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Cross-Border Merger Control: Challenges for Developing and Emerging Economies

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Cross-border Merger Control held at the Global Forum on Competition in February 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation, dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la contrôle des fusions transnationales qui s'est tenue en février 2011 dans le cadre du Forum Mondial sur la Concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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EXECUTIVE SUMMARY

By the Secretariat

From the Secretariat background paper, the country contributions and the discussion at the roundtable on “Cross-Border Merger Control: Challenges for Developing and Emerging Economies”, the following main points emerged:

- (1) *Effective merger control of cross-border mergers requires that the countries involved have effective merger control regimes. However, this may be a challenging task in many developing and emerging economies (DEEs) given the complexities of enforcing competition law in these economies. In particular, DEEs face many challenges in their efforts to build effective merger control regimes, including a lack of resources, an inadequate legal framework, the absence of a proper competition culture, the difficult transition towards a market-based economy, the dominance of industrial policy, problems with implementation, and the role of foreign direct investment (FDI).*

In light of the increasing role of competition authorities from DEEs in the review of cross-border transactions, the roundtable emphasised the importance of introducing and enforcing effective merger control regimes in DEEs. This reflects the trend already in practice of a notable geographical expansion of merger control rules around the developing world and of an increasing number of cases which affects markets in two or more countries.

The absence of effective merger control is regarded as undermining the interests of DEEs. This view rests on a number of commercial, legal, economic, social and political factors including: (i) the unique and problematic nature of markets in these economies; (ii) the adverse effect that some cross-border mergers may have, and the need to prevent such an effect; (iii) the fact that if handled properly, merger control can contribute to a better market structure for different sectors of the economy and enhance the prospects of stronger economic performance; and (iv) the fact that effective merger control will help achieve better outcomes for businesses.

The roundtable recognised the unique multi-faceted nature of cross-border merger control, which requires a delicate balance between competition policy and other public policy considerations, most notably social and industrial policy. Other important considerations were emphasised, including: (i) the need to take into consideration jurisdictional, procedural and substantive issues; (ii) the complex interaction between legal regimes and business interests; and (iii) the interaction between global, regional and domestic interests and considerations.

DEEs face numerous challenges when seeking to regulate cross-border mergers, including:

- **Lack of resources:** Merger control is a very resource intensive process. Many competition authorities in DEEs lack the human and financial resources as well as sufficient expertise in law and economics, to carry out the necessary tasks.

- **Inadequate legal framework:** An effective merger control regime requires a comprehensive mechanism for merger regulation. However, many DEEs provide only basic provisions in the law, which are inadequate for efficiently controlling mergers.
- **Absence of a proper competition culture:** Many DEEs are subject to heavy state control and planning, and private forces have therefore not been allowed to play a serious role in the market place. Competition is consequently not regarded as an economic process.
- **Difficult transition towards a market-based economy;** Competition can only be a meaningful process if a market-based economy is established. However, this can be particularly difficult in DEEs with planned, centralised economies.
- **Importance of industrial policy:** DEEs place heavy reliance on industrial policy considerations, and they dominate economic decision-making and policy-formulation processes. Competition related considerations such as merger control can therefore be overshadowed.
- **Implementation issues:** Implementing a merger control regime in DEEs can be extremely slow and time-consuming, especially when implementing a competition law regime is not ranked highly on the agenda of governments.
- **The role of foreign direct investments (FDI):** FDI is of key economic and political importance, enabling DEEs to secure their integration into the global economy. Governments may therefore be wary of implementing an effective mechanism for regulating cross-border mergers, in case this discourages FDI.

These challenges deserve careful attention. However, the discussion emphasised that caution is necessary when addressing the challenges facing DEEs as they do not affect all countries in the same way. Some challenges are common to both DEEs and developed countries, while others are unique to individual DEEs. Generalisations should therefore be avoided.

- (2) *The relationship between merger control (and competition policy more generally) and FDI is open to debate. However, the overwhelming view is that effective merger control should not impact adversely on efforts of DEEs to attract FDI.*

The question of whether the existence of effective merger control in DEEs encourages or discourages FDI was a central discussion of the roundtable. A number of views emerged. While some jurisdictions suggested that effective merger control in the developing world might discourage FDI, the general view was that effective merger control should not impact adversely FDI. However, in some countries, FDI may take priority over merger control as FDI policies are integral to the economic development required in many DEEs.

A number of local experiences were discussed and some case studies were presented, including from regimes in Korea, Morocco, Brazil and some African and European countries. The general view was that determining the relationship between merger control and FDI policies depends on the overall objectives of the relevant economy and an assessment should be carried out on a case-by-case basis taking into account the experience and special circumstances of the relevant country.

Some delegations noted that in many countries the government or relevant ministries can over-ride decisions by the competition authority on non-competition grounds, including that of economic development or international competitiveness. This represents a significant challenge for an effective enforcement action by the competition authorities.

- (3) *For an effective review of cross-border transactions, and to ensure consistent decisions, international co-operation between the competition authorities involved is essential. There are three main types of co-operation: multilateral, regional and bilateral. While all three are relevant to DEEs, bilateral contacts are a key element for effective review of cross-border mergers.*

The roundtable emphasised the importance of international co-operation, most notably through bilateral contacts, as a key element for an effective review of cross-border transactions. Some jurisdictions favour bilateral co-operation through formal links, i.e. through bilateral agreements with peer agencies, particularly to facilitate the exchange of information concerning mergers under investigation. However, a number of participants reported that the absence of formal bilateral links has not hindered their ability to achieve meaningful cooperation. It was noted that informal relationships can be particularly effective in forging strong links between competition authorities. These relationships can take the form of email communications, telephone calls and meetings along the sidelines of multilateral events and gatherings, such as those of the OECD and the ICN.

Multilateral co-operation has the advantage of catering for the different interests and unique circumstances of DEEs. This creates strong incentives for competition authorities from these economies to implement principles or recommendations produced at an international level. The soft law model has become the dominant form of multilateral co-operation, allowing convergence and harmonisation but without imposing rules, principles or standards on DEEs or their competition authorities. Particular importance has therefore been attached to this model as an effective international strategy, especially in the area of merger control.

While regional co-operation has been a widespread phenomenon in the developing world, this type of co-operation has not proved to be fully effective in the developing world. The effectiveness of a regional merger control mechanism requires the presence of merger control in at least some (if not all) of the countries concerned in the first place. However, this may not feature highly on regional agendas where other more pressing economic and political issues take precedence.

- (4) *Exchange of confidential information is a sensitive issue and can act as a constraint on meaningful co-operation between competition authorities. However safeguards can be put into place to facilitate such type of exchanges where necessary.*

The exchange of confidential information can raise serious concerns for the firms involved in cross-border mergers. Competition authorities entering into bilateral co-operation agreements are, with few exceptions, unable to engage in the exchange of confidential information without the consent of the merging parties or a clear authorisation under local law or an international treaty. However, the roundtable highlighted two important developments. First, the number of cross-border merger cases in which competition authorities exchanged confidential information (for example, through the use of a confidentiality waiver granted by the merging parties) has increased. Second, the prevailing view seems to be in favour of encouraging merging parties to consider waiving their right to confidentiality in order to enable the relevant competition authorities to co-operate fully and meaningfully. Some competition authorities reported the use of these waivers as standard practice.

- (5) *Competition authorities should be sensitive to the interests and needs of merging parties, and in particular to the fact that the costs imposed on firms in cross-border merger cases can be significant. This is particularly the case when the merging firms are active in many jurisdictions, increasing the cost of gathering information and requiring the parties to present this information to the competent agencies in their own official language.*

Multi-jurisdictional merger review imposes high costs in terms of both time and finance. The business community emphasised the importance of reducing the burden imposed on merging firms. One of the key suggestions was for competition authorities to implement relevant ICN and OECD recommendations and best practices on asserting jurisdiction over merger transactions and co-operation between competition authorities. This would assist in reducing the number of competition authorities reviewing the relevant merger. The need to enhance legal certainty in the merger review process, through ensuring transparency and predictability, was also emphasised in the discussion. To the extent possible, harmonising the basic set of information required for filing a merger and allowing firms to submit their merger filings in English would significantly reduce the cost of information gathering for firms and speed-up the notification process.

- (6) *While mandatory notification systems are the most common, a number of jurisdictions have adopted voluntary notification systems. Voluntary and mandatory notifications have both advantages and disadvantages, but mandatory notification enjoys greater support.*

The discussion emphasised both advantages and disadvantages of voluntary notifications. Among the advantages of voluntary notification, participants mentioned the reduced burden on merging parties and the possibility for agencies to optimise the use of their scarce resources focusing their enforcement activities only on those transactions which are more likely to have an adverse effect on competition.

Nonetheless, the majority of delegations favoured mandatory notification systems, with voluntary notification considered by many delegates to have more shortcomings than benefits. Specifically, voluntary notification can result in harmful mergers being implemented without proper control, leading to irreversible harm to competition. Competition authorities then have to contemplate the challenges associated with a de-merger, with the accompanying harm to the business interests of the merging parties.

Another disadvantage of voluntary notification systems is that they can lead to late notifications with a detrimental impact on the effectiveness of international co-operation between reviewing agencies. In these cases, a great deal of pressure is therefore put on countries with a voluntary notification regime, when the cross-border merger has already been approved by competition authorities under their mandatory review systems.

- (7) *Increased co-operation should be encouraged between competition authorities in the design of remedies in cross-border merger cases. Behavioural remedies should be considered as a viable option when remedies are required.*

The benefits of international cooperation in designing merger remedies formed a central theme of the roundtable. A number of jurisdictions spoke in favour of increased cooperation, although it was acknowledged that certain difficulties remain for an effective cooperation, for example due to restrictions related to confidentiality.

The pros and cons of behavioural remedies were discussed, and in particular their applicability by agencies in DEEs. While it was felt by some delegations that behavioural remedies can lead to over-regulation, the suitability of behavioural remedies for DEEs was emphasised given the difficulties in DEEs to find suitable purchasers who would be interested in purchasing the assets to be divested. The influential

positions frequently enjoyed by large businesses was recognised as a difficulty for competition authorities in DEEs who may lack the ability to take specific enforcement action, whether unilaterally or through bilateral cooperation, to ensure compliance by the firms involved in cross-border merger operations. This is particularly the case if the assets involved in the structural remedy are located in a foreign jurisdiction. However, a number of successful examples were presented in which structural remedies were deployed successfully by competition authorities of DEEs.

- (8) *'Free-riding' on the efforts of more experienced competition authorities may be advantageous for DEEs.*

It was generally viewed that free-riding by competition authorities in DEEs on the efforts of more experienced competition authorities in cross-border merger cases should not be seen as a negative practice. A pragmatic approach can be adopted. Free-riding by a competition authority of a DEE can be beneficial when action taken by a foreign competition authority would address the competition concerns in the local market of the relevant DEE. Free-riding can benefit both the competition authorities in DEEs and the merging parties: the former economise on their scarce resources and the latter benefit from a reduction in the burden and costs associated with cross-border mergers.

SYNTHÈSE

Par le Secrétariat

Le document de référence du Secrétariat, les contributions des pays et les débats de la table ronde intitulée « Contrôle des fusions transnationales : défis à relever par les pays en développement et les économies émergentes » ont fait ressortir les points suivants :

- (1) *Pour être efficace, un contrôle des fusions transnationales impose aux pays concernés d'être dotés d'un véritable régime de contrôle des fusions. Cela étant, la tâche peut être difficile pour nombre de pays en développement et économies émergentes (PDEE) étant données les complexités qu'y pose l'application du droit de la concurrence. Lorsqu'ils s'efforcent de mettre en œuvre des régimes efficaces de contrôle des fusions, les PDEE sont en particulier confrontés à de nombreuses difficultés : manque de ressources, inadéquation du cadre juridique, absence de véritable culture de la concurrence, difficile transition vers une économie de marché, prédominance de la politique industrielle, problèmes de mise en œuvre de la loi et rôle des investissements directs étrangers (IDE).*

Compte tenu du poids croissant des autorités de la concurrence des PDEE en matière de contrôle des transactions transnationales, la table ronde a souligné qu'il importait de mettre en place et de faire appliquer des régimes efficaces de contrôle des fusions dans ces pays et économies. Ce point de vue s'explique par la tendance actuelle à l'expansion géographique notable des règles de contrôle des fusions dans les pays développés et à l'augmentation du nombre d'affaires se rapportant à des marchés situés dans au moins deux pays.

Les participants à la table ronde ont considéré que l'absence de contrôle efficace des fusions porte atteinte aux intérêts des PDEE. Cette opinion se fonde sur un certain nombre de facteurs commerciaux, juridiques, économiques et politiques, notamment : (i) la nature singulière et problématique des marchés de ces économies, (ii) les effets préjudiciables que peuvent avoir certaines fusions transnationales et la nécessité de les prévenir, (iii) le fait que le contrôle des fusions, à condition d'être convenablement géré, peut contribuer à renforcer la structure de différents secteurs de l'économie et à améliorer les possibilités, pour ces pays, de réaliser de meilleures performances économiques, et (iv) le fait qu'un contrôle des fusions efficace permettra aux entreprises d'enregistrer de meilleurs résultats.

