 3(5) of the EC Merger Regulation sets out three exceptional situations where the acquisition of a controlling interest does not constitute a concentration. These include:

- the acquisition of securities by companies whose normal activities include transactions and dealing in securities for their own account if such an acquisition is made in the framework of these businesses and if the securities are only held on a temporary basis. The acquiring undertaking must be a credit institution or other financial institution or an insurance company, the securities must be acquired with a view to their resale, the voting rights must not be exercised by the acquiring company with a view to determining the strategic commercial behaviour of the company and the controlling interest must be disposed of within one year;
- where control is acquired by an office-holder according to the law of a Member State relating to liquidation, insolvency, cessation of payments and analogous proceedings; and
- where control is acquired by a company whose sole purpose it is to acquire holdings in other undertakings without involving themselves directly or indirectly in the management of those undertakings.

Germany: Definition of a Covered Transaction

Statutory Definition

A transaction can only be subject to German merger control if it constitutes a concentration within the meaning of the statute. The Bundeskartellamt cannot initiate merger control proceedings if the transaction falls short of that definition. The following transactions are deemed to be concentrations within the meaning of the Act against Restraints of Competition (ARC), Section 37 (1) ARC (emphasis added):

A concentration shall arise in the following cases:

1. acquisition of all or of a ***substantial part of the assets*** *of another undertaking;*

2. acquisition of ***direct or indirect control*** *by one or several undertakings of the whole or parts of one or more other undertakings. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking having regard to all factual and legal circumstances, in particular through:*
a) ownership or the rights to use all or parts of the assets of the undertaking,
b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of the undertaking;

3. acquisition of shares in another undertaking if the shares, either separately or in combination with other shares already held by the undertaking, reach:
a) 50 percent or
b) 25 percent
of the capital or the voting rights *of the other undertaking. The shares held by the undertaking shall also include the shares held by another for the account of this undertaking and, if the owner of the undertaking is a sole proprietor, also any other shares held by him. If several undertakings simultaneously or successively acquire shares in another undertaking to the extent mentioned above, this shall be deemed to also constitute a concentration among the undertakings concerned with respect to those markets on which the other undertaking operates;*

4. any other combination of undertakings enabling one or several undertakings to directly or indirectly exercise a ***competitively significant influence*** *on another undertaking.*

A concentration also arises if the participating undertakings had already merged previously and the concentration results in a substantial strengthening of the existing affiliation between the undertakings (Section 37 (2) ARC).

Interpretation of the Statutory Definition

Substantial part of the assets (Section 37 (1) no. 1 ARC)

A substantial part of the assets within the meaning of Section 37 (1) no. 1 ARC is not confined to the parts of the assets which, in terms of quantity, are sufficiently large in relation to the seller's total assets. Rather, a part of the assets is substantial whenever it has a significance of its own as regards production, distribution targets and current market conditions and whenever it consequently appears to be a unit that can be separated from the seller's other assets. Such a unit may, for example, be an establishment (*e.g.*, an outlet of a food chain operator) or a business unit (*e.g.*, the industrial sewing machines division of a mechanical engineering firm), a trademark or the publishing and title rights of a newspaper.

Control (Section 37 (1) no. 2 ARC)

The acquisition of control means the possibility of exercising decisive influence on an undertaking. As a rule, this is the case if the acquirer can decisively influence strategic business policy decisions or the composition of the supervisory or administrative boards of the target undertaking.

Control within the meaning of Section 37 (1) no. 2 of the ARC may be acquired by one or several undertakings; an affiliation need not exist among the acquirers. It suffices for joint control if the undertakings are able, by virtue of their joint business policy, to co-ordinate and implement their own competitive interests in relation to one another or vis à-vis the controlled undertaking, *e.g.* by means of pooling agreements, stricter voting requirements in the shareholders’ meeting, or because a uniform influence is guaranteed on the basis of long-term shared interests.

A change from joint control to sole control also constitutes a concentration. For example: A and B hold shares of 60 and 40 per cent respectively in a joint venture. All important decisions have to be made by a two-thirds majority (i.e. the joint venture is jointly controlled by A and B). The subsequent acquisition by A of B’s 40 per cent of the shares is deemed a concentration subject to merger control within the meaning of Section 37 (1) no. 2 of the ARC. The same applies to a change in control from three to two undertakings.

