# The Fundamentals of the Commonwealth Merger Control Regimes (South Africa, Australia and India)

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On February 20, 2025, the International Committee of the American Bar Association's Section of Antitrust Law hosted a webinar on the mechanics of the merger control process in South Africa, Australia, and India. This was the final session of a seven-session "Crash Course in Global Merger Control" series organized by the International Committee and co-sponsored by the section's Mergers and Acquisitions Committee. The series, which ran from December 2024 through February 2025, was designed for junior lawyers and economists interested in international merger control. The sessions tackled the basics of merger control and review process in general, as well as outlined information specific to various jurisdictions around the globe.

This session explored the details and specifics of the merger control regime in South Africa, Australia, and India, including the conditions under which a transaction must be submitted to and reviewed by the competition authority, the merger review procedure, and its timeline. Moderated by Mélanie Perez of Covington & Burling in Brussels, the panel featured four speakers: Joshua Eveleigh and Megan Friday of Primerio in Johannesburg, South Africa; Rachael Stowasser of White & Case LLP in Sydney, Australia; and Alisha Mehra of Khaitan & Co in New Delhi, India.

# South Africa

Ms. Friday started by describing the organization of the South African competition authorities under the Competition Act 89 of 1998. The system includes the Competition Commission of South Africa (SACC), the Competition Tribunal (SACT), and the Competition Appeal Court (CAC). SACC is mandated to investigate notifiable transactions and to issue a determination for intermediate mergers and a recommendation to SACT for large mergers. Based on SACC's recommendation, the SACT considers and approves large mergers, conditionally approves or prohibits. Finally, the CAC is the appeals court to SACT. Where a party is aggrieved by the decision of the SACT, its decision may be taken on appeal to the CAC.

Ms. Friday then explained that in South Africa, a merger is defined as the change in control over the whole or part of a business of another firm. There are multiple instances of de *juris* or *de facto* change in control, such as the acquisition of more than one half of the shared capital or the ability to vote a majority of the votes at a general meeting of the firm. Another important example of change in control is having the ability to *materially influence* the policy of the firm even under minority rights. This catch-all provision allows to capture instance of negative control, such as having the right to appoint or dismiss senior employers and power to oversee the strategic direction of the firm.

Ms. Friday mentioned that there are two categories of mandatorily notifiable mergers in South Africa: intermediate and large. Both have combined and target assets/turnover value thresholds (whichever is the greater). If a proposed merger meets the threshold, then the firm needs to fil a notification and the merger is reviewed.

South Africa's merger control regime consists of a competition and a public interest assessment. Ms. Friday described the competition assessment mentioning that the overarching consideration is to determine whether the proposed transaction is likely to substantially prevent or lessen competition (SLC), and if there are any efficiency or procompetitive gains attributable to the transaction. There are multiple factors that enter the competition assessment, for example, barriers to entry, the level and trend of concentration, the potential removal of competitors, and vertical considerations, among many more.

Mr. Eveleigh expanded on the public interest assessment. He stressed that the importance of this element is particular to the South African jurisdiction. The public interest effects are very relevant obtaining merger approval and should be proactively considered by firms. South Africa's merger control regime is unique in that an otherwise anticompetitive merger may be approved on public interest grounds and a competitively benign transactions can be prohibited or conditionally approved based on public interest considerations alone. Firms seeking merger approval in South Africa should consider their existing public interest commitments and how these can be approved upon. Some examples of public interest grounds are increasing ownership levels of historically disadvantaged persons or workers of the merging parties, increasing employment and increasing the ability of national industries to compete in international markets.

Finally, Mr. Eveleigh explained the merger review timelines. This timeline differs for the two mandatory notifiable transactions. For intermediate transactions, the SACC needs to make a determination within 60 business days, or the merger is approved. For large mergers, the SACC has 40 business days to issue its recommendation. This period can be extended by 15 business days intervals upon either consent by the merging parties, or order by the SACT. After the SACC's recommendation the matter is referred to SACT which approves, conditionally approves or prohibits the merger. In some contested cases, a series of hearing before the SACT begins and once done the SACT delivers its decision. In contested mergers, there is no strict timeframe by when a decision by SACT may be issued, although recent experience shows that this may take as long as a few months to a few years (depending on the degree of opposition).

# Australia

Ms. Stowasser provided an overview of the current merger control regime in Australia, and the country's upcoming transition to a new mandatory regime commencing January 1st, 2026.

The primary statute governing mergers in Australia is section 50 of the *Competition and Consumer Act 2010* (CCA) which prohibits acquisitions of shares or assets that have the effect, or likely effect, of substantially lessening competition in a market. Potentially notifiable transactions include mergers, acquisitions and joint ventures. Foreign-to-foreign mergers are caught where there is a local nexus, given the operation of the substantial lessening of competition test. Potential enforcement action for breaches of section 50 include pecuniary penalties, injunctions preventing completion of the merger or acquisition, and divestiture orders.

