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The International Comparative Legal Guide to:

Merger Control 2017

13th Edition

A practical cross-border insight into merger control issues

Published by Global Legal Group, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd
November 2016

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ISBN 978-1-911367-22-2
ISSN 1745-347X

Strategic Partners

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the thirteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 50 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors, Nigel Parr and Catherine Hammon of Ashurst LLP, for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

Commission for the Protection of Competition

The authority primarily empowered to enforce merger control rules in Bulgaria is the Commission for the Protection of Competition ("CPC", www.cpc.bg), established in 1991. The CPC is an independent and specialised state body. The CPC consists of seven members – a chairperson, a deputy chairperson and five members – who are elected by the National Assembly. The members of the CPC board are elected for a five-year period.

The current board of the CPC was elected in 2016.

Supreme Administrative Court

CPC decisions may be appealed before the Supreme Administrative Court.

1.2 What is the merger legislation?

The main regulatory act is the Law on Protection of Competition ("LPC"), published in the Official State Gazette 102/2008 (the latest amendments were published in the Official State Gazette 56 in 24 July 2015; and entry into force as of 28 July 2015). The LPC contains the substantive and procedural legal framework. The substantive legal provisions are fully harmonised with Regulation 139/2004. The proceedings before the CPC are also governed by the Administrative Procedure Code.

Certain issues relevant for merger control have been expanded upon by the CPC in secondary legislation, such as the Organisational Rules of the Commission for the Protection of Competition and the Tariff of the Fees Charged by the Commission for the Protection of Competition under the LPC. Of further material importance are the Methodology of Investigation and Definition of the Market Position of Undertakings in the Relevant Market (the "Methodology"), the Notification Form and the Guidelines for Submitting the Notification Form (adopted 20 January 2009), as well as the Methodology for Determination of the Pecuniary Sanctions and Fines under the LPC. At the end of 2011, the CPC adopted rules for the imposition of measures for the prevention of competition within merger control.

1.3 Is there any other relevant legislation for foreign mergers?

The LPC applies equally to foreign-to-foreign mergers which meet the turnover thresholds (see question 2.4 below). The turnover of the undertakings concerned within the territory of Bulgaria is the only criterion for the appraisal of whether a concentration shall be notified at the CPC.

1.4 Is there any other relevant legislation for mergers in particular sectors?

In addition to the LPC, specific rules apply to concentrations (see question 2.1 below), *inter alia*, in the banking and insurance sectors. In particular, the acquirer of shares in a bank or an insurance company is obliged to seek the prior approval of the Bulgarian National Bank or the Financial Supervision Commission, respectively, if the acquisition will lead to an increase of its shareholding above certain thresholds. Absent clearance, the acquirer must not exercise the rights attached to the acquired shares.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Pursuant to Article 22 of the LPC, a concentration arises where:

- two or more independent undertakings merge;
- one or more persons, already holding control over at least one undertaking, or one or more undertaking directly or indirectly acquire control over one or more undertaking or parts of them; or
- a full-function joint venture is established.

"Control" means the possibility to exercise, as a result of rights, contracts, or other elements, individually or taken together, thereby also considering *de facto* and *de jure* circumstances, decisive influence over an undertaking, especially through:

- rights of ownership or of possession over the whole or part of an undertaking's assets of an undertaking; or
- rights or contracts which confer decisive influence on the composition, voting or decision-making of the bodies of an undertaking.

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As a rule, sole control is achieved by the acquisition of:

- the majority of the share capital or assets of the target undertaking;
- the majority of the voting shares of the target undertaking; or
- the right to appoint more than half of the members of the target undertaking's decision-making bodies.

Joint control generally arises where shareholders are granted equal voting rights or equal rights to nominate executive bodies or where shareholders are granted veto rights in relation to decisions on the appointment of the management, the determination of the budget, adopting the business plan or future investments.

It should be noted that not only the acquisition of control, but also the change in quality of control (from joint control to sole control and *vice versa*) is deemed a concentration.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

Yes, there are constellations where control can also be exercised by minority shareholders on a *de jure* or a *de facto* basis. *De jure* control may be conferred upon a minority shareholder who is granted preferential shares on the basis of which the minority shareholder holds the majority of voting rights or is vested the power to decide on the commercial behaviour of the target undertaking. *De facto* control may be obtained by a minority shareholder if, for instance, the remaining voting rights are widely spread.