In the case of companies listed on the stock exchange, the acquisition of a safe majority of votes in the shareholders’ meeting constitutes a significant case of acquisition of control. This will as a rule be the case when it can be gathered from the attendance records of the last three shareholders’ meetings that the voting rights acquired will suffice to enforce the decisions of the shareholders’ meeting. Even if the transaction falls short of the threshold of Section 37 (1) no. 3a of the ARC, *e.g.* where the shareholding is increased from 25 to 45 per cent, it still constitutes a concentration.

Competitively significant influence (Section 37 (1) no. 4 ARC)

The supplementary clause § 37 (1) no. 4 ARC covers combinations of undertakings implemented through company law which, although falling short of the definitions in section 37 (1) nos. 1-3 ARC, would restrict competition between the undertakings concerned to such an extent that these would no longer operate independently in the market. The main area of application of the definitional element of the exercise of competitively significant influence is the acquisition of interests falling marginally below the 25 per cent threshold. In the practice of the Bundeskartellamt such cases arise particularly in markets in which acquisitions exceeding the 25 per cent threshold are likely to be prohibited.

The assessment of this definitional element is done by way of an overall appraisal of the transaction, taking into account the size of the interest acquired and any other circumstances. Of significance in this respect are the granting of rights of nomination to supervisory or administrative boards of the company, the entrepreneurial interest in the participation, and the economic relations between the acquirer and the targeted company (*i.e.* competitor or supplier-customer relationship). The lower the intended level of interest, the more significant the other circumstances have to be to fulfil the element of competitively significant influence. Conversely, if the amount of shares acquired falls only marginally short of 25 per cent, already minor factors can be sufficient to enable competitively significant influence.

Other Issues

Joint ventures

The establishment of a joint venture is not exempted from German merger control. The general principles are applied to examine whether the transaction constitutes a concentration. Whether the establishment of a joint venture also falls under the ban on cartels is of no significance for the applicability of merger control. The general principles of § 37 (1) ARC also apply to later amendments to the partnership agreements, the composition of the shareholders, or the amount of shares held by the individual shareholders.

Conversely, an examination of the establishment of a joint venture under merger control does not stand in the way of an examination under the ban on cartels if, beyond the scope of merger control, the agreement is likely to restrict competition between the companies concerned.

Exemptions

The only exemption to the definition of a transaction within the meaning of merger control is the so-called “banking clause” (Section 37 (3) of the ARC). If credit institutions, financial institutions, or insurance undertakings acquire shares in another undertaking for the purpose of resale, this is not deemed to constitute a concentration as long as they do not exercise the voting rights attached to the shares and provided the

resale occurs within one year. This time limit may, upon application, be extended by the Bundeskartellamt if the undertakings can substantiate that the resale was not reasonably possible within this period.

Japan: Definition of a Covered Transaction

Joint Relationship

The Japanese Antimonopoly Act prohibits a business combination if the effect may substantially restrain competition in a particular field of trade. The Act regulates business combinations in case they can have an impact on competition in the market through formation or strengthening of the relationship where more than one company conducts business activities in a united form, fully or partially by stockholdings, mergers or other transactions (this relationship is hereinafter referred to as a "joint relationship").

The transactions which may form or strengthen the joint relationship between the parties are: (1) stockholdings (Article 10 of the Antimonopoly Act), (2) interlocking directorates (Article 13), (3) mergers (Article 15), (4) divisions (joint establishment divisions and acquisition divisions) (Article 15-2), and (5) acquisitions of business (Article 16). A mere alliance without stockholding is not considered to form or strengthen the joint relationship.

Mergers, Divisions, and Acquisitions of Businesses

Regarding mergers, divisions, and acquisitions of businesses (hereinafter these are referred to as "mergers etc."), transactions are considered to be likely to form or strengthen a joint relationship unless the parties have already had a joint relationship before the transaction (*i.e.* the transaction is held between group companies).

The parties which are above the certain scale thresholds[13] must notify the Japan Fair Trade Commission (hereinafter referred to as "JFTC") in advance if they plan to consummate the transaction (Article 15, 15-2 and 16 of the Antimonopoly Act). Transactions between parent and subsidiary companies or between sister companies, however, do not have to be notified (Article 15) because the transactions would not form or strengthen the joint relationship.