Les participants à la table ronde ont bien noté que le contrôle des fusions était un sujet singulier et à multiple facettes nécessitant un équilibre délicat entre la politique de la concurrence et d'autres considérations relevant des pouvoirs publics, notamment la politique sociale et industrielle. D'autres aspects importants ont également été mis en évidence notamment : (i) la nécessité de tenir compte des questions de compétence, de procédure et de fond, (ii) l'interaction complexe entre le régime juridique et les intérêts des entreprises et (iii) l'interaction entre les préoccupations et intérêts nationaux, régionaux et mondiaux.

Les PDEE sont confrontés à de nombreuses difficultés lorsqu'ils s'efforcent de réglementer les fusions transnationales. Ces difficultés sont notamment les suivantes :

- **Le manque de ressources** : le contrôle des fusions nécessite d'utiliser des ressources considérables. Nombre d'autorités de la concurrence des PDEE ne disposent pas des ressources humaines et financières dont elles ont besoin et elles manquent de compétences juridiques et économiques suffisantes pour mener à bien les missions qui leur incombent.
- **L'inadéquation du cadre juridique** : un régime efficace de contrôle des fusions nécessite un dispositif complet de réglementation des fusions. Pourtant, la législation de nombreux PDEE ne contient que des dispositions élémentaires à cet égard et qui ne permettent pas d'exercer un contrôle efficace des opérations de fusion.
- **L'absence de véritable culture de la concurrence** : de nombreux PDEE sont soumis à un contrôle et à une planification étatiques importants et les mécanismes du secteur privé ne peuvent donc pas jouer un rôle sérieux sur le marché. La concurrence n'y est, de ce fait, pas considérée comme un processus économique.
- **La difficile transition vers l'économie de marché** : la concurrence ne peut avoir de sens que si une économie de marché est en place. Ce processus peut donc être particulièrement difficile dans les PDEE dont l'économie est planifiée et centralisée.
- **L'importance de la politique industrielle** : les PDEE accordent une grande importance aux considérations de politique industrielle qui dominent le processus de décision et de formulation des politiques économiques. Les considérations relatives à la concurrence comme le contrôle des fusions peuvent s'en trouver éclipsées.
- **Les problèmes de mise en œuvre** : la mise en œuvre d'un régime de contrôle des fusions dans les PDEE peut être extrêmement lente, notamment quand la mise en place d'un régime de droit de la concurrence ne fait pas partie des priorités de l'action gouvernementale.
- **Le rôle des investissements directs étrangers (IDE)** : les IDE sont d'une importance économique et politique capitale et permettent aux PDEE de réussir leur intégration au sein de l'économie mondiale. Les États peuvent donc craindre de mettre en place un dispositif efficace de réglementation des fusions transnationales si cela doit décourager les IDE.

Ces difficultés méritent d'être examinées avec une grande attention. Cela étant, les débats ont fait ressortir qu'il convient de traiter des difficultés rencontrées par les PDEE avec circonspection car ces difficultés ne sont pas les mêmes d'un pays à l'autre. Certaines d'entre elles sont communes aux PDEE et aux pays développés, tandis que d'autres ne se posent que pour tel ou tel pays en développement ou économie émergente. Il faut donc se garder de toute généralisation.

- (2) *La relation entre le contrôle des fusions (et plus généralement la politique de la concurrence) et l'IDE est matière à débat. Cela étant, l'opinion qui prévaut est qu'un contrôle des fusions efficace ne doit pas porter préjudice aux efforts déployés par les PDEE pour attirer l'IDE.*

La question de savoir si l'existence d'un régime de contrôle des fusions efficace dans les PDEE encourage ou décourage l'IDE a été un point central des débats de la table ronde. Plusieurs avis se sont exprimés. Les représentants de certains pays ont émis l'opinion qu'un régime efficace de contrôle des fusions dans les pays en développement peut décourager l'IDE mais, quoiqu'il en soit, les participants ont estimé, en général, que le contrôle des fusions ne doit pas porter préjudice à l'IDE. Cela étant, dans certains pays, l'IDE peut primer sur le contrôle des fusions puisque les politiques en faveur des investissements directs étrangers sont un élément essentiel du développement économique indispensable à nombre de PDEE.

Un certain nombre d'expériences locales ont été examinées et certaines études de cas ont été présentées, se rapportant notamment aux régimes en vigueur en Corée, au Maroc, au Brésil et dans certains pays africains et européens. L'opinion qui a prévalu a été que le lien entre le contrôle des fusions et les politiques en faveur de l'IDE dépend des objectifs d'ensemble de l'économie concernée et qu'une évaluation doit être effectuée au cas par cas en tenant compte de l'expérience et de la situation particulière de chaque pays.

Certaines délégations ont constaté que, dans de nombreux pays, le gouvernement ou les ministères concernés vont parfois à l'encontre des décisions rendues par l'autorité de la concurrence pour des motifs ne relevant pas de la concurrence et notamment pour des raisons liées au développement économique ou à la compétitivité internationale. Cet état de fait constitue un obstacle important à une action efficace des autorités de la concurrence.

- (3) *Pour procéder à un contrôle efficace des transactions transnationales et pour garantir la cohérence des décisions rendues, la coopération internationale entre les autorités de la concurrence des différents pays est essentielle. Il existe trois grands types de coopération : la coopération multilatérale, la coopération régionale et la coopération bilatérale. Ces trois grandes catégories valent aussi pour les PDEE, sachant que, pour ces pays, les contacts bilatéraux sont un élément essentiel du contrôle des fusions transnationales.*

La table ronde a mis en relief l'importance de la coopération internationale, s'opérant principalement par le biais des contacts bilatéraux, car elle est un élément essentiel à un réel contrôle des fusions transnationales. Certains pays préfèrent que la coopération bilatérale repose sur des liens formels – et soit formalisée, par exemple, par des accords bilatéraux conclus avec les autorités de la concurrence d'autres pays – pour favoriser en particulier les échanges de renseignements relatifs à des opérations de fusion faisant l'objet d'une enquête. Cela étant, selon plusieurs participants, l'absence de liens bilatéraux formels n'amoindrit nullement la capacité des pays à instaurer une authentique coopération. Ces participants ont noté que des relations informelles peuvent être particulièrement efficaces et permettre aux autorités de la concurrence de forger entre elles des liens étroits. Ces relations peuvent prendre la forme d'échanges de courriers électroniques, d'appels ou de conférences téléphoniques intervenant en marge d'événements et de rencontres multilatéraux, comme ceux organisés par l'OCDE et le RIC.

La coopération multilatérale a pour avantage de satisfaire les intérêts divers des PDEE tout en tenant compte de leur singularité. Les autorités de la concurrence de ces pays sont de ce fait fortement incitées à mettre en œuvre des principes ou des recommandations élaborés au niveau international. Le modèle de coopération multilatérale reposant sur des instruments juridiques non contraignants (« soft law model ») est désormais dominant et assure une convergence et une harmonisation sans imposer de règles, de principes et de normes aux PDEE ou à leurs autorités de la concurrence respectives. Les participants ont donc accordé une importance particulière à ce modèle qui représente une stratégie internationale efficace, notamment dans le domaine du contrôle des fusions.

Si la coopération régionale est un phénomène largement répandu dans les pays développés, ce type de coopération ne s'est pas avéré pleinement efficace dans les pays en développement. Pour qu'un dispositif régional de contrôle des fusions soit efficace, encore faut-il qu'un régime de contrôle des fusions soit en place dans certains (sinon la totalité) des pays concernés au premier chef. Or, cette préoccupation peut ne pas faire partie des grandes priorités régionales lorsque priment d'autres problèmes économiques et politiques plus impérieux.

- (4) *La question de l'échange d'informations confidentielles est sensible et peut avoir pour effet de limiter une authentique coopération entre les autorités de la concurrence. Cela étant, des garanties peuvent être mises en place, s'il y a lieu, pour faciliter ce type d'échanges.*

L'échange d'informations confidentielles peut susciter des craintes sérieuses chez les entreprises prenant part à des opérations de fusion transnationales. Les autorités de la concurrence concluant des accords de coopération bilatéraux ne peuvent, à quelques exceptions près, se livrer à des échanges d'informations sans le consentement des parties à la fusion ou sans une dérogation explicitement prévue par le droit local ou une convention internationale. Cela étant, la table ronde a mis en relief deux évolutions importantes. Premièrement, le nombre d'affaires relatives à des opérations de fusion transnationales dans le cadre desquelles les autorités de la concurrence ont échangé des informations confidentielles (par exemple grâce à une exemption de confidentialité accordée par les parties à la fusion) a progressé. Deuxièmement, l'opinion dominante semble être qu'il convient d'encourager les parties à la fusion à renoncer à leur droit à la confidentialité afin de permettre aux autorités de la concurrence compétentes de coopérer pleinement et véritablement entre elles. Certaines autorités de la concurrence ont fait savoir que, pour elles, le recours à ces exemptions était une pratique courante.

- (5) *Les autorités de la concurrence doivent être attentives aux intérêts et aux besoins des parties à la fusion et en particulier au fait que les coûts imposés aux entreprises dans les affaires de fusion transnationale peuvent être importants. Tel est surtout le cas lorsque les entreprises envisageant de fusionner exercent leurs activités dans de nombreux pays, ce qui accroît pour elles le coût de collecte des informations et leur impose de communiquer ces informations aux organismes compétents dans la langue officielle de leur pays respectif.*

Le contrôle multi-juridictionnel des fusions peut être très coûteux, soit en raison de la longueur des délais, soit d'un point de vue strictement financier. Les représentants du secteur privé ont souligné qu'il importe d'alléger la charge imposée aux entreprises envisageant une fusion. Ils ont principalement proposé que les autorités de la concurrence mettent en œuvre les recommandations pertinentes et les meilleures pratiques du RIC et de l'OCDE, relatives à l'attribution de la compétence pour les opérations de fusion et à la coopération entre les autorités de la concurrence. Cela permettrait de réduire le nombre d'autorités procédant au contrôle d'une même opération. Les participants ont en outre souligné lors des débats qu'il est indispensable de renforcer la certitude juridique, en veillant à la transparence et à la prévisibilité du processus de contrôle des fusions. Dans la mesure du possible, l'harmonisation de l'ensemble d'informations ordinairement demandées aux entreprises pour la notification du projet de fusion et le fait de leur offrir la possibilité de présenter leurs dossiers en anglais allègeraient sensiblement les coûts que leur impose la collecte d'informations et accélèreraient le processus de notification.

- (6) *Les systèmes de notification obligatoire sont les plus courants mais un certain nombre de pays ont adopté un régime de notification libre. Ces deux systèmes présentent l'un et l'autre des avantages et des inconvénients, mais le système de notification obligatoire est davantage plébiscité.*

Les débats ont principalement porté sur les avantages et les inconvénients des systèmes de notification libre. Au nombre de ces avantages, les participants ont mentionné l'allègement de la charge pesant sur les parties candidates à une fusion et la possibilité pour les autorités de la concurrence d'utiliser au mieux leurs ressources limitées pour concentrer exclusivement leur action sur les opérations qui sont le plus susceptibles de porter atteinte à la concurrence.

La majorité des délégations a néanmoins plébiscité le système de notification obligatoire, de nombreux délégués considérant que le système de notification libre présente plus d'inconvénients que d'avantages. Plus précisément, avec ce dernier système, des projets de fusion préjudiciables peuvent

aboutir sans qu'aucun contrôle véritable n'ait été exercé, ce qui peut déboucher sur des atteintes irréversibles à la concurrence. Le cas échéant, les autorités de la concurrence doivent alors envisager les difficultés que poserait une le démantèlement d'une fusion et le préjudice inévitable que porterait une telle opération aux intérêts des deux parties à la fusion.

Autre inconvénient des systèmes de notification libre : ils peuvent aboutir à une notification tardive des projets de fusion, ce qui nuit à l'efficacité de la coopération internationale entre les autorités chargées d'exercer un contrôle. Ainsi, lorsque des autorités de la concurrence ont déjà approuvé un projet de fusion transnationale dans le cadre d'un régime de contrôle obligatoire, les pays dotés d'un système de notification libre ne peuvent alors plus faire autrement que d'agir sous pression.

- (7) *Le renforcement de la coopération entre les autorités de la concurrence doit être encouragé pour la conception des mesures correctives dans les affaires de fusion transnationale. Quand de telles mesures s'imposent, il convient de considérer les mesures comportementales comme étant une solution viable.*

Les avantages de la coopération internationale pour la conception des mesures correctives dans les affaires de fusion ont été l'un des thèmes centraux de la table ronde. Les représentants de plusieurs pays se sont exprimés en faveur d'un renforcement de la coopération, même s'ils ont admis que certaines difficultés demeuraient pour parvenir à une réelle coopération dans ce domaine, par exemple en raison des limitations liées à la confidentialité.