2.3 Are joint ventures subject to merger control?

Yes, joint ventures are subject to merger control, provided that they purport to carry out a commercial activity on a lasting basis and function as an autonomous economic entity. The LPC does not differentiate explicitly between coordinative and concentrative joint ventures, but respects the principles laid down in the EC merger control rules.

2.4 What are the jurisdictional thresholds for application of merger control?

Pursuant to Article 24 of the LPC, a concentration must be notified to the CPC if the following thresholds are met:

- the combined Bulgarian turnover of the undertakings concerned in the previous financial year must exceed BGN 25 million (approximately EUR 12.8 million or USD 16.4 million); and
- at least two of the undertakings concerned or the target undertaking alone must have a turnover in Bulgaria in the previous financial year which exceeds BGN 3 million (approximately EUR 1.5 million or USD 1.9 million).

Turnover

The concept of "turnover" refers to net revenues of the undertakings concerned, i.e. revenues from sales of products, goods and services after deduction of (i) allowances, (ii) discounts, (iii) rebates, and (iv) value added tax. Intergroup sales shall be disregarded.

The turnover of an undertaking concerned comprises the total turnover of the group it belongs to, i.e. its subsidiaries, mother undertakings, its mother undertakings' subsidiaries and any other undertakings jointly controlled by two or more companies belonging to the group. As a general rule, if a group contains a joint venture, the joint venture's turnover shall be allocated equally to its mother undertakings after deduction of sales to mother undertakings. Such a rule is explicitly provided only with respect to situations where the mother undertakings controlling the joint venture are also undertakings concerned with the economic concentration.

If the concentration relates to the establishment of a joint venture, the group turnover of the two mother undertakings must be taken into account.

Special rules for the calculation of turnover apply to banks, credit institutions, financial entities and insurance companies. These are similar to those established by the EC merger control rules.

2.5 Does merger control apply in the absence of a substantive overlap?

Yes, concentrations that meet the turnover thresholds set out in question 2.4 require notification to the CPC, irrespective of their impact on competition.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

All foreign-to-foreign transactions that meet the cumulative turnover thresholds (question 2.4) must be notified to the CPC. It is not required that the turnover thresholds are achieved by a Bulgarian subsidiary. Rather, it is sufficient for the establishment of jurisdiction of the CPC that the thresholds are met by indirect sales.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Except for the one-stop-shop principle pursuant to the EC merger control rules, i.e. that all concentrations having a Community Dimension fall within the sole jurisdiction of the European Commission, there are no further provisions whereby the authority of the CPC may be overridden.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

If several transactions (or the same transaction implemented in several stages) take place among the same undertakings within a period of fewer than two years which, taken together, fulfil the turnover thresholds mentioned in question 2.4, such transactions are assessed as a single concentration subject to notification as of the date of the latest transaction. The current wording does not expressly cover staggered transactions performed by different undertakings which are part of the same group. The EC merger control rules are applicable. Please also see the comments in question 2.4 above.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Where the thresholds set forth in question 2.4 are met, notification is compulsory. In general, the LPC does not stipulate a filing deadline.

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3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Pursuant to Section 23 of the LPC, the following concentrations do not require merger control clearance:

- Credit institutions or other financial institutions, or insurance companies that hold, on a temporary basis, securities of a given undertaking with a view to reselling them, provided that they:
  - (i) do not exercise the corresponding voting rights in order to influence the competitive conduct of the target undertaking; or
  - (ii) exercise the voting rights only in order to prepare the disposal of the securities, which should be done within one year from their acquisition.
- The acquisition and exercise of control by a trustee or a liquidator or a person who, according to the legislation in force, performs certain functions related to the winding-up of the undertaking or the declaration of the insolvency thereof.
- The acquisition and exercise of control by a financial holding company with the sole purpose of maintaining the full value of the investment in the company.

Finally, no notification is required in the case of group internal restructurings and reorganisation measures.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Administrative fines

Undertakings which violate the prohibition to implement a transaction prior to obtaining clearance are subject to administrative fines of up to 10% of the aggregate group turnover in the preceding business year. Other criteria to be taken into account by the CPC when setting the fine are, *inter alia*: the gravity of the infringement; the duration of the infringement; the relevant market structure; the effect on competition; changes in the structure of supply and demand; and cooperation with the CPC during the investigation, etc.