In case of divisions and acquisitions of businesses, 'business' means the whole or a substantial part of the business of a company (Article 15-2 and 16). The "substantial part" does not mean substantial part for the succeeding company, but for the splitting company. It is limited to the case in which the split portion of the business must function as a single business unit, and the portion is objectively deemed to have a value to the business of the splitting company.

[13] As for mergers, the parties have to notify the JFTC in case that the total assets of one company (the total assets mean the sum of the total amount of assets of the said company, subsidiaries of the said company, and a parent company of the said company) exceed ten billion yen, and that the total assets of one of the other companies exceed one billion yen. (The pecuniary thresholds for divisions and acquisitions of business are the same as those for mergers above.)

Stockholdings

As for stockholdings/shareholdings, whether the transactions would form or strengthen a joint relationship depends on the extent of the voting right holding ratio[14] etc.

According to the Japanese M&A Guidelines, in the following cases a joint relationship is formed or strengthened by stockholdings;

1) the voting right holding ratio exceeds 50%
2) the voting right holding ratio exceeds 25% and the acquiring company is the sole leading holder
3) the voting right holding ratio exceeds 10% and the acquiring company is ranked among the top 3 holders (in this case, whether or not a joint relationship is formed or strengthened is judged according to the situation).

If the voting right holding ratio exceeds 10%, 25% or 50% by stockholdings, the parties which are above the certain scale thresholds[15] must submit a report to the JFTC within 30 days after stockholdings (Article 10 of the Antimonopoly Act).

Interlocking Directorates

As for interlocking directorates, the notification requirement were abolished in 1998 because interlocking directorates are often held with stockholdings and it is not considered necessary to reach interlocking directorates themselves.

Joint Ventures

In order to fulfil common objectives, a joint venture is sometimes established by investment of several companies. In Japan, joint ventures are categorized into a part of stockholdings. If the said investment by a company meets the notification criteria mentioned above, the company has to submit a report about the said stockholdings to the JFTC, whatever the type of the joint ventures may be.

Notifiable Transactions and Scope of Reviews

Mergers, stockholdings and other transactions which form or strengthen the joint relationship but do not meet notification thresholds are still subject to review by the JFTC.

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[14] The voting right holding ratio means the rate of shares possessed by the acquiring company to the total voting rights of the acquired company.

[15] The parties have to submit a report in case that a company with assets of more than two billion yen and with total assets of more than ten billion yen acquires voting rights of a company with total assets of more than one billion yen.

South Africa: Definition of a Covered Transaction

Notifiable Events

Compulsory pre-merger notification is required under the Competition Act 89 of 1998, (“the Act”) with respect to all merger transactions entered into by independent firms, which involve economic activity taking place within or having an effect within the Republic of South Africa, provided they meet the required thresholds determined in section 11 of the Act read together with the Government General Notice 254 of 2001.

If it is determined that an acquisition of control would occur as a result of a proposed merger transaction, and that such transaction falls either within a category of an intermediate or a large merger, it is compulsory for parties to notify the Competition Commission (“Commission”) and obtain approval from either the Commission (for intermediate mergers) and Competition Tribunal (large mergers) before implementing it. Accordingly, types of transactions that are potentially notifiable events under the Act include acquisitions of control of businesses or parts of businesses and changes in the type of control of a business.

The Definition of Notifiable Transactions

The general definition of transactions that are subject to notification is a merger. A merger is defined in Section 12(1) of the Act as occurring when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. Such a merger may be achieved, among others, through the purchase or lease of the shares, an interest or assets of the other firm in question, or amalgamation or other combination with the other firm in question.

There are a limited number of business transactions that do not result in an acquisition of control, and as such, are not notifiable. Examples include, *inter alia*, the reshuffling of shareholdings amongst the wholly-owned subsidiaries and their parent/holding company and financial risk mitigation transactions involving banks. Regarding risk mitigation transactions, the exclusion is only valid for a 12 month period in the event of a default on the part of the firm(s) granted financial assistance. Should the 12 month period pass with the financier still in control, an obligation to notify arises.