Les avantages et les inconvénients des mesures correctives comportementales ont été examinés, et notamment leur applicabilité par les autorités de la concurrence des PDEE. Si certaines délégations ont estimé que ces mesures correctives peuvent aboutir à une sur-réglementation, il a été souligné que ces mesures sont particulièrement adaptées pour les PDEE du fait qu'il peut être difficile, dans ces pays, de trouver des repreneurs susceptibles d'être intéressés par le rachat d'actifs sur le point d'être cédés. Les participants ont en outre estimé que les positions influentes dont bénéficient souvent les grandes entreprises représentent une difficulté pour les autorités de la concurrence des PDEE. Elles n'ont pas toujours la possibilité d'engager une action ciblée, unilatéralement ou grâce à la coopération bilatérale, pour assurer que les entreprises prenant part à des opérations de fusion transnationales se conforment aux décisions prises. Cela vaut particulièrement lorsque les actifs sur lesquels portent les mesures structurelles se trouvent à l'étranger. Cela étant, les participants ont présenté plusieurs affaires dans lesquelles les autorités de la concurrence de PDEE ont déployé avec succès des mesures structurelles.

- (8) *Pour les PDEE, il peut être avantageux que leurs autorités de la concurrence s'en remettent entièrement aux efforts déployés par des autorités de la concurrence plus expérimentées.*

Les participants ont été généralement d'avis que le fait, pour les autorités de la concurrence des PDEE, de s'en remettre entièrement aux efforts déployés dans les affaires de fusion transnationale par des autorités de la concurrence plus expérimentées ne doit pas être considéré comme une mauvaise pratique. Une approche pragmatique peut être adoptée sur ce plan. Cette pratique peut être avantageuse quand les mesures prises par l'autorité de la concurrence d'un autre pays s'attaquent à des problèmes de concurrence qui se posent sur le marché du pays en développement ou de l'économie émergente concernée. Dans les PDEE, elle peut être profitable aussi bien pour les autorités de la concurrence que pour les parties à la fusion : n'ayant pas besoin d'utiliser leurs ressources limitées, les premières réalisent des économies ; quant aux deuxièmes, elles bénéficient d'un allègement de la charge et des coûts induits par les fusions transnationales.

BACKGROUND NOTE ^{*}

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1. Introduction

The purpose of this paper is to identify some of the main challenges related to cross-border merger control in developing and emerging economies (DEEs). The paper offers an analytical and critical account of the topic by focusing on a number of underlying themes. The paper is intended to offer a framework within which these themes can be examined from both theoretical and practical perspectives, as well as from the perspectives of law and policy. The paper highlights the importance of cross-border merger control in DEEs, notably in the context of their increasing integration into the global economy. In doing so, the paper focuses on the challenges faced by these economies when seeking to regulate cross-border mergers.

Merger control has become increasingly important over the last decade. A significant number of countries, including many DEEs have introduced some form of control of merger operations. However, not every competition law regime in the world has merger control provisions, and competition law in general has not been introduced in all countries around the world. This background paper will therefore not consider the challenges faced by countries without a merger regime, though certain aspects of it may be relevant to those countries in which competition law regimes exist but which do not include a specific mechanism for merger control.

The paper is structured as follows. Part 2 provides an overview of the topic. Part 3 will consider the particular challenges faced by DEEs in the area of merger control. Part 4 will discuss three important themes underpinning the topic: co-operation, jurisdiction and remedies. The conclusions of the paper appear in Part 5.

2. Cross-border merger control

2.1 *The concept of ‘cross-border merger’*

There are a number of ways in which the term cross-border merger can be defined¹, either on the basis of the ‘structure’ or the ‘effect’ of the merger.

In relation to the structure, a merger can be considered to have a cross-border dimension if it involves firms established in more than one jurisdiction. In relation to the effect, such dimension can be said to exist where – regardless of the place of establishment of the merging firms – the merger affects the markets in more than one jurisdiction. Moreover, a cross-border dimension may be found, regardless of whether the classification is done on the basis of structure or effect. For example, in its Recommendation on Merger Review (2005), the OECD defines the concept of ‘transnational merger’ as one that is subject to review under the merger laws of more than one jurisdiction.

Regardless of the basis on which a cross-border dimension to a merger may arise, a number of views may be advanced in relation to how many jurisdictions this dimension should cover. On the one hand, a cross border merger may exist where the merger concerns two or more jurisdictions. On the other hand, the view may be taken that a cross-border dimension should be wider and will therefore only be found where the merger concerns more than two jurisdictions. Arguably, the former (narrow) view would be more sensible to adopt given that the difference between the two views is one of quantity and not quality. This means that when it comes to regulating such mergers, the same issues (or problems) are likely to arise in both situations. These issues include: the fact that notification of the merger needs to occur in more than one jurisdiction and the possibility of inconsistent decisions between the relevant competition authorities.

¹ See further below, at paragraph 21 which sets out different ‘classifications’ of cross-border mergers in the case of DEEs.

2.2 *The special nature and characteristics of merger control*

Merger control is a unique aspect of competition law.² Merger operations are a business phenomenon, and are therefore distinct in fundamental respects from other key antitrust conduct, such as cartels and abuse of dominance.³ Mergers involve structural, as opposed to transient behavioural issues. They have the potential to fundamentally effect future development in a sector of the economy as they alter the very structure of an industry. Moreover, from a public interest perspective, mergers cannot be classified with negative antitrust conduct such as cartels and abusive dominance given that mergers will often produce positive effects.⁴

Mergers typically involve significant commercial and financial risks, and often have an impact on financial markets and stock exchanges. This enhances their value from a business perspective and necessitates a special regulatory approach within the overarching competition law regime. It is important in this context to emphasise the role that merger control should have in practice. Whilst merger control prevents the occurrence of anticompetitive outcomes, it also assists businesses in making sound decisions in the design of long-term business and commercial strategies. This point is of crucial importance for DEEs: merger control in such economies can have positive impact in terms of structuring different sectors of the economy and enhancing the prospects of stronger economic performance, in addition to protecting competition and consumers.⁵

Cross-border merger control is a multi-faceted topic. An interesting interaction exists between all of the following: competition policy and other public policy considerations; jurisdictional, procedural and substantive issues relating to merger control; legal regimes and business interests; and global, regional and domestic interests and considerations. This unique interaction enhances the importance of, and difficulties associated with, merger control, especially when dealing with merger operations involving cross-border elements.

Merger control is designed to achieve public policy objectives concerned with the structure of industry within a particular jurisdiction.⁶ It focuses on the commercial and economic consequences of a merger for the relevant jurisdiction rather than on the processes by which mergers are brought about. Through controlling merger operations, particular market structures can be maintained and effective competition guaranteed. The specific objectives behind merger control, however, may differ between jurisdictions.⁷ Nonetheless, the consensus around the world is that the objective of merger control is maintaining competitive market structures to safeguard consumer welfare.

² See generally the special report produced by the IBA's Global Forum for Competition and Trade Policy, *Policy Directions for Global Merger Review*.

³ It is worth noting, however, the overlap which may exist between mergers and these other antitrust phenomena. For example, a merger may be considered to be an abuse of a dominant position where it leads to a strengthening of such position. See Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215.

⁴ See Dabbah, Maher and Lasok, Paul, *Merger Control Worldwide* (Cambridge, 2005), ch. 1.

⁵ See 'The analytical framework for merger control' produced by the UK Office of Fair Trading for the International Competition Network Merger Working Group, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>.

⁶ See *Mussati*, Giuliano, *Mergers, Markets and Public Policy* (Kluwer, 1995).

⁷ For example, protecting local or small and medium size competitors, achieving various socio-economic and socio-political objectives, protecting employment, encouraging enterprise, and achieving various industrial policy objectives including promoting the international competitiveness of the local economy and building strong national firms.

A number of developments in recent years have pushed merger control up the agenda of many countries as well as various international bodies and organisations. The following are worth mentioning.

First, as noted above, merger control is motivated by competition policy or industrial policy considerations. Therefore, the social and political conditions in a country must be sufficiently developed before merger control can be introduced.⁸ An increasing number of countries – many of them DEEs – have now reached this point in recent years, which has pushed merger control to the fore. Mergers should therefore be considered from two opposing perspectives. On the one hand, they are essential operations for fostering the development of local economies and, on the other hand, they are operations likely to trigger changes and introduce new competitive structures, change employment patterns, and impact on consumer, environmental and other important economic and social aspects.⁹

Second, since the 1980's there has been global recognition that the uniqueness of mergers necessitates specifically tailored rules and tools for the purposes of regulating them.¹⁰ In a number of key jurisdictions, experience has revealed the inadequacy of other competition law provisions, e.g. those dealing with abuse of dominance and horizontal agreements as merger control tools.¹¹

Third, globalisation since the mid-1990s means that cross-border elements are now a typical feature of a significant number of merger operations, including those between local firms.¹² In practice, such operations may easily affect local markets of different countries throughout the world. Many of these countries include DEEs located in different regions.

Fourth, a number of bodies and international organisations have promoted the significance of cross-border merger control. The International Competition Network (ICN) devoted almost exclusive focus to the topic in the early years of its existence and the Organisation for Economic Co-operation and Development (OECD) has held a number of important roundtable discussions on the subject over the past two decades.¹³

⁸ See Hamner, Kenneth, 'The globalization of law: international merger control and competition law in the United States, the European Union, Latin America and China' (2002) *The Florida State University Journal of Transnational Law & Policy* 385.

⁹ Cowling, Keith, Stoneman, Paul, Cubbin, John, Cable, John, Hall, Graham, Domberger, Simon, and Dutton, Patricia, *Mergers and Economic Performance* (Cambridge, 1980).

¹⁰ See *Ibid.*

¹¹ See, as an example, the EU experience prior to the adoption of the first merger Regulation, Regulation 4064/89. Until 1989, the European Commission relied on Article 101 (which prohibits anti-competitive agreements) and 102 (which prohibits abuses of a dominant position) of the Treaty on the Functioning of the European Union for the purposes of regulating merger operations. See the case of *Continental Can*, mentioned in note 3 above, for the use of Article 102 for this purpose. Whilst these two provisions were considered to be possible to use in dealing with merger operations, it became clear that they were not adequate. A specific tool for merger control was therefore deemed necessary.

¹² See Holmstrom, Bengt and Kaplan, Steven, 'Corporate governance and merger activity in the United States: making sense of the 1980s and 1990s' (2001) *The Journal of Economic Perspectives* 121.

¹³ The output of these roundtables has been phenomenal. See the roundtables on: *Competition, concentration and stability in the banking sector* (2010); *The failing firm defence* (2009); *Standard for merger review* (2009); *Minority shareholdings and interlocking directorates* (2008); *Dynamic efficiencies in merger analysis* (2007); *Mergers and dynamic efficiencies* (2007); *Managing complex mergers* (2007); *Vertical mergers* (2007); *Media mergers* (2003); *Merger remedies* (2003); *Merger review in emerging high innovation markets* (2002); *Substantive criteria used for merger assessments* (2002); *Portfolio effects in conglomerate mergers* (2001); *Competition issues in joint ventures* (2000); *Mergers in financial services* (2000); *Airline mergers and alliances* (1999); *Notification of transnational mergers* (1999); and *Failing firm defence* (1995).

One notable result of this extensive policy discussion is in the 2005 Recommendation on Merger Review (see Box 1).¹⁴ The United Nations Conference on Trade and Development (UNCTAD) has also been active in the area of merger control.¹⁵ The work of these bodies has not only created an important 'bank of information', it has also given DEEs an extremely useful insight into the area of merger control as well as providing them with a platform in order to build their national rules and design their policies in the area.¹⁶

Box 1. The OECD 2005 Merger Review Recommendation

The Recommendation on Merger Review 2005 offers a number of suggestions for making merger control effective, efficient and timely. These include: ensuring that competition authorities have access to the necessary information to conduct their merger appraisal; reducing the burden on merging parties; allowing for greater flexibility in merger review; and using objective criteria for determining the issue of notification and for fixing the parameters of asserting jurisdiction over merger operations.

The Recommendation also emphasises the importance of countries upholding fundamental principles, such as transparency in the merger review process and procedural fairness, as well as the right to be heard during proceedings (which should be extended to third parties with a legitimate interest). Another principle that is given particular mention is that of non-discrimination between domestic and foreign firms.

The Recommendation highlights the need and importance of co-operation and co-ordination between competition authorities in the area of merger control, in both bilateral and multilateral forms. It addresses a number of issues related to co-operation and co-ordination, most prominently that of confidential information. The Recommendation encourages merging parties to consider a waiver of confidentiality where possible. At the same time, however, it stresses the need for competition authorities to have the necessary safeguards for handling the exchange of confidential information.

The Recommendation encourages countries to conduct a periodic review of their merger regimes in order to achieve improvements in these regimes as well convergence towards best practices in the area.

A further reason for the increased attention given to merger control is that complicated large-scale merger operations attract significant media coverage.¹⁷

The international attention focused on merger control has been a catalyst for discussions not only of the socio-economic impact of merger operations on the industry in question but also of the legal-political nature of the merger control process itself. A number of issues fall under the latter, notably: the powers and mandate of the competition authority, including its independence from the government of the time; whether it is called upon to assess mergers purely on a competition basis or whether there is a consideration of broader socio-economic goals; how closely it can or will collaborate with other competition authorities (discussed

¹⁴ See also the useful OECD Report on *International cooperation in transnational mergers* (2001).