Ms. Stowasser explained that Australia's national competition and consumer regulator, the Australian Competition and Consumer Commission (**ACCC**), is tasked with enforcing the CCA, including section 50. The current regime is essentially a judicial enforcement model, with an informal process having developed for approaching the ACCC to seek comfort that it will not oppose a transaction. The new mandatory, suspensory regime shifts Australia to a primarily administrative regime, with the ACCC as the first instance decision maker on each notified acquisition and decisions reviewable by the Australian Competition Tribunal. However, as no safe harbours will exist for below threshold transactions, the ACCC may still take enforcement action for transactions that potentially breach section 50.

The current merger control regime is voluntary and there are no mandatory pre-notification requirements. However, the ACCC encourages merger parties to take a conservative approach and recommends that parties notify the ACCC well in advance of completing a merger where:

1. the products of the merger parties are either substitutes or complements; and

2. the merged firm will have a post-merger market share of greater than 20% in the relevant market(s).

The current regime includes two types of merger review: informal and authorisation, which differ along multiple dimensions. Following commencement of the transition to the new regime on 1 July 2025, the authorisation process will become unavailable. While informal merger review technically remains available until the end of 2025, the ACCC has indicated that merger parties should seek informal clearance by early October 2025 or file voluntarily under the new regime prior to its commencement to avoid the risk of refiling.

Under the new regime, notification will be required where the target carries on or plans to carry on a business in Australia, the transaction results in the acquisition of *control* and the monetary thresholds are met. The regime introduces ministerial discretion, allowing the Treasurer to mandate notification for certain acquisitions even if monetary thresholds are not met. The test for whether a transaction results in an SLC under section 50 will also be expanded to include whether the acquisition has the effect or is likely to have the effect of creating, entrenching or strengthening a position of market power.

The proscribed monetary thresholds under the new regime consider the combined Australian turnover of the merger parties and the global transaction value. To address serial acquisitions, a cumulative threshold will apply where acquisitions have been undertaken by the acquirer in relation to the same or substitutable goods or services over the preceding three years. Ms. Stowasser noted that there is uncertainty regarding how these thresholds will be calculated in practice.

Finally, Ms. Stowasser described the new expected review timeline that includes a pre-notification process of a currently unknown time period and two potential phases of ACCC review. Persons dissatisfied with the ACCC's decision may seek limited merits review in the Australian Competition Tribunal. Ms. Stowasser mentioned that uncertainty remains over the new regime, with further ACCC and government consultation expected in H1 2025.

# India

Ms. Mehra described the legislative framework for competition law in India that is governed by the Competition Act, 2002 (Competition Act). In terms of merger review, the process came into force from June 2011. The primary legislative authority is the Competition Commission of India (CCI). The CCI has exclusive jurisdiction over all aspects of competition regulation, and its mandate is to investigate, review, approve, block, and remedy transactions which meet the notification thresholds under the Competition Act. Transactions which meet such notification thresholds are referred to as combinations. A combination can include various kinds of transactions including, any acquisition, merger or amalgamation. Ms. Mehra specified that the definition of acquisition involves directly or indirectly, acquiring or agreeing to acquire shares, voting rights or assets of an enterprise, or control over the management or assets of any enterprise. Control is the ability to exercise material influence in any manner over the management, affairs, or strategic commercial decisions of a target.

Ms. Mehra also explained the filing thresholds applicable in the Indian merger review regime. The filing threshold accounts for two dimensions. The first dimension involves an assessment based on the value of assets and turnovers of the transacting parties (or their group entities). A transaction qualifies as a "combination" if it exceeds any one of these thresholds. The second dimension involves a deal value threshold (DVT). The DVT is effective since September 2024 and it is a self-assessment based on the value of the transaction, that includes multiple factors such as interconnected transactions and call options, among many others. It also involves an assessment of whether the target has substantial business operations in India (SBOI). SBOI is understood differently for digital and non-digital services and products. Ms. Mehra continued explaining that a transaction meeting either the (a) asset and turnover based threshold or (b) DVT, must be notified except when the combination qualifies for an exemption. Combinations notifiable under the asset or turnover thresholds are exempt from notification obligations if they: qualify for the small target exemption or if they qualify for any exemption in the exemption rules. The exemption rules provide a detailed list of exemptions applicable to combinations. Commonly available exemptions include the non-controlling minority acquisition exemption and intra-group exemptions. As an example, if the acquisition is for less than 25% of shares or voting rights and only for investment purposes, without the acquisition of director or observer rights, or the right or ability to access commercially sensitive information (CSI), then the acquisition does not need to be notified.

Finally, Ms. Mehra explained some practical elements of the merger review process, such as the mode of filing and timeline of the actual review. First, she described that the mode of filing involves two channels: the ordinary route and the green channel route (GCR). To access the GCR, the business of the acquirer(s) and their affiliates should not have any horizontal or vertical overlaps, or any complementary linkages with the target(s) and their downstream affiliates. The concept of affiliates is defined as 10 percent or more of the shares or voting rights, having the ability to appoint a board member, or the right or ability to access CSI. Second, the review timeline consists of two phases; the length of each of these have been reduced recently, which may lead to increased timeline pressure on the CCI.

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