With respect to securitisation schemes involving banks, the exclusion is premised on the understanding that the banking sector in South Africa (“SA”) is closely supervised and highly regulated. Further, it was understood that the legislature in enacting the Act could not have intended to include such pure bank financial transactions like securitisation within its ambit, since these types of transactions seldom have effect on competition or an impact on the public interest. The exclusion does not extend to the financial risk mitigation transactions and securitisation schemes that do not involve registered banks. That is the dividing line.

Transactions that fall within the definition of a merger but do not meet notification thresholds can still be subject to Commission review. Those transactions are referred to as small mergers. It is not obligatory to notify the competition authorities about these transactions. However, parties can voluntarily do so, and no fee is incurred for such notification. On the other hand, the Commission can recall small mergers for notification within a period of six months from their implementation if the smalll merger would result in the substantial lessening or prevention of competition in the relevant market or when such a merger may not be justified on public interest grounds.

Definition of Control

Acquisition of direct or indirect control within the meaning of section 12 of the Act refers to control that the primary acquiring firm would gain after the implementation of the transaction, which control the primary acquiring firm never exercised over the whole or part of the business of the primary target firm prior to the proposed merger.

In terms of Section 12(2) of the Act, a person can be said to be controlling a firm if that person, *inter alia*,

> (a) beneficially owns more than one half of the issued share capital of the *firm*;
> (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the *firm*, or has the ability to control the voting of a majority of those votes
> (c) is able to appoint or to veto the appointment of a majority of the directors of the *firm, and*
> (g) has the ability to materially influence the policy of the *firm* in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control as referred to in paragraphs (a) to (f) of sections 12 of the Act.

These instances are not exhaustive.[16] Subsections a to f of section 12 (2) merely provide for the most common occurring instances. Therefore control, either *de jure* (legal control, *i.e.* 50% plus 1 shareholding) or *de facto* (*i.e.* less than 50 plus veto rights strategic to the business to be acquired), joint control and sole control are all considered on a case-by-case basis.[17]

Acquisitions that Fall Short of Outright Control

As already indicated above these acquisitions are covered. Section 12(2)(g) of the Act covers them, and the criteria used for determining such transactions is as set out in above.

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[16] Case law in South Africa interprets the definition of a merger, and the concept of control, broadly. *See* Bulmer SA Ltd and Distillers Corporation (SA) Ltd, Case 94/FN/Nov00, and Distillers Corporation (SA) Ltd / Bulmer SA Ltd, Case 08/CAC/May01.

[17] Case law has adopted, for example, a “bright line” policy in relation to the acquisition of control, whereby once the “bright line” threshold is surpassed, a transaction arises for the purposes of notification and review. *See* Ethos Private Equity Fund IV / Tsebo Outsourcing Group

Minority Shareholding

The merger definition covers minority shareholdings. There is no specified criterion as such besides the acquisition or establishment of control or material influence over another company. If a minority acquires such control or material influence, it is considered a merger for purposes of notification and review.

Asset Acquisitions

Section 12 states that asset acquisitions can constitute mergers. This principle has been confirmed by the Competition Tribunal, the adjudicative body.

It is generally accepted that there must at least be some kind of commercial activity or trading connected to the asset(s) to be acquired in relation to the business of a firm. Accordingly, an acquisition of a bare asset is unlikely to trigger a merger for purposes of notification and review.

The Competition Tribunal has further held that if the acquirer of an asset is going to have its market share or productive capacity increased as a result of an asset acquisition, or such asset acquisition increases concentration in the industry, then it constitutes a merger for notification and review.

Notification Requirements for Joint Ventures

It is generally accepted that Section 12 of the Act also applies to joint ventures that result in a change of control and may therefore constitute notifiable mergers if they meet the thresholds of either an intermediate or large merger. For example, a change of control may be triggered where two or more independent firms, who are competitors in the manufacturing and distribution of certain products, decide to transfer their respective assets or interests into the newly created joint venture. The assets that are transferred by the creating companies will constitute an acquisition by the joint venture, which is a separate entity, of control over the business, or a part thereof, of the creating companies.