¹⁵ A number of publications have been produced within UNCTAD which deal with merger control; some of which with particular focus on developing countries. See for example: Correa, Paulo and Aguiar, Frederico, 'Merger control in developing countries: lessons from the Brazilian experience' (UNCTAD, 2002); and the note by the UNCTAD Secretariat, 'The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble' (UNCTAD, 2010).

¹⁶ This particular point will be discussed in more detail in paragraph 54 below in the context of multilateral co-operation.

¹⁷ The prestige which some merger operations enjoy arises out of the hopeful nature of these operations, which are often devised as a solution to major industrial problems or a daring attempt to achieve additional commercial benefits (such as new synergies) and tap into and release additional revenue streams.

further below in the context of international co-operation); and, fundamentally, the extent to which a merger control regime achieves the objectives of national economic policy.

The importance of these issues is magnified when multiple national competition authorities are involved in the same merger operation. The multiple reviews provide the opportunity for a comparison of different approaches, including the compatibility of the objectives pursued, the limitations of implementing procedures and the protection of local consumers. These approaches can easily diverge in some cases. The views taken by different countries on the policy regarding merger control reflect national economic and political preferences. Therefore, the scope of official intervention beyond certain market imperfections will often differ significantly.

Issues related to cross-border merger operations are important to all types of economies around the world, whether small or large, advanced or emerging. However, the topic is of particular relevance for DEEs, and its importance is expected to increase in the next decade. Nonetheless, these economies face serious hurdles in establishing fully effective merger control regimes that can deal with the challenges of cross-border merger operations.

DEEs have unique economic, political and social circumstances.¹⁸ Merger control in these countries should therefore be approached with particular care. Crucially, one should make no assumptions regarding the topic based on knowledge or experience found in the developed world. There are substantial differences between experiences with merger control in DEEs and in developed and advanced economies. However, the experiences of these more advanced economies can be drawn upon by DEEs to gain insight into best practices in the area, in addition to improving international co-operation.

A number of scenarios may be envisaged in which the unique circumstances of DEEs affect cross-border mergers.

- First, a cross-border merger may involve two or more foreign firms located in the same foreign jurisdiction but one or more of them may operate in the relevant DEE.
- Second, the same cross-border merger may involve two or more firms located in different foreign jurisdictions.
- Third, the foreign firms in question may have no presence in the relevant DEE but their merger operation (most notably the creation of a full-function joint venture)¹⁹ may give them, or the merged entity, such presence.
- Fourthly, at least one of the firms in the merger may be located in the relevant DEE.

The unique circumstances of DEEs mean that the question of merger control in these economies acquires an added complexity, enhancing the challenges they face.

¹⁸ See Dabbah, Maher, 'Competition policy, abusive dominance and economic development' in Hawk, Barry, *International Antitrust Law and Policy* (Juris Publishing, 2010).

¹⁹ Also referred to, in some cases, as a concentrative joint-venture. This operation involves the creation of a new entity, which is independent from its parents and to which assets and personnel will be transferred so that it is capable of carrying out its activities as an autonomous entity. The concept of full-function joint venture features in Article 3(4) of EU Regulation 139/2004.

3. Particular challenges faced by DEEs

Developing and emerging economies face enormous challenges when seeking to establish merger control regimes and effective competition law regimes more generally.²⁰ During the past decade in particular, an abundance of academic literature, studies and reports by various international organisations have emerged in which challenges were identified and discussed at length in relation to establishing effective competition law regimes in DEEs. There has been, however, insufficient attention given to the challenges in the area of *merger control* specifically.

This is at odds with the expansion of merger activity – in particular cross-border mergers – in both value and volume over the past two decades, in parallel with the proliferation of merger control regimes around the world. And, as noted, it is of direct relevance to DEEs.

This part of the paper will consider the different challenges faced by DEEs in the area of merger control and their efforts to address cross-border merger operations. This is not intended to be an exhaustive discussion of all possible challenges. Rather, the purpose is to focus on the key challenges. Most of these challenges, however, are not unique to the area of merger control and are equally relevant to the field of competition law and policy more generally.

3.1 *The absence of a proper competition culture*

Most, if not all, DEEs lack an established competition culture. This is due to a number of factors. At a basic level, many DEEs have for a long time suffered from heavy state control and planning. As a result, private forces have not been allowed to play a serious role in the marketplace. Furthermore, due to the prevailing culture in these economies, there is a lack of sufficient awareness of competition as an economic process.²¹ This culture often resembles unfair competition more than competition law because of the fairly widespread ideology that competition is something that must be overcome by defeating competitors through illegitimate means.²²

The lack of a proper competition culture directly impacts on the role and significance that competition law assumes in practice. It narrows down considerably the scope for effective enforcement to emerge. It may even call into question the actual need for a strong competition law regime, with an independent and powerful competition authority. Obviously, the lower the significance or relevance attached to competition law, the more likely it is that merger control will not receive adequate attention in DEEs.

International and peer pressure – along with internal awareness – have lead to a noticeable increase in concrete actions taken by DEEs to engage in competition advocacy and build domestic competition cultures. However, additional work remains necessary to further the privatisation process and enable private firms to play a greater role in the marketplace.

²⁰ See Dabbah, Maher, “Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime” (2010) *World Competition: Law and Economics Review* 457.

²¹ See Gal, Michal, ‘The Ecology of antitrust preconditions for competition law enforcement in developing countries’ (2004), *New York University Law and Economics Working Papers*, Paper 10, available at http://lsr.nellco.org/nyu_lewp/10.

²² These cultural trends are possible to observe throughout entire regions around the world, including in Latin America, Africa and the Middle East. See Dabbah, Maher, *Competition Law and Policy in the Middle East* (Cambridge, 2007); Fox, Eleanor and Sokol, Daniel, *Competition Law and Policy in Latin America* (Hart Publishing, 2009).

3.2 *The difficult transition towards a market-based economy*

Competition can only be a meaningful process if a market-based economy is established in the relevant country. China's transition to a market-based economy is illustrative in this regard. As the market system has progressively been introduced in greater parts of the economy, various laws have been enacted to combat anti-competitive practices and to regulate mergers.²³ This process has culminated in the adoption in 2007 of the Anti-monopoly Law (AML), which is the first specific competition law in China applying generally to public, private, domestic and foreign owned firms. The provisions of the AML are substantially similar to those found in competition laws of developed economies. Already in the two years since the AML has been in force, China's Ministry of Commerce (MOFCOM), the authority responsible for merger control, has adopted guidelines²⁴ and regulations²⁵ and reached a number of significant merger decisions, including those of conditional clearance or prohibition of some notable mergers.²⁶

3.3 *The dominance of industrial policy*

DEEs place heavy reliance on industrial policy considerations, and they dominate the economic decision-making and policy-formulation processes.²⁷ As a consequence, competition and competition-related considerations may be overshadowed. These are economies in which issues such as employment, economic development and various other industrial policy considerations, such as promoting international competitiveness of the economy occupy a key position on government agendas.²⁸ These are politically sensitive issues in any economy, but perhaps more so in DEEs.²⁹

Many countries have placed particular emphasis on industrial policy over the years. The Korean approach up to the 1980's is one example.³⁰ It has been argued that this policy approach resulted in competition considerations being marginalised, and led to distortion of competition in local markets. This was evidenced from the subsidies offered to national firms and the protection offered to these firms from foreign competition.³¹ It is important to note, however, that not everyone has looked at such favourable

²³ Including, for example, the Anti-Unfair Competition Law (1993).

²⁴ See the guidelines produced in 2009: *Guidelines for merger review of concentrations*; *Guidelines on notification of concentrations*; and *Guidelines on merger filing documentations for the notification of concentration*.

²⁵ See the *Provisions on the Notification Thresholds for Concentration of Undertakings*, issued by the State Council of the People's Republic of China (2008); *Measures for Calculating the Turnover of Financial Sector Undertakings in Notification of Concentration* jointly issued by MOFCOM and other financial industry regulators (2009); *Measures on Notification of Concentrations* issued by MOFCOM (2010); and *Measures on Review of Concentrations* issued by MOFCOM (2010).

²⁶ One of the notable merger cases worth noting here is the *Panasonic/Sanyo* merger of 2010; another example is the prohibition decision adopted by MOFCOM in 2008 in the *Coca-Cola/ Huiyuan Juice Group Ltd* proposed merger.

²⁷ See Smith, Stephen, *Industrial Policy in Developing Countries* (Economic Policy Institute, 1991).

²⁸ Indeed, this is the position also in developed economies. See in particular the experience of countries such as Japan and Germany. In the latter, a decision of the Federal Cartel Office blocking a merger on competition grounds may be reversed by the relevant minister – using a statutory-based ministerial authorisation mechanism – if the merger is considered to be beneficial to the international competitiveness of the German economy.

²⁹ See the OECD Roundtable on *Competition policy, industrial policy and national champions* (2009).

³⁰ See *Ibid.*

³¹ A notable example of a national firm benefiting from such favourable treatment is Hyundai.

treatment to national champions in negative terms. Some have argued that important benefits have resulted from this policy approach.³²

Where heavy emphasis is placed on non-competition considerations, merger activities involving local firms may be seen as particularly important for the purposes of giving expression to these considerations in practice. This is notwithstanding the possible negative effect such mergers may cause to competition locally. As a result, merger control – from a competition perspective – may not be looked at favourably, especially by politicians who may favour non-competition considerations over controlling these mergers on competition grounds.³³

3.4 *The lack of resources*

Merger control is a particularly resource-intensive process in both human and financial terms. Without the necessary capabilities, the relevant competition authority will simply be unable to carry out its tasks in this area. This is especially so where a mechanism of mandatory notification is used.³⁴ Almost all competition authorities of DEEs face a major challenge due to the lack of adequate human and financial resources. The local skills markets of these economies do not always have the necessary expertise in the field of competition law. The picture has been changing, gradually, in a number of DEEs in recent years however. An increasing number of students and young professionals from these economies are seeking to specialise in competition law. This is a positive development which will, in the long-term, lead to a dramatic improvement of the current position.

Many competition authorities in DEEs invest significant efforts in recruiting, in maintaining their work force and in reducing the incentives for their young officials to leave for other career opportunities in the private or academic sectors.³⁵ On the other hand, in financial terms these authorities often suffer from serious budgetary constraints with the result that they are forced to prioritise in their work. Merger control is not considered to be a top priority and greater importance is usually attached to other areas, such as anti-cartel enforcement, competition advocacy and abuse of dominance.³⁶

Handling merger enforcement work requires competition officials with the necessary expertise in law and economics. This expertise should include suitable knowledge in the operation of different sectors of the economy and the competition officials will need to adopt an international outlook in their approach to merger control. This is important in order to effectively assess the cross-border merger in question and to interact with foreign competition officials involved in assessing this merger, possibly through bilateral links. All of these points should be considered in the light of the special nature of merger assessment, which involves strict time limits and considerable time pressures. It also demands intensive communications between the reviewing officials and the merging firms, as well as third parties, and possibly other public authorities (such as sector regulators) in the same country.

The lack of adequate resources – especially when looked at in the light of the special nature of merger control – goes some way to explain the little attention given to the area in many DEEs. This is in addition

³² See Rodrik, Dani, 'Getting interventions right: how South Korea and Taiwan grew rich' (1995) *Economic Policy* 20. The author argues that the favourable treatment offered to the Hyundai group was beneficial for the purposes of enabling the group to internalise labour market externalities and encouraging it to become more efficient *vis-à-vis* its international rivals.

³³ See also below on the relationship between merger control and foreign direct investment.

³⁴ See below on the issue of notification.

³⁵ See note 20 above.

³⁶ This has been the experience of Singapore, and is also true for many other countries around the world.

to the fact, as noted above, that mergers have often been seen as important for achieving economic development and international competitiveness.

Many competition authorities in the developing world may also feel that it is unnecessary for them to be concerned with cross-border mergers. When mergers are regulated by more experienced foreign competition authorities, the competition problems can be identified and remedied quickly and effectively without the need for DEEs to intervene.³⁷ Some competition authorities (and even courts) have particular confidence in the credibility of foreign actions and decisions as an effective means of enforcement.³⁸ Some of these DEE authorities may prefer reliance on foreign actions in order to avoid possible conflicts with more experienced competition authorities. Other authorities from DEEs may prefer to limit their role to that of assisting foreign authorities. However, in the area of merger control this may not be particularly likely.

Furthermore, reliance by competition authorities in DEEs on foreign actions may not offer the required solution to the potential problems likely to be triggered by a given cross-border merger. These authorities are concerned with protecting competition and safeguarding the necessary competitive market structures in the local economy. A foreign action may not address effectively all of the potential competition problems from the merger at hand, some of which may be unique to the particular local jurisdiction. This means there is no substitute for local action in the relevant situation.

A final comment to be made is that there are situations in which a cross-border merger may occur without the competition authority in a DEE becoming aware of this fact.³⁹ This has been the position in a number of African countries, including Kenya and Zimbabwe. In the latter, it is thought that a number of harmful mergers with a cross-border element occurred without the knowledge of the Competition Commission in the country. The situation has improved significantly since 2002 with the strengthening of the merger control mechanism in the country and with the introduction of a requirement for mandatory notification.