Restoration measures

The CPC is vested with the power to order appropriate measures to restore the position of the undertakings on the market concerned prior to the concentration, including orders for the divestment of capital, and shares and assets brought together and/or for the termination of joint control.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In general, all actions that implement the transaction prior to obtaining clearance are prohibited. However, we deem it arguable that agreements, pursuant to which the Bulgarian business of the target undertaking is kept strictly separate from the remaining business until clearance is obtained, are permissible.

3.5 At what stage in the transaction timetable can the notification be filed?

There are no legal deadlines for the notification of a concentration. A merger may be notified upon (i) signing of an agreement, (ii) announcement of a public bid, or (iii) acquisition of control but before the parties undertake any actions for implementation of the agreement. The parties may request the CPC to assess the concentration even at an earlier stage, provided that they can produce documents that manifest their intention to implement the transaction under consideration (e.g. by a memorandum of understanding, preliminary agreements, decisions of the managing bodies, etc.).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Within three days following the registration of the notification, the CPC has to start reviewing the filing to assess whether it is complete. There is no statutory deadline for the CPC to declare a notification complete. If the CPC deems the filing incomplete, it will request further documents from the parties. If the latter do not provide the CPC with the requested documents within seven days, the CPC ceases the procedure.

Once the notification is deemed complete, the CPC has 25 working days to assess the concentration. This timeframe may be prolonged by up to 20 working days in cases where the parties wish to alter the notified transaction.

The 25-working-day period always stops running when the parties have to provide additional documents.

Should the CPC still have competition concerns at the end of Phase I, it may open Phase II proceedings. Phase II proceedings may take up to four months, and may be prolonged by 25 working days due to the factual or legal complexity of the transaction.

In Phase II, the parties may propose remedies. If they do, Phase II may be prolonged by 15 working days irrespective of whether it has been already prolonged by 25 working days or not. This prolongation starts as of the day on which the CPC receives the complete information concerning the remedies.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

As set out in question 3.4 above, parties are prohibited from implementing the respective transaction before obtaining approval from the CPC, with the exception of public bids and series of transactions with securities traded on regulated markets of financial instruments where different persons acquire control. For the risks of closing prior to clearance, please refer to question 3.3.

3.8 Where notification is required, is there a prescribed format?

The CPC has published a notification form, which can be downloaded from: http://www.cpc.bg/Additional/ConcentrationTemplate.aspx.

If any document is in a foreign language, it has to be translated into Bulgarian and legalised. All copies shall be authenticated with a "true to the original" statement and a signature of the representative of the notifying undertaking. Official documents issued by non-Bulgarian authorities must be notarised and legalised, where applicable.

In order to avoid any delay in merger control proceedings, parties should liaise with the CPC prior to submitting a notification in order to ensure that the submission contains all of the necessary information.

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3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

Other than clearance in Phase I, there is no accelerated procedure. In addition, the Bulgarian merger control rules do not provide for a short form filing. No other informal ways for speeding up the clearance timetable are provided.

3.10 Who is responsible for making the notification?

The notification has to be submitted:

- in the case of acquisition of sole control by the party acquiring sole control;
- in the case of acquisition of joint control, by the parties acquiring joint control; and
- in the case of mergers by the merging parties.

3.11 Are there any fees in relation to merger control?

Prior to submission of the filing, a fixed filing fee in the amount of BGN 2,000 (approximately EUR 1,000) has to be paid.

If a transaction is cleared, the parties have to pay a clearance fee in the amount of 0.1% of the aggregate turnover of the undertakings concerned. The fee is capped at BGN 60,000 (approx. EUR 30,000).

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

Parties may request that the CPC assesses the concentration before the announcement of the public offer if they have publicly announced their intention to make a public offer.

Currently, the LPC provides for an exemption from the prohibition of the implementation of the concentration prior to clearance by public bids and a series of transactions with securities traded on regulated markets of financial instruments where different persons acquire control. In order for the exemption to be applicable: (i) the parties have to notify the CPC without delay (see question 3.1); and (ii) the acquirer(s) must not exercise the voting rights associated with the acquired shares except for maintaining the full value of the investment.