United Kingdom: Definition of a Covered Transaction

The United Kingdom operates a voluntary two phase merger control regime with separate institutions for phase I and II merger review, as well as judicial review by a specialist tribunal. The Office of Fair Trading (OFT) is the phase I authority and the Competition Commission (CC) is the phase II authority which examines in greater depth those cases which the OFT believes raise a realistic prospect of substantially lessening competition. Under the Enterprise Act 2002 (the Act), the OFT has a duty to refer a merger to the CC if it believes that a 'relevant merger situation' has been created and that it is or may be the case that the merger has resulted or may be expected to in a substantial lessening of competition within any market or markets in the UK. The CC can only examine those cases which are referred to it by the OFT. The Competition Appeal Tribunal can hear appeals on all types of OFT and CC decisions, regardless of the outcome (clearance, opening of a Phase II inquiry, remedies, prohibition).

As the UK has a voluntary notification regime, parties are not required to notify transactions to the OFT.[18] A merger must meet all three of the following criteria to constitute a relevant merger situation:

(1) Two or more enterprises must cease to be distinct;

(2) The merger must not have taken place or a reference to the CC should be made not more than four months after either the date on which the merger became unconditional or information about the merger became public, whichever is the later; and

(3) Either:

- the UK turnover of the acquired enterprise exceeds £70 million (also known as the 'turnover test'); or

- the merged enterprises will, as a result of the merger, acquire or enhance a share of supply (or purchase) of 25% or more of a good or service in the UK or in a substantial part of it (also known as the 'share of supply test'[19]).

While the turnover test may catch a transaction in which only the target has substantial activities in the UK, the share of supply test will only apply where **both** parties are active in supplying the same good(s) or service(s) in the UK. In order for a relevant merger situation to be created the merger may be proposed (anticipated) or completed within the last four months.

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[18] Unless the party itself has previously given an undertaking to do so.

[19] This is not a market share test as the group of goods or services to which the jurisdictional test is applied need not amount to a relevant economic market.

If a relevant merger situation has not been created, the OFT will not investigate whether a substantial lessening of competition has resulted (or may be expected to result).

The term 'enterprise' is defined in the Act as the activities, or part of the activities, of a business. However, the enterprise does not need to be a separate legal entity; only whatever components are needed to carry on the business. This might include the assets and records, together with the benefit of existing contracts and/or goodwill.

As a general rule, two enterprises will 'cease to be distinct' if they are brought under common ownership or control. The acquisition of a business by another business as a going concern normally amounts to 'enterprises ceasing to be distinct'. Enterprises may cease to be distinct even if only part of a business' activities is acquired. However, an acquisition of assets does not in itself amount to 'enterprises ceasing to be distinct' unless part or all of a business' activities are transferred.

The Act defines three levels of control: material influence, control of policy (also known as 'de facto control') and a controlling interest (also known as 'de jure control').[20] The acquisition of material influence or an increase in the level of control may constitute a relevant merger situation, but further acquisitions by a person who already owns a controlling interest do not give rise to a relevant merger situation. However, where a person acquires control of an enterprise in any of the three senses through a series of transactions within a single two-year period, the Act allows them to be considered as having occurred simultaneously on the date of the last transaction.

Therefore, acquisitions which fall short of outright control constitute a change of control. The Act does not specify particular limits within which these transactions are covered; for example, the OFT may investigate at a level of shareholding in the region of 15% or above to see whether the holder might be able to materially influence the company's policy. The type of factors the OFT will take into account might include voting rights including any special or veto rights, board representation, special provisions in the company's constitution and any financial relationships.

Joint ventures may fall within the scope of the merger regime provided it is considered that two or more enterprises cease to be distinct.

Agreements and conduct that give rise to a merger, as well as any restrictions that are directly related and necessary to the implementation or the attainment of the merger (known as 'ancillary restrictions') are generally excluded from antitrust investigation. However, this exclusion may be withdrawn if the OFT considers that the agreement will otherwise infringe the Competition Act 1998 Chapter I rules applicable to anti-competitive agreements (the UK equivalent of Article 81 EC Treaty).

[20] Chapter 2 of the OFT's published guidance 'Mergers - Substantive assessment guidance' OFT 516 describes the general approach to determining whether there has been a change of control, which will be determined on a case-by-case analysis.