3.5 *Inadequate legal framework*

Where the relevant competition law of a DEE does not provide an adequate framework for merger control or provides only basic provisions (i.e. that mergers are within the scope of the law), competition authorities face a challenge in controlling mergers. An interesting example is found in the Egyptian competition law regime (see Box 2).

An effective merger control regime requires more than a provision in the law stating that harmful mergers are prohibited or merely demanding merger notification. In practice, it requires a comprehensive mechanism for merger regulation, including: established avenues for notification; interaction between the competition authority and merging and third parties; and rules and principles which clearly lay down the

³⁷ See further section 4.2.2 in relation to extraterritorial assertion of jurisdiction with regard to obtaining information.

³⁸ See for example the view of the Israel Antitrust Authority (IAA) in a case which was brought before the Israel Supreme Court (sitting as a High Court of Justice) which concerned abusive dominance: Case 6623/03 Oded Lavie vs. Director of Antitrust Authority (2003). According to the IAA it made no sense to bring an action against the abusive conduct of a firm when this conduct was brought to an end globally as a result of the action by a foreign competition authority.

³⁹ See Kububa, Alexander, 'Issues in market dominance: merger control in Zimbabwe', speech delivered at the *Regional Conference On Competition Policy, Competitiveness, and Investment in A Global Economy* (Tanzania, 10 May 2004), available at: [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/\\$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf). Also, Dabbah, Maher, jurisdictional chapter on 'Kenya', in Dabbah and Lasok, note 4 above.

powers of the competition authority and the obligations of all (the authority, the merging parties and third parties).

Box 2. Merger Control in Egypt

Article 11(2) of the Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices 2005 merely provides that one of the functions of the Egyptian Competition Authority (ECA) is to receive merger notifications. This is repeated in Article 44 of the Executive Regulations, albeit with more details. The latter Article provides that the ‘Authority shall receive notifications from Persons within 30 days from the acquisition of assets, proprietary rights, usufruct, shares, the setting up of unions, mergers or amalgamations or joint management of two or more Persons.’ Article 45 of the Regulations gives only a brief list of the kind of information that should be submitted as part of the notification. No proper mechanism in practice has been established, although a very basic, but under-developed, notification form has been devised. In practice, limited action is taken concerning the notifications received. The information submitted by merging parties is stored by the ECA, but not used to conduct a formal merger appraisal.

3.6 Problems with implementation

The implementation of a competition law regime in a DEE can be a challenge. It is often accompanied by various difficulties, ranging from institutional design, to equipping the competition authority with the necessary expertise or managing the relationship between the authority and the government or other public bodies. The process can be extremely slow and time consuming,⁴⁰ especially when merger control is not ranked highly on the agenda of governments and competition authorities in DEEs. Thus, a slow implementation process in the competition law regime as a whole can translate into a significant delay in implementing and achieving merger control in practice.

3.7 The role of foreign direct investment

In DEEs, foreign direct investment (FDI) is of key economic and political importance.⁴¹ This has been recognised not only by many of these economies themselves, but also by several international organisations. Some of these organisations – most notably the World Bank – have been strong advocates of facilitating FDI in DEEs as a means of achieving international openness on the part of these economies and securing their integration into the global economy.

It is open to debate, however, whether FDI is perceived positively by all DEEs around the world. The attitudes of such economies seem to differ on this front. At one end of the spectrum, there are those economies in which FDI is embraced fully and foreign firms (and their governments) are given a wide opportunity to venture into the economic (and possibly also the political) landscape of DEEs.⁴² These economies tend to consider FDI a key engine for advancing themselves technologically and enhancing

⁴⁰ One of the most notable examples of delayed enactment of a competition law is found in China where the process took two decades to complete. See, more recently, the position in Hong Kong in which a competition bill has been prepared and is expected to be enacted into law in 2011. Other examples may be found throughout the Middle East and Africa.

⁴¹ See De Mello, Luiz, ‘Foreign direct investment in developing countries and growth: a selective survey’ (1997) *Journal of Development Studies* 1.

⁴² See Dabbah, note 22 above.

their international competitiveness.⁴³ Some DEEs, at the other end of the spectrum, do not appear to share the same enthusiasm and they tend to exert strict control over foreign participation in different sectors and markets of the local economy.⁴⁴

DEEs in favour of attracting FDI usually adopt carefully tailored measures for the purposes of attracting FDI which may include offering important tax incentives or concessions in the form of custom levies or monetary terms. However, a positive attitude towards FDI may be linked to a more hands-off approach to regulation more generally. The more emphasis placed on encouraging FDI, the less open a government may be to embracing a mechanism such as merger control fully, and opting for an effective mechanism for regulating cross-border mergers.

A cross-border merger is one form which FDI can take: a foreign firm without any presence in the relevant DEE acquiring a local firm established (or another foreign firm operating) in this economy. However, the foreign firm(s) involved in a cross-border merger may already have a presence in the DEE concerned. In either case, although the merger may raise competition issues, the government concerned may still not opt for regulating such merger for concerns over the possibility of the relevant foreign firms deciding either not to 'invest' or to quit the domestic market in response. A decision or a threat by foreign firm(s) involved in a merger operation to desert the local market of a DEE may arise where the relevant local competition authority opts to impose conditions on the merger.

The government and/or competition authority in a DEE may consider they do not have the upper hand in any possible dealing with foreign firm(s) involved in a cross-border merger. This perception may be more pronounced where particular emphasis is placed on FDI and the need to attract it.

The existence of effective merger control regimes in DEEs cannot be considered to be a hurdle impeding or excluding FDI in all circumstances. The existence of effective merger control and effective competition enforcement more generally may be seen as complementary to FDI, by providing a mechanism of addressing restraints impeding the latter and also creating a business and regulatory environment with enhanced legal certainty.⁴⁵ It ought to be remembered that there are many situations in which foreign firms (and their governments) need DEEs and markets in these economies as much as the latter need such firms and their home governments. Nonetheless, there is a prevailing view that the lack of such control or enforcement can prove to be particularly attractive to such firms as a good environment to invest in.⁴⁶

⁴³ In some DEEs, the competition law itself may be utilised for the purposes of attracting FDI. There is indeed a growing recognition in many such economies that competition law should be adopted and used for this purpose.

⁴⁴ Among the different conditions which may be imposed are those that FDI should lead to economic growth, technological development, improvement in the quality of goods or services, increase in employment opportunities, or boosting the country's entry into world markets. In some cases, the relevant law may have additional strict conditions aimed at ensuring that the firm engaged in FDI would not come to enjoy a monopolistic position in local markets.

⁴⁵ See as a good example the action taken by Coca-Cola to modernise the bottling plan of Schweppes Zimbabwe Limited and later to transfer it to an indigenous company in the country, Fidelity Life Asset Management Company (Pvt) Limited. This was done as part of the conditional merger clearance given by the Competition Commission of Zimbabwe in the *Coca-Cola Company/Cadbury-Schweppes* Merger in 1998.

⁴⁶ See Kee, Hiau Looi and Hoekman, Bernard, 'Imports, entry and competition law as market disciplines' (Centre for Economic Policy Research, 2003).

4. Co-operation, jurisdiction and remedies

Having considered the challenges and unique circumstances faced by DEEs in the area of merger control, it is important to turn to issues of high practical significance in the area. This part of the paper will examine three key themes residing at the heart of the regulation of cross-border mergers, namely: the issue of co-operation between competition authorities; the question of jurisdiction (including merger notification); and the issue of merger remedies. These issues play a key role in the whole operation of a merger control mechanism. They also offer concrete illustrations of many of the challenges facing DEEs.

4.1 *Co-operation between competition authorities*

Co-operation between competition authorities around the world has received close attention over the years, particularly since the 1980s. This co-operation may take a number of forms. A distinction is usually made between three main types of co-operation: multilateral co-operation; regional co-operation; and bilateral co-operation. All of these are of direct relevance to DEEs, although some are slightly more relevant than others.

4.1.1 *Multilateral co-operation*

Multilateral co-operation in the field of competition law is the oldest of the three types of co-operation identified above. Its roots date back to the efforts made in the first half of the twentieth century to create an international trade organisation, which was intended to have competence in regulating restrictive business practices at an international level.⁴⁷ This particular effort put in place a form of multilateral co-operation widely referred to as hard law-based co-operation. This was based on binding obligations on countries under a multilateral agreement with the aim of creating an international body with competence in the field of competition law. The (unsuccessful) effort started in the 1990s to introduce competition law within the World Trade Organisation represents one variant of this idea.

Binding multilateral co-operation, however, is not the only type to be mentioned. Multilateral co-operation also takes a ‘soft law’ form, meaning co-operation without binding commitments by countries. The origins of this type of multilateral co-operation date back to the 1980s when UNCTAD adopted its Set on Multilaterally Agreed Rules and Principles.⁴⁸

With the OECD’s increased input in the field of competition law since the 1990s and with the creation of the International Competition Network in 2001, the soft law model has become the dominant form of multilateral co-operation. Particular importance has been attached to it as an effective international strategy especially in the area of merger control. This can be seen from the impressive output of the OECD and the ICN since the mid-1990s.⁴⁹

Multilateral co-operation of a soft law nature has direct relevance to DEEs in the area of merger control. This type of co-operation has the advantage of catering for the different interests and unique circumstances of DEEs. The experience of the ICN shows how this form of co-operation creates strong incentives for competition authorities from these economies to implement principles or recommendations

⁴⁷ See the draft Havana Charter for an International Trade Organisation, UN Doc. E/Conf. 2/78 1948.

⁴⁸ It is worth noting that the *Set* was produced following substantial efforts made by developing countries. However, only a passing reference is made to merger control.

⁴⁹ In addition to the OECD output mentioned in note 13 above, see the *Recommendation on Cooperation between Member Countries on Anticompetitive Practices affecting International Trade* (1995); and ICN *Guiding Principles for Merger Review* (2002), among other ICN output.

produced at an international level.⁵⁰ This experience also shows how these authorities can be given an opportunity to participate in the deliberation process and to play an important role within it. The flexibility underpinning soft law multilateral co-operation is a major selling point as far as DEEs are concerned.

Soft law multilateral co-operation helps promote a level playing field notwithstanding the differences between developed and less developed economies. This is particularly important in the area of cross-border merger control where competition authorities located in the latter may easily become involved in regulating cross-border mergers alongside more experienced and established competition authorities.⁵¹ This particular type of co-operation has some clear advantages especially when compared with other forms, notably bilateral co-operation. It has the potential to achieve important convergence and harmonisation but without imposing rules, principles or standards on DEEs or their competition authorities. It also paves the way for good policy design within DEEs through facilitating the creation of an important bank of principles and ideas from which DEEs and their competition authorities can draw when building their domestic experience in the area of merger control.

4.1.2 *Regional co-operation*

4.1.2.1 *General*

Regional co-operation in the field of competition law has been a widespread phenomenon in the developing world. A number of regional efforts have been launched, although this type of co-operation has not proved itself to be fully effective. Among the high profile examples of these efforts are: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU). However, these are not the only regional communities in existence.⁵²

Regional co-operation in the field of competition law generally and the area of merger control particularly, may be designed using different models, three of which are worth mentioning.

- First, the regional co-operation may take the form of a forum for consultation and experience sharing between the relevant countries as well as for offering technical assistance or helping with capacity building in these countries. This forum may be used specifically for the purposes of establishing domestic competition law or merger control regimes in the countries concerned.
- Second, there is the European Union (EU) model of establishing a regional institution(s) with competence to handle enforcement at the regional level and with a regional network bringing together the relevant regional and domestic competition authorities (as is the case with the European Competition Network (ECN)).
- Third, regional co-operation may rest on approaches seeking to achieve procedural and/or substantive law convergence and harmonisation among the competition law regimes of the countries concerned.

⁵⁰ See, for example, the changes introduced by Brazil in relation to its notification thresholds on the basis of OECD and ICN principles, explained in Box 4 below.

⁵¹ See OECD Whish and Wood study on *Merger Control Procedures* (1994) which includes a number of case studies where DEEs were involved in the regulation of cross-border mergers; see in particular the case studies dealing with two mergers which occurred in 1989: the *Gillette/Wilkinson* merger and the *Coats Viyella/Tootal* merger.

⁵² See Dabbah, Maher, *International and Comparative Competition Law* (Cambridge, 2010), pp. 366-7 for a comprehensive list of all relevant regional organisations and communities.

There are mixed views about the value of regional co-operation as a practical way to develop merger control (as part of competition law) in DEEs. On the one hand, this co-operation has been considered particularly relevant to these economies for a number of reasons. First, there are the unique circumstances of DEE economies. Second, competition policy is seen as a good fit within the wider economic co-operation between countries and as complement to trade policy. Both of these areas – economic co-operation and trade policy – form the cornerstone of regional co-operation. Third, there is the strong belief that creating a ‘centre of gravity’ at a regional level helps to enhance the status and importance of competition law domestically within the countries concerned. This can assist with facilitating the provision of technical assistance between the participating competition authorities to build domestic competition capacity. A further benefit of this centre of gravity would be the harmonisation of the various national rules and standards. This would be advantageous from the perspective of business, which is interested in reducing costs, having greater legal certainty and operating in similar regulatory environments.⁵³ Fourth, regional co-operation is considered to be an effective means of addressing serious competition problems (especially those of a cross-border nature) within the countries concerned where they lack effective domestic merger control regimes.⁵⁴

The advantages identified in the previous paragraph are well-illustrated by the EU’s experience, which has been very successful in the area of merger control. It demonstrates how a regional approach can help achieve effective and efficient enforcement in relation to cross-border mergers.