3.13 Will the notification be published?

The notification will not be published. However, the CPC publishes a short announcement of the notification on its website, which contains the names of the parties and markets concerned. Within seven days of publishing the announcement, every third party which may be affected by the concentration may submit information or a statement to the CPC.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive test applied by the CPC in merger control proceedings is whether a concentration leads to the creation or strengthening of a market-dominant position that would significantly impede effective competition on the relevant market.

When assessing whether this is the case for the respective concentration, the CPC takes into account, *inter alia*, the following criteria:

- the position of the involved undertakings on the market concerned;
- their economic and financial power;
- access to supply and markets for the relevant goods and services;
- the legal (or other) barriers to entry in the markets; and
- the future development of the market as a result of the respective transaction and the change in supply and demand conditions.

4.2 To what extent are efficiency considerations taken into account?

Efficiency might be considered by the CPC as one of the grounds for providing a clearance, when the concentration under consideration may lead to the creation or strengthening of a market-dominant position.

4.3 Are non-competition issues taken into account in assessing the merger?

Even if a transaction leads to the creation or strengthening of a market-dominant position (please see question 4.1), the CPC may clear a transaction provided that the transaction leads to:

- general improvement of the existing market structure;
- modernisation of an entire business sector;
- promotion of the consumers' interests; or
- overall benefits for the economy as a result of the entry of new investments.

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Upon registration of a new transaction, the CPC publishes the transaction on its website and invites third parties to submit comments on the concentration to the CPC.

All third parties (competitors and customers alike) whose interests may be affected by the concentration may participate in the merger control proceedings at the stage of in-depth inquiry. As parties to the proceedings, they have access to the file (except for those documents and information containing business secrets), they have the right to attend hearings and they have a right to be heard.

4.5 What information gathering powers does the merger authority enjoy in relation to the scrutiny of a merger?

Beside the power to contact interested third parties as well as other state authorities, the CPC is entitled to request from the parties any information and documentation that is considered necessary for the assessment of the transaction. The member of the CPC responsible for the case in cooperation with the case-handlers may also request a meeting with representatives of the undertakings concerned or any other written explanation. If the CPC has to establish facts which require special knowledge, the CPC may appoint one or more external experts to produce expert opinions. Moreover, the CPC may request information and assistance by other national

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competition authorities in the Member States of the EU, as well as from the European Commission. The CPC may conduct raids to find out facts only within Phase II.

Failure to provide complete and accurate information entails the risk of fines in the amount of up to 1% of the aggregate of the turnover of the undertaking for the last financial year. In addition, the CPC may also revoke a clearance decision that was based on incorrect or incomplete information.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The notifying party shall submit to the CPC a non-confidential version of the notification and all its enclosures which contain business secrets as enclosures to the original notification, therein deleting all information which is considered a business secret. When the whole document is a business secret, the parties have to provide the CPC with a short description of this document. Copies of documents which contain sensitive information shall be marked with a "business secret" statement. A list of documents which has to be considered a business secret should be incorporated with the notification.

All decisions of the CPC are publicly available. However, the CPC only publishes non-confidential versions of its decisions.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

As mentioned in question 3.6, when the CPC finds the notification to be complete, the CPC has 25 working days (which may be extended) to decide whether to:

- establish that the transaction is not a concentration (see question 2.1 above);
- permit the concentration;
- permit the concentration with the amendments made by the undertakings concerned; or
- launch an in-depth inquiry.

In the latter case, the CPC has a further four-month period (which again can be extended) to ultimately decide whether to (i) clear the transaction unconditionally, (ii) clear it subject to conditions, or (iii) prohibit it.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The CPC may impose measures directly related to the implementation of the concentration which it deems necessary for the preservation of effective competition and for restriction of the negative effects of the concentration on the relevant market(s). The notifying party/ies may also propose such measures which have to be approved by the CPC. In the rules for the imposition of measures for the preservation of competition within merger control, the CPC recommends the notifying party/ies to propose remedies alone. The CPC has discretion to decide on the remedies to be imposed on the parties or on approval of the remedies proposed by the parties. See also question 5.4 below.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The CPC may impose remedies in foreign-to-foreign mergers if it deems such measures necessary for the preservation of effective competition and for the restriction of the negative effects of the concentration on the relevant market(s).