United States: Definition of a Covered Transaction

In general, the HSR Act (15 U.S.C. §18a) requires premerger notification for acquisitions of "voting securities" or "assets" if, as a result of the acquisition, the acquiring person will hold in excess of $50 million (as adjusted*) in assets or voting securities of the acquired person. If the acquisition is valued between $50 million (as adjusted) and $200 million (as adjusted), then a size-of-person test must also be met where one party has sales or assets of $100 million (as adjusted) or more and another party has sales or assets of $10 million (as adjusted*) or more. 15 U.S.C. §18a(a)(2). (* Important note: Since 2005, the jurisdictional thresholds are adjusted annually to reflect changes in gross national product. To reference the current thresholds, see http://www.ftc.gov/bc/hsr/hsr.htm.)

For acquisitions of voting securities, coverage does not hinge on whether "control" of the issuer is obtained: acquisitions of minority interests may be reportable if they result in an acquiring person holding greater than $50 million (as adjusted) in voting securities of an issuer. The HSR Act and Rules do, however, exempt acquisitions that result in holding 10% or less of an issuer's voting securities if made solely for the purpose of investment. 15 U.S.C. §18a(c)(9) and 16 CFR 802.9. The types of asset acquisitions that may be covered include acquisitions of intangible assets such as patents.

Premerger reporting may be required for the formation of certain types of joint ventures. Rule 801.40 provides specific rules regarding the formation of corporate joint ventures, treating such formations as acquisitions of voting securities of the venture by the venturers. Rule 801.50 provides specific rules regarding formations of non-corporate joint ventures, such as partnerships and limited liability companies. In the few instances in which formation of a partnership or LLC requires premerger notification, the acquiring person is the venturer who "controls" the new entity, and it is deemed to be acquiring assets that it did not previously hold.

While change of control of an entity is generally not a prerequisite for reportability of a transaction, it is a key factor in determining when an acquisition of an interest in an unincorporated entity must be reported. "Control" is defined in Section 801.1(b) of the HSR rules. For corporate entities, control is defined as either holding 50% or more of the outstanding voting securities of an issuer or, having the contractual power presently to designate 50% or more of the directors of a corporation. In the case of an entity that has no voting securities (e.g., a partnership or LLC), control means having the right to 50% or more of the profits of an entity, or having the right in the event of dissolution to 50% or more of the assets of the entity. The concept of control also is relevant to determining what entities are included in the acquiring and acquired persons when calculating whether the statutory size-of-person test is met; it also is relevant in determining whether the Rule 802.30 exemption for intraperson transactions applies.[21]

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[21] The "intraperson" exemption exempts acquisitions where the acquiring person and at least one of the acquired persons are the same by reason of control. Examples of exempted transactions include: an acquiring person who already holds 50% or more of

Numerous types of acquisitions that would be subject to premerger notification under these general coverage principles are exempted from HSR's notice and waiting period requirements. These exemptions generally are grounded in one of two broad rationales. First, the transactions may be exempted from HSR because they are of a type not likely to raise substantive antitrust problems in the United States. Examples of these exemptions include the exemptions for acquisitions of assets in the ordinary course of business, acquisitions of certain types of real property such as office and residential property and hotels, and exemptions for acquisitions of foreign voting securities or foreign assets that lack a sufficiently large nexus with U.S. commerce.[22] Some of these exemptions are mandated by the HSR Act (see 15 U.S.C. §18a(c)); others were created by the federal antitrust agencies pursuant to their rulemaking authority to exempt classes of transactions that are not likely to violate the antitrust laws. (See 15 U.S.C. §18(a)(d)(2)(B); 16 CFR Part 802.) Second, some transactions, such as bank mergers, were exempted from HSR because they were already subject to premerger competitive review by another federal agency.

Thus, in determining whether any particular acquisition requires premerger notification under HSR, it is important to examine both the general coverage requirements, and – assuming they apply – the exemptions contained in the HSR Act and Rules.

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the voting securities of an issuer acquiring the remaining shares; and the merger of, or the transfer of assets between, two subsidiaries controlled by the same parent.

[22] In order for the acquisition of foreign assets to be reportable, the assets must have generated sales of more than $50 million (as adjusted) into the United States in the most recent fiscal year. In order for an acquisition of voting securities of a foreign issuer to be reportable, the issuer must have either $50 million (as adjusted) in assets located in the United States or $50 million (as adjusted) in sales in or into the United States in the most recent fiscal year; an additional requirement, if the acquiring person is foreign, is that a controlling interest must be acquired in the issuer.