Many regional co-operation initiatives around the world have been inspired by the EU model especially in an era of intensive globalisation and with an increasing number of competition problems taking on a cross-border dimension as a result. Indeed, it should be acknowledged that regional co-operation may, in some cases, offer a suitable tool to address (and where relevant regulate) competition issues of a cross-border nature more effectively than domestic enforcement.

Nonetheless, building effective regional co-operation in the area of merger control in the case of DEEs is an extremely challenging and ambitious goal. This is highlighted by the fact that to date no single regional effort has proved effective or fully workable. Building regional co-operation in the regulation of cross-border mergers is also dependent upon sufficient progress being achieved in the field of competition law more generally. The effectiveness of a regional merger control mechanism requires the presence of merger control in at least some (if not all) of the countries concerned in the first place. This may not feature highly on regional agendas where other more pressing economic and political issues take precedence, such as regional conflicts and poverty. Furthermore, it is uncertain – given the absence of effective merger control regimes in many DEEs – whether a top-down approach would prove effective for the purposes of establishing merger control mechanisms within the countries comprising the regional grouping.

A top-down approach is based on the notion that a strong and advanced regional competition law framework could enable the relevant countries to strengthen their own domestic regimes and ensure harmonised standards in those regimes. It is questionable whether this is a sound approach, however, given that achieving such a desired outcome would – at any rate – be undermined by the fact that competition law is simply lacking or not enforced in some of the countries concerned.

⁵³ One of the ways this is achieved is through using a one-stop shop principle, under which when a transaction is regulated at the higher regional level it will be excluded from the jurisdiction of the competition authorities at the lower national level. See the existence and the operation of this principle under Regulation 139/2004 in the EU.

⁵⁴ See Gal, Michal, ‘Regional competition law agreements: an important step for antitrust enforcement’ (2010) *University of Toronto Law Journal* 239.

Moreover, it would be vital for the regional regime and the domestic regimes to operate in harmony, ensuring full and effective co-operation. In practice, this requires a properly defined relationship between the regional and domestic actors, as well as between the different domestic regimes of the relevant countries.

Finally, one comment should be added on the benefit of harmonisation of the domestic merger laws of the relevant DEEs within a regional setting, which was referred to above. Even with a comprehensive regional approach to harmonisation, success can never be guaranteed when major divergences exist in the legal, political and economic regimes and circumstances among the different countries concerned. There are clearly significant differences between the countries which are members of regional communities or organisations in the developing world. Any harmonisation initiative will be harder to achieve in these circumstances. Moreover, the countries within one and the same community may be at different stages of economic development with varying degrees of economic and trade strengths. Any attempt to achieve harmonisation – regardless of the mechanism used in this case – is likely to result in one or a small group of countries ‘dominating’ the process and this is likely to trigger objections on the part of weaker countries. Alternatively, this may result in a lowest-common denominator approach resulting in a mechanism of little practical value.

4.1.2.2 *Assessing existing regional efforts*

It may be helpful at this stage to offer an assessment of existing regional efforts, notably the four examples mentioned above: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU).

- **Association of South East Asian Nations (ASEAN)⁵⁵**

A number of references to competition law and policy feature within various ASEAN documents.⁵⁶ More concretely, some steps have been taken towards establishing a form of regional co-operation. This includes adopting the ASEAN Regional Guidelines on Competition Policy and publishing the Handbook on Competition Policy and Law in ASEAN for Businesses in 2010.⁵⁷ However, no proper framework for this purpose has been created.⁵⁸

⁵⁵ The Association of South East Asian Nations (ASEAN) was established in 1967 in Bangkok. Currently, it has ten member states. The goals behind ASEAN range from political to socio-cultural to economic integration. The emphasis however has been put in practice on the third of these. See the proposal to establish the ASEAN Economic Community (AEC).

⁵⁶ See paragraph 41 of the *ASEAN Economic Community Blueprint 2007* which provides that all member countries ‘endeavour to introduce competition policy... by 2015’. This paragraph also provides for the establishment of ‘a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and co-ordinating competition policies’ and encouraging ‘capacity building programmes/activities for ASEAN Member Countries in developing national competition policy’. The *Blueprint* is available at: <http://www.aseansec.org/21083.pdf>

⁵⁷ The adoption of the Guidelines is based on the idea expressed in the *Blueprint* which was to develop a ‘regional guideline on competition policy based on country experiences and international best practices with a view to creating a fair competition environment’. See paragraph 41, *ibid.* The Guidelines deal with a number of issues, ranging from, among others, the aims of competition policy to those of enforcement, competition advocacy and international co-operation. The Guidelines are available at: <http://www.aseansec.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf>.

At present, only five of ASEAN's members have enacted competition law, with provisions dealing with merger control⁵⁹. However, competition law and policy are high on the ASEAN agenda and there is potential for development in the future.⁶⁰

- **Southern Common Market (MERCOSUR)**⁶¹

A specific effort has been made within MERCOSUR to seek harmonisation between the domestic competition law regimes of its different member countries. This particular attempt was seen as a necessary step towards regional integration. However little progress was made in practice until 1996,⁶² when Argentina, Brazil, Paraguay and Uruguay adopted the *Fortaleza Protocol*⁶³ within the MERCOSUR framework under which they agreed to form a common institutional framework to address competition issues. For this purpose, the *Protocol* created a number of tools for co-operation between domestic competition authorities.⁶⁴ It also advocates greater harmonisation between the domestic competition law regimes of MERCOSUR countries in the area of merger control. However, despite the *Protocol* having been formally in force since 2000, it has yet to be actually implemented in practice (See Box 3).

The Handbook is addressed to businesses operating in the ASEAN region. It provides basic information and an explanation of the key principles and concepts of competition law and policy. It also gives an account of the substantive and procedural competition rules of ASEAN member countries.

⁵⁸ It is worth noting that to date no official ASEAN competition authority has been established. Nonetheless, in 2007, an agreement was reached by all ASEAN leaders to establish a network of local competition authorities which could serve as a forum for holding discussions and facilitating co-ordination on competition matters and also developing a regional policy framework. To this end, a group of experts was set up – the ASEAN Experts Group on Competition (AEGC) – which was given the task of studying and making recommendations on competition law and policy including enforcement on a regional level. The group has focused on issues such as capacity building within domestic competition authorities, competition advocacy, establishing new competition authorities, and determining the priorities of such authorities.

⁵⁹ These are Indonesia, Singapore, Thailand, Viet Nam and Malaysia.

⁶⁰ See Dabbah, ch. 7, note 52 above.

⁶¹ The Southern Common Market (MERCOSUR) was founded in 1991. MERCOSUR stands on a regional free trade agreement between four South American nations (Argentina, Brazil, Paraguay and Uruguay). Venezuela signed a membership agreement and currently is awaiting ratification before being formally admitted as a full member state. Bolivia, Chile, Colombia, Ecuador and Peru are associate member states.

⁶² Some pre-1996 developments, however, had promising competition relevance. This includes the *Ouro Preto Protocol* signed in 1994 which provided for a dispute settlement mechanism.

⁶³ See http://www.cade.gov.br/internacional/Protocolo_de_Ouro_Preto.pdf.

⁶⁴ See Andrade, Maria, 'Competition law in Mercosur: Recent developments' (2003) *Global Competition Review* 1.

Box 3. The MERCOSUR Protocol

The *Protocol* has only been ratified by Brazil and Paraguay, with Argentina and Uruguay yet to agree. Furthermore, only Brazil and Argentina have a merger regime under their competition law and fully dedicated competition authorities. Although full ratification has not occurred, it is worth noting that an informal ‘network’ exists between the domestic competition authorities of MERCOSUR member states. Practical examples include in 2007 the Brazilian Administrative Council for Economic Defence (CADE) deciding to block the merger between Saint Gobain and Owens Corning because of likely adverse effect on competition in the relevant markets due to risks of concentrations in these markets (especially the glass manufacture market) in Brazil. The CADE took the step of informing competition authorities of relevant MERCOSUR member states.

Responsibility for adjudication and enforcement of the *Protocol* was placed in the hands of the MERCOSUR Trade Commission (TC) and the Committee for the Defence of Competition (CDC).⁶⁵

However, the framework of the Protocol has yet to reach its full potential.⁶⁶ To ‘compensate’ for this, a *memorandum of understanding* was approved in 2003 which was intended to enhance co-operation within the MERCOSUR framework. The *memorandum* addresses: notification procedures; exchange of information; and technical assistance. The *memorandum* has been implemented within the legal systems of MERCOSUR member states.⁶⁷

- **Common Market for Eastern and Southern Africa (COMESA)**⁶⁸

COMESA has, in many respects, been inspired by the EU model. Competition law is a foundation stone within the COMESA framework⁶⁹ as the economic transition experienced by the majority of

⁶⁵ The CDC is intended to be composed of national competition authorities. The TC and the CDC are not supranational bodies. The CDC was intended to take charge of intra-regional investigations, which are handled in three stages. First proceedings begin before the competition authority of each member state at the request of an ‘interested’ party which, after a preliminary determination considering whether there are MERCOSUR implications, decides whether to submit the case to the CDC for a second determination. At the second stage the CDC must decide whether there is an infringement of the *Protocol* and recommend that sanctions and/or other measures be imposed. Finally, through a directive, the CDC ruling is submitted to the TC for a final decision to be adopted.

⁶⁶ In 2004, the TC requested a revision of the *Protocol* which was intended to finally create the CDC. The revision was also intended to enhance co-operation between domestic competition authorities and provide technical assistance by Argentina and Brazil for Uruguay and Paraguay. See Rosenberg, Barbara and Tavares de Araújo, Marianna, ‘Implementation costs and burden of international competition law and policy agreements,’ in Brusick, Philippe, Alvarez Ana Maria, and Cernat, Lucian (eds.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (United Nations, 2005).

⁶⁷ See Jenny, Frederic and Horna, Pierre, ‘Modernization of the European legal system of competition law enforcement: lessons from other regional groupings’ in Brusick, Alvarez and Cernat, *ibid*.

⁶⁸ The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) was signed on 5 November 1993. It brings together 18 African nations. COMESA resembles more an overarching community given that it covers other regional organisations, including the East African Community (EAC) and the Southern African Development Community (SADC). The impact of COMESA on these regional organisations is clear. For example, a Memorandum of Understanding was signed with the EAC under which the EAC has agreed to adopt and implement the COMESA trade liberalisation and facilitation programme. A Joint Task Force has also been established with SADC in order to harmonise its programmes with those of COMESA.

COMESA member states indicated the need for competition law. Such transition appears to have highlighted and helped articulate the need for a regional framework to confront possible anticompetitive situations.⁷⁰

A number of COMESA member states have domestic merger control regimes, but these were considered to be inadequate to deal with complex cross-border and multi-jurisdictional issues.⁷¹ It was acknowledged that co-operation at bilateral level could resolve and redress some of these issues, but a regional framework was perceived to be a more consistent and sustainable way of doing so.

COMESA's competition law and policy incorporates a mechanism for achieving harmonisation among the competition rules and policies of its member states in order to minimise and avoid conflicts. Under Article 55(3) of the COMESA Treaty, regional competition law was adopted in the form of the *COMESA Competition Regulations*. A designated body, the COMESA Competition Commission – which has responsibility in the field of competition law –⁷² is given the function of applying the *Regulations*.⁷³

As far as merger control is concerned, the *Regulations* have a wide scope and provide for, among other things, the notification and control of mergers and acquisitions. Merger control is covered under Part 4 of the *Regulations* which contains fairly detailed provisions. These provisions, however, are not comprehensive and in many places are incomplete.⁷⁴ The COMESA Competition Commission has jurisdiction in relation to 'notifiable mergers'.

A notifiable merger is a merger with 'regional dimension', a concept defined in Article 23(2) as requiring two conditions: (i) one or both of the firms involved operate in two or more COMESA member states, and (ii) the thresholds of combined annual turnover or assets – provided for in Article 23(3) of the *Regulations* – are exceeded.⁷⁵ There is an obligation to notify these mergers to the Commission. The Commission, however, may require notification of a merger, which does not meet the two conditions for notification, if the merger appears to the Commission likely to lead to substantial lessening of competition (SLC) or likely to operate against the public interest.⁷⁶ The Commission will use the SLC test to conduct its substantive appraisal of mergers within a timeframe of 120 days, which may be extended if the Commission feels this is necessary to be able to complete its investigation.⁷⁷ Article 26 of the *Regulations* deals with the Commission's procedures when conducting its review, the factors taken into account as part

⁶⁹ See *Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition* (COMESA, 2008).

⁷⁰ See *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD, 2005).

⁷¹ See, for example, the views of Kenya, Zambia and Zimbabwe who openly acknowledged prior to the creation of COMESA that national competition rules were insufficient to combat restrictive practices manifested at a regional level.