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

Remedies may be negotiated in Phase II proceedings only before the open hearing of the party/ies at the CPC. Within the Phase II proceedings, the CPC collects further evidence and makes preliminary conclusions about the effect of the transaction on competition. The parties have the right to be informed about the CPC's preliminary conclusions, to comment on them within a certain time period, to provide additional evidence and to propose remedies.

When the CPC receives the remedies which are proposed by the notifying party/ies, the CPC conducts a "*market test*". Within the latter, the CPC requests from the relevant competitors, suppliers and clients their opinion on the effectiveness of the proposed remedies.

The CPC assesses the proposed remedies once the notifying party/ies has/have provided all details about the remedies. The CPC qualifies as admissible only those remedies which meet the criteria set out in the rules, such as: efficiency; objectivity; proportionality; adequacy and sufficiency; and concreteness, etc. If the proposed remedies do not meet the criteria set in the rules or if the market test shows that they will not be efficient, the CPC may provide the undertakings concerned with an additional time period to propose new remedies.

The notifying party/ies and any interested third parties might be heard by the CPC in an open hearing session, if they make such a request, before the issuance of the final decision. The CPC decides on the remedies when it makes its final decision.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

According to the new remedies rules, the divested business should be viable and capable of running independently. If these criteria are not fulfilled, the purchaser of the divested business should at least have such additional assets or should be capable of easily acquiring such assets so that he can start running the divested business independently. The divested business should encompass all necessary personnel, assets, consumables, etc. The business relations between the divested business and the divesting party/ies should continue at an arm's-length basis.

Divesting party/ies may conclude a binding contract with the potential purchaser of the divested business, but the completion of the transfer can be completed after the approval of the measure by the CPC. However, if the purchase of the divested business consists of a concentration, the general rule should apply.

5.6 Can the parties complete the merger before the remedies have been complied with?

In general, yes. However, constellations are an option where the CPC links closing a subsidiary with the closing date.

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5.7 How are any negotiated remedies enforced?

The parties have to inform the CPC of the enforcement of the remedies within one month of the expiration of the term which is provided by the CPC for the enforcement of remedies, but no later than one year after the CPC's decision becomes effective. The procedure for verification of the enforcement of remedies may take up to three months.

Non-compliance with imposed remedies may entail fines of up to 10% of the aggregate group turnover in the preceding business year. The CPC may also impose behavioural and/or structural measures to restore effective competition, including demerger of capital and/or ceasing the joint control.

Failure to comply with remedies imposed may also entail periodic payments of up to 5% of the average daily turnover in the previous financial year.

5.8 Will a clearance decision cover ancillary restrictions?

Parties are advised to disclose information on ancillary restraints in the notification. The CPC will assess the ancillary restraints during the review period, and the clearance decision will also cover them.

5.9 Can a decision on merger clearance be appealed?

A decision of the CPC may be appealed before the Supreme Administrative Court (i) by the parties after the decision has been announced to the parties in the assessment procedure, or (ii) by every interested third party after the decision has been announced in the electronic register on the CPC webpage.

5.10 What is the time limit for any appeal?

A decision by the CPC may be appealed before the Supreme Administrative Court within 14 days of: (i) the day on which the parties were informed about the decision; or (ii) the day on which the decision was announced for every interested party.

5.11 Is there a time limit for enforcement of merger control legislation?

The statutory prescription period for failure to notify a merger or for implementation thereof is five years.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

Following Bulgaria's accession to the European Union, the CPC has become a member of the European Competition Network ("ECN").

The CPC provides assistance to, and exchanges information with, the European Commission and the other national competition authorities in the EU Member States pursuant to Article 11, paragraph 6, Article 12 and Article 13, paragraph 5 of Regulation (EC) No. 139/2004. The CPC may also request information or assistance from other national competition authorities, as well as from the European Commission.

The CPC has also been a member of the International Competition Network ("ICN") since 2003.

6.2 Are there any proposals for reform of the merger control regime in your jurisdiction?

Currently, after the latest amendments of the LPC, there are no proposals for reform of the merger control regime in Bulgaria.

6.3 Please identify the date as at which your answers are up to date.

These answers are up to date as of 30 August 2016.

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