⁷² The Commission is a corporate body with an international legal personality.

⁷³ The *Regulations* are considered to have supremacy over national laws: in the case of conflict the *Regulations* must prevail over the conflicting national law (Article 5(2) of the *Regulations*). This idea of supremacy has been borrowed from the EU.

⁷⁴ See, for example, below regarding the timeframe for merger review (under Article 25 of the *Regulations*) within which the Commission operates.

⁷⁵ Details of these thresholds have yet to be published.

⁷⁶ See Article 23(5) of the *Regulations*.

⁷⁷ See Article 25 of the *Regulations*. The Article is silent, however, on how long such an extension is likely to be.

of its merger assessment and the likely outcomes of a merger investigation. The Article also sets out the powers of the Commission when conducting its merger appraisal.

- **West African Economic and Monetary Union (UEMOA⁷⁸ or WAEMU)⁷⁹**

A regional competition law regime has been established within WAEMU. The WAEMU Commission has competence to apply the competition rules,⁸⁰ subject to the control of the Court of Justice, which has jurisdiction to rule on all decisions issued and fines imposed by the Commission.⁸¹

In 2002, the WAEMU Council of Ministers adopted the *Community Competition Law*, which came into force in January 2003. The law has five elements: (i) control of anticompetitive behaviour within WAEMU; (ii) rules and procedures relating to the control of cartels and abuse of dominant position within WAEMU; (iii) the control of state aids within WAEMU; (iv) transparency of the financial relationship between members states and public enterprises on the one hand, and between public enterprises and international or foreign organisations on the other; and (v) co-operation between the WAEMU Commission and national authorities in the enforcement of the *Law*.

There is thus no specific reference to merger control in the WAEMU Treaty. However, WAEMU's position has been that this does not rule out the control of merger operations. Such operations are thought to be possible to control under the provisions dealing with abuse of dominance.⁸²

4.1.2.3 *Comments on existing regional efforts*

Comprehensive regional co-operation in the area of merger control in the developing world is an ambitious goal. A fully-fledged regional merger control framework does not seem realistic without at least undertaking some preliminary steps. The first of these steps is the removal of serious political obstacles facing DEEs. Raising the profile of competition law on the regional agenda will depend on domestic successes by the countries concerned both in terms of competition law enforcement and progress towards economic integration more broadly. Due to the highly complex nature of the economic integration process, political disagreements will very likely emerge and will likely impact on the field of competition law and ultimately on merger control.

Beyond the potential political disagreements, 'functional' constraints also present serious problems. Huge differences exist between the countries concerned in terms of their experience in the area of merger control. It is therefore premature to embrace the idea of regional co-operation as a means of introducing effective merger control regionally to overcome domestic constraints. The initial focus should be on reaching a stage where merger control rules are introduced domestically in the countries concerned and

⁷⁸ Acronym for the French name *Union Économique et Monétaire Ouest Africaine*.

⁷⁹ The West African Economic and Monetary Union was established in 1994 as a union between 8 African countries. Its objectives are mainly of general economic nature.

⁸⁰ The Commission acts through the Department of Fiscal Customs and Trade Policies, via the Trade and Competition Authority. It monitors compliance with WAEMU competition rules at the national level and; (i) receives complaints directly through national structures; (ii) initiates and investigates legal actions; and (iii) takes provisional measures, deciding on restrictions and fines. Before the Commission acts, it seeks advice from the Competition Advisory Committee.

⁸¹ The Court of Justice enjoys the power to hear legal actions launched by WAEMU bodies and appeals against Commission decisions, which can be amended or annulled as the Court of Justice sees fit.

⁸² Article 88 (b) prohibits practices 'comparable' to situations of abusive dominance and it has been thought to serve as a legal basis for a certain degree of merger control.

enforced effectively. It is an essential premise that countries have the same level of development for regional co-operation to work effectively in this area. One solution would be for merger control rules in different regions of the developing world to be developed from the bottom up, i.e. with each country designing its own merger control regime and making some progress in enforcing it. Advancing in this way is more conducive to achieving meaningful co-operation at a regional level.

Regional communities around the developing world often lack the necessary tools to deal with the issues and problems that arise following the exercise of jurisdiction by regional authorities.⁸³ Most notably, it is important to have suitable tools for the following: (i) the allocation of jurisdiction between the ‘community’ level and ‘national’ levels; (ii) the enforcement role and powers of the regional authorities (for example whether they will have the ability (and, if yes, how) to access and gather information in actual cases from firms operating in the different countries); and (iii) the necessary safeguards in place for an expansion in workload beyond the capabilities of the regional authorities (for example, the ability to involve national competition authorities to lessen the burden on the regional authorities).

The issue is aggravated by the fact that some DEEs are parties to more than one regional community.⁸⁴ This leads to difficulties related to whether an individual country will give priority to the merger control framework of one community over another. The existence of overlaps in membership has the potential to undermine the real prospects for creating a fully effective merger control regime at regional level.

It is clear that regional communities which exist in DEEs have been inspired by the EU model. While drawing from the EU experience is beneficial, it is important to appreciate the limitations of attempting to transpose the EU model. It took the EU over five decades (including two long decades of intensive work in the area of merger control) to reach its current position in the field of competition law and the area of merger control. Many DEEs are still in the nascent phase of developing their competition law and their circumstances and history also differ significantly from those of the EU.

A large part of the work and discussion on regional co-operation has been merely academic. Considerable efforts need to be made to promote the regional co-operation agenda. In particular, ‘implementation’ at the domestic level of regional rules or principles in many cases is crucial for this purpose. This necessitates instituting domestic merger control regimes in the countries concerned, as noted above.⁸⁵ Overly burdensome bureaucracy is also a major constraint facing all regional organisations among DEEs making the task of setting a clear future for regional co-operation and achieving effective implementation much harder.⁸⁶

The problems facing regional co-operation are exacerbated by uncertainty faced over whether the emphasis of these regional communities should be placed on economic or political goals. Merger control is not seen through a pure competition law lens, and it cannot be detached from the wider political and economic issues that affect it. Co-operation cannot, therefore, stand in isolation and in almost all cases

⁸³ See *The Attribution of Competence to Community and National Competition Authorities in the Application of Competition Rules* (UNCTAD, 2008).

⁸⁴ This is particularly notable on the African continent.

⁸⁵ For example, in relation to the MERCOSUR *Protocol*, implementation here would require the introduction of competition law regimes and the setting up of domestic competition authorities in Uruguay and Paraguay, two of the member states.

⁸⁶ Establishing a proper institutional structure at domestic level with sufficient financial resources and expertise is important to ensure successful implementation.

will depend on the wider political and economic circumstances prevailing in the region and on the individual countries concerned.

A final comment concerns capacity constraints, which is an issue for many of the regional communities in the developing world suffer. As noted in the previous part of the paper, the members of these communities are generally small economies which lack the necessary resources to be able to establish effective domestic merger control regimes, let alone devote resources to a regional merger control regime. The latter have the potential to be extremely high. Many of these countries do not consider allocating resources for merger control at regional level to be a national priority.⁸⁷

4.1.3 *Bilateral Co-operation*

Bilateral co-operation has developed into an important tool by which competition authorities engage, among themselves, in a variety of enforcement and enforcement-related activities. Bilateral co-operation may occur in both a formal (on the basis of an agreement) and informal (without the conclusion of an agreement, including on a *de facto* basis) manner. In the discussion below, the reference is made to competition-specific bilateral co-operation agreements, which should be distinguished from general bilateral links between countries including those of free trade agreements and memoranda of understanding. The latter do usually contain provisions dealing with competition law and policy but they are not suitable as a vehicle for proper bilateral co-operation in the field of competition law.

The number of bilateral co-operation agreements has grown quite considerably since the 1990s. However, compared to the number of competition authorities in existence, the number of agreements is relatively small. The vast majority of bilateral agreements and links have been entered into between experienced competition law agencies in the developed world. Thus, there is a noticeable absence from the competition law scene in most DEEs of specific bilateral co-operation agreements. This is interesting given the strong regional ties, as seen in the previous part of the paper, which exist between many of the countries in these regions. One explanation for this absence may be that competition law was introduced only recently in the different countries and therefore competition enforcement (let alone merger control) has not matured to an extent to make the conclusion of such agreements possible or deemed necessary. However, given the extent of 'cross-border' or 'inter-regional' trade within regions and the existence of many firms operating in the different countries of these regions, the likelihood of merger transactions with cross-border elements is a realistic prospect.

The absence of bilateral links with competition authorities in DEEs is also understandable as far as their relationships with more experienced competition authorities in the developed world are concerned. The lack of a level playing field between the two groups is a major reason for this. There is also the fact that experienced authorities are usually time constrained in their merger investigations. Engaging in bilateral co-operation with authorities in DEEs (who may be reviewing the same merger) may not be seen as compatible with their goal of ensuring efficiency in these investigations.

Bilateral free trade agreements have been concluded between different countries within the same region. Some of these agreements have competition provisions, although these agreements are arguably not the most suitable medium for bilateral co-operation in the area of merger control to be established. The lack of formal or competition-specific bilateral co-operation agreements between the different countries does not mean, however, that co-operation is non-existent. Different forms of bilateral co-operation can be found, such as those involving joint meetings between competition officials and training seminars and workshops that may occur on an informal basis.

⁸⁷

See Stewart, Taimoon, 'Is flexibility needed when designing competition law for small open economies? A view from the Caribbean' (2004) *Journal of World Trade* 725.

Bilateral co-operation offers a number of important benefits to countries and their competition authorities specifically. These were identified and advocated by the OECD in its 1995 Recommendation.⁸⁸ The Recommendation lists the following specific benefits: (i) improved efficiency in enforcement and investigations; (ii) avoidance of jurisdictional conflicts; (iii) protecting the legitimate interests of countries; (iv) reducing the need for exchange of confidential information; (v) enhancing the interests of merging parties and legal certainty; and (vi) creating a closer nexus between the relevant competition authority and the relevant merger.⁸⁹

These benefits are relevant to DEEs. Thus, introducing bilateral co-operation should be a positive development for these economies. In reality, however, serious obstacles exist in the face of any effort to convert bilateral co-operation in the case of DEEs into an effective tool in the area of merger control. In particular, as noted above, the chances that experienced competition authorities will enter into such agreements with competition authorities in DEEs are quite slim. Arguably, only where the merger control regime of a DEE is modelled on that of a developed economy, and where the necessary wider political and economic circumstances exist which may facilitate such co-operation, will a competition authority in the latter consider entering into a bilateral co-operation agreement with the former.

Bilateral co-operation can only work if both parties to the agreement will benefit or at least consider it beneficial to enter into such co-operation. This is well demonstrated by the experience with the EU-US⁹⁰ bilateral co-operation and that of Australia-New Zealand.⁹¹ These are the two most successful examples of bilateral co-operation in the field of competition law. The success achieved in these two instances is due in a large part to the similarities between the parties. In the case of the EU and the USA, this is seen in light of the fact that these are the world's most advanced competition law regimes and there is a significant jurisdictional overlap between them in many cases, especially in merger operations. In the case of Australia and New Zealand, this is seen in light of the similar levels of economic development existing in both countries as well as the close political ties and mutual trust and confidence between them.

Notwithstanding the limitations from which bilateral co-operation suffers as an international option for DEEs, it may nevertheless be advantageous for these economies to attempt to establish bilateral links in the field of competition law either among themselves or with more developed economies. These links do not have to be exclusively for the purposes of co-operation in individual enforcement actions,⁹² but may facilitate technical training and capacity building. These would be particularly important in the area of merger control given the specific demands, as we saw above, of this area, especially in terms of adequate resources, most notably relevant expertise.⁹³ This could also enhance the prospects for convergence and harmonisation which are likely to emerge from such bilateral links.

⁸⁸ See OECD Recommendation on *Cooperation between member countries on anticompetitive practices affecting international trade* (1995).

⁸⁹ The idea in relation to the latter point is that a given merger will be assessed by the relevant competition authority.

⁹⁰ The EU/US co-operation is based on two co-operation agreements: the 1991 and 1998 agreements.

⁹¹ The co-operation between Australia and New Zealand is founded in the Closer Relations Agreement 1983 and a co-operation agreement from 2007.

⁹² It is important to note that the prospects of this cannot be ruled out completely even in the absence of a formal co-operation agreement. See for example the consultations conducted between the Competition Commission of Zimbabwe and the Australian Competition and Consumer Commission in the *Coca-Cola Company/Cadbury-Schweppes* merger, mentioned in note 45 above.

⁹³ See above.

4.2 *Jurisdictional issues*

Jurisdictional issues sit at the very heart of the merger control mechanism. As a process, merger control begins with the question of jurisdiction: i.e. whether a particular transaction falls within the scope of the relevant regime and whether the relevant jurisdictional requirements are satisfied. This is what triggers the entire process of substantive merger appraisal. Where the jurisdictional thresholds are not met, no notification of the merger will be necessary and as a consequence the relevant competition authority will not carry out an assessment of the merger.⁹⁴

The jurisdictional question assumes particular importance in relation to cross-border merger operations given the high probability of these operations having to be notified *ex ante* in many jurisdictions. One issue concerns whether these mergers, where they involve foreign firms, should be caught – under all circumstances – by the relevant local merger rules of a given jurisdiction or whether this should only happen under certain circumstances.⁹⁵ In relation to DEEs, this question is particularly relevant in the context of cross-border merger control.

4.2.1 *Notification*

In the vast majority of merger control regimes in the world, a mechanism of mandatory notification exists. Only a few jurisdictions in the world (including the United Kingdom, Chile, Australia and New Zealand) have a mechanism of voluntary notification. When designing or operating a merger control regime, a DEE will need to consider whether to rely on mandatory or voluntary notification and, more importantly, the jurisdictional thresholds which trigger notification to the relevant competition authority. This is a complex issue that requires careful consideration. Such thresholds should, on the one hand, reflect the size of the economy in question and relevant national sensitivities and, on the other hand have proper regard to the interests of firms engaged in merger operations.

There is a particular difficulty in setting the jurisdictional thresholds at an appropriate level. In relation to this task, a risk exists that these thresholds may be set too high or too low. There are implications in both of these situations. Where the thresholds are set at a high level, there is a risk that some problematic mergers (which normally should require appraisal on substantive grounds) would escape scrutiny. Where the thresholds are set at a low level, this will increase dramatically the number of merger operations caught under the notification rules.⁹⁶ Some of these mergers may not have a sufficiently material link to the relevant jurisdiction (See Box 4). Such an outcome will have serious repercussions for the scarce resources available to competition authorities in DEEs. This is in addition to the unnecessary regulation to which merging parties in cross-border situations will be subjected to. This point deserves particular emphasis given that most mergers do not give rise to competition problems.

⁹⁴ It should be borne in mind however that jurisdiction may nonetheless be exercised by the relevant competition authority in such cases. See for example the provision in the COMESA *Regulations* to that effect, note 73 above and accompanying text; or where a voluntary notification mechanism exists and the relevant competition authority chooses to examine a merger *ex post*.

⁹⁵ In some jurisdictions, an exemption exists for certain types of ‘foreign’ mergers. See, for example, the exemption in existence in the US merger control regime.

⁹⁶ See Lorenz, Moritz, ‘Legislative comment: the new Chinese competition act’ (2008) *European Competition Law Review* 257.

Box 4. Reform of Merger Notification Thresholds in Brazil

It is worth mentioning the change which occurred in Brazil.

Under section 54 of the Competition Act 1994, notification is mandatory for all mergers, acquisitions, joint ventures, or any other type of corporate grouping where: the transaction generates effects in Brazil; *and* the transaction results in a market share equal to or higher than 20% of a given relevant market; *or* any of the parties to the transaction achieved a turnover above R \$400 million in the preceding financial year.

For a long time, the Brazilian competition authorities gave an expansive interpretation to the concept of ‘effects in Brazil’. This was encouraged by the wording of section 54 which omits a geographic reference to Brazil in relation to the market share and turnover thresholds. With such low thresholds, many merger operations which produced no impact at all on competition in local markets had to be notified to the Brazilian Administrative Council for Economic Defence (CADE).

A new interpretation was given to the concept of effects and the turnover criterion in a key decision delivered by the CADE on 19 January 2005. The CADE stated that notification should occur in the case of transactions, which involved economic groups with a turnover exceeding R \$400 million – *in Brazil* – in the preceding financial year. This significant change has been facilitated by the adoption of the principle of appropriate nexus of jurisdiction as advocated by the OECD and the ICN. The change in position led to a significant decrease in the number of merger operations, which would have had to be notified in Brazil in the absence of this change. Therefore at present only those merger operations in which the turnover generated in Brazil exceeds the stated threshold should be notified.

It is worth noting that there is a proposed change currently under discussion in Brazil (Bill of Law 06/2009) which is seeking to place exclusive reliance on turnover thresholds and not market share thresholds for establishing jurisdiction. This proposed change also follows OECD and ICN best practices (see note 97 below and accompanying text).

The work of the OECD and the ICN demonstrates the difficulty involved in determining the appropriate jurisdictional nexus and the appropriate level at which to set the notification thresholds. The ICN principles produced on this issue⁹⁷ show that it is difficult to determine the criteria for such thresholds. This is in part due to the general nature of the criteria proposed under these principles for determining the notification thresholds i.e. that they should be clear and understandable and based on objective and quantitative and not subjective factors.⁹⁸

The OECD Recommendation on Merger Review (2005) offers further clarification on this issue. According to the Recommendation, OECD member countries should assert jurisdiction only where a merger operation has an appropriate nexus with their jurisdiction. It also states that the criteria for determining notification must be clear and objective. Clearly, such recommendations are motivated by an interest to reduce the cost and burden on merging firms and third parties. They are therefore welcome.

4.2.2 *Obtaining information and information exchange with other competition authorities*

Another jurisdictional issue, which has great practical significance, concerns the tools and powers for seeking and gathering information in merger cases and for exchanging information between competition authorities. In merger cases, the information will usually come from the merging parties themselves as part of the merger notification exercise. However competition authorities in DEEs encounter a number of

⁹⁷ See ICN Recommended Practices for *Merger notification and review procedures*.

⁹⁸ Criteria such as turnover figures and assets are considered to be objective; market shares, on the other hand, are considered to be subjective criteria.

difficulties in obtaining information from, and exchanging information with, firms involved in cross-border mergers. To understand this issue, the discussion should be placed in the wider context of extraterritorial assertion of jurisdiction by competition authorities (especially those of DEEs) over these operations.

The doctrine of extraterritoriality has been a source of controversy in the field of competition law.⁹⁹ The aggressive use of the doctrine in some parts of the world has triggered disputes and conflicts between countries and has led to some countries and their authorities taking measures to block extraterritorial efforts by other countries.¹⁰⁰

However, the doctrine of extraterritoriality has an important role to play in the field of competition law and in merger control particularly. Without it at least some potentially harmful transactions might escape scrutiny. Extraterritoriality has a particularly important role in the absence of an effective multilateral strategy in the relevant country and given the limitations from which bilateral co-operation suffers.¹⁰¹

Extraterritoriality is an inherent feature of merger control. This can be seen in light of the wording and nature of the jurisdictional thresholds triggering merger notification (whether mandatory or voluntarily), which feature in different merger control regimes. The judicial confirmation given in the US and Europe strengthens this point.¹⁰² However, the ability of competition authorities of DEEs to assert jurisdiction extraterritorially in cross-border merger cases remains a challenge.¹⁰³

As a starting point competition authorities in DEEs may struggle to obtain all the necessary information required to conduct the merger analysis.¹⁰⁴ When the relevant information is located outside the territory of the DEE in question, it can be very difficult for the relevant competition authority to obtain it. The firm(s) concerned may refuse to comply with the orders of the authority to supply the relevant information and the only way to obtain it would be to rely on the possible assistance of the relevant foreign competition authority. However, unless a bilateral co-operation agreement to assist and exchange information exists between the relevant jurisdictions, ad hoc co-operation of this type is unlikely.¹⁰⁵ This

⁹⁹ See Dabbah, ch. 8, note 52 above. Extraterritoriality refers to a situation where a competition authority or court asserts jurisdiction over a situation involving foreign elements (such as behaviour, conduct or transactions of foreign firms). This may be done on the basis of 'effects' produced on competition in local markets, or on the basis of 'implementation' of the behaviour, conduct or transaction in the relevant jurisdiction, or (in some cases) on the basis of the 'single economic group' doctrine (where although the firm(s) concerned may be foreign, nonetheless they may own a local subsidiary). The 'effects' and 'implementation' doctrines are the main scenarios for asserting jurisdiction extraterritorially. The former is used in the USA (and many other) regimes whereas the latter is used in the EU.

¹⁰⁰ See, for example, the blocking efforts – through both case law and statute – by the United Kingdom in relation to extraterritorial assertions of jurisdiction by the USA. Other countries which have adopted blocking legislation against US extraterritorial actions include Australia and South Africa.

¹⁰¹ See discussion above in paragraphs 93 and 94.

¹⁰² Judgments of the US Supreme Court and the European Court of Justice have been crucial in recognising the doctrine of extraterritoriality. See, for example, the judgement of the General Court of the EU (then the CFI) in Case T-102/96 *Gencor v. Commission* (1999) ECR II-753.

¹⁰³ This does not mean that such assertion is impossible however. A number of examples are possible to identify of successful assertion of extraterritorial jurisdiction, including the *Coca-Cola Company/Cadbury-Schweppes* merger, mentioned in note 45 above.

¹⁰⁴ This arguably highlights the importance of having mandatory notification as opposed to voluntary notification.

¹⁰⁵ For illustrations, see Dabbah, ch. 4, note 22 above.

highlights the need for bilateral co-operation, although as stated above considerable constraints may prevent it from materialising.

Even if the competition authority is able to obtain the necessary information and reach a conclusion that the relevant merger should be blocked or cleared subject to conditions, it can still face serious problems in enforcing its decision where there are no assets belonging to the firm(s) concerned in local markets.¹⁰⁶ The likelihood of an authority succeeding to enforce its decision in the courts of the relevant foreign jurisdiction is slim. The situation is exacerbated where fundamental differences exist between the two jurisdictions, for example in civil and common law jurisdictions, or because one jurisdiction allows for criminal penalties whereas the other allows only for civil penalties.¹⁰⁷

4.3 Remedies

Remedies play a decisive role in merger control.¹⁰⁸ Without the ability to impose remedies, agencies would have no other choice than to reject problematic mergers. Remedies allow problematic mergers, which nonetheless have obvious and important benefits, to be cleared where these benefits outweigh possible competition problems which the relevant merger is likely to give rise to. Merger remedies create a third category – next to unconditional clearance or prohibition decisions – of outcome in merger cases, namely that of conditional clearance.

4.3.1 Types of remedies available

There are several types of merger remedies. Broadly speaking, these remedies are divided along the lines of structural and behavioural remedies. In some merger control regimes, however, the categorising of remedies is more sophisticated than this.¹⁰⁹ In these regimes, a distinction is made between: structural remedies;¹¹⁰ ‘other’ structural remedies;¹¹¹ behavioural remedies;¹¹² and other types of remedies.¹¹³

¹⁰⁶ See for example the *Rabies-Vaccines* merger which was investigated by the US Federal Trade Commission (Case No. 891 0098, 55 Fed. Reg. 1614 (1990)). This case concerned the acquisition of the French firm, Connaught by Institute Merieux of Canada. Despite identifying competition concerns in the case, the firms had no assets in the USA and so the FTC needed the co-operation of the Canadian Competition Bureau in the circumstances.

¹⁰⁷ Some important illustrations can be found from practice, most notably: the decisions of the UK House of Lords (now the Supreme Court) in *Huntington v. Attrill* [1893] A.C. 150 and in *Government of India v. Taylor* [1955] AC 491; and the judgement of the UK Court of Appeal in *United States of America v Inkley* [1988] 3 All ER 144.

¹⁰⁸ For a useful discussion of merger remedies, see the OECD Roundtable on *Merger Remedies* (2003) and the ICN principles on remedies.

¹⁰⁹ See for example the classification made by the UK Office of Fair Trading and UK Competition Commission.

¹¹⁰ Structural remedies include most commonly divestiture.

¹¹¹ Other structural remedies may include granting access to facilities of infrastructure or intellectual property rights.

¹¹² Behaviour remedies may include things like licensing of intellectual property rights, removal of exclusivity clauses in contracts with customers or price regulation measures.

¹¹³ Other types of remedies may include recommendations by the competition authority to the government or parliament to change a law or regulation deemed to be an obstacle to competition in the relevant market.

Competition authorities overwhelmingly prefer structural remedies over behavioural ones. Structural remedies are considered to have greater effectiveness than behavioural remedies in addressing the competition problem(s) identified during merger appraisal. Moreover, unlike behavioural remedies, they do not require ongoing monitoring. Nonetheless, when it comes to designing merger remedies and determining its policy on this topic (including what type of remedies to accept), a competition authority faces a difficult task. This is particularly the case in DEEs.

A competition authority in a DEE may choose – as part of its policy – to express preference towards structural remedies. In practice, however, authorities may struggle to implement this type of remedy where the merging parties maintain no relevant assets in the jurisdiction in question and (more generally) where the merging firm(s) have the upper hand in their dealings with the authority.¹¹⁴

The merger may also require the divestiture of a number of assets and the relevant competition authority in a DEE may lack the experience to deal with such complex cases.¹¹⁵ It may also be the case that the competition concerns identified in the investigation are related to issues which are behavioural in nature such as exclusivity clauses in contracts between one or more of the merging firms and customers of these firms.¹¹⁶

In practice, competition authorities in DEEs may therefore have to opt for behavioural remedies in more instances than they would like to be the case. This has been the situation adopted in Korea. (See Box 5). However, despite their drawbacks one should not dismiss the importance and relevance of behavioural remedies and the need to opt for a behavioural remedy in a given case as a first choice or as one part of a sophisticated remedies package.

¹¹⁴ One such example is whether the firms may be able to threaten to withdraw from the relevant jurisdiction and/or to lobby the government in order to exert heavy pressure on competition officials, as discussed previously.

¹¹⁵ See for example the views submitted by Mexico within the OECD Policy Roundtable on *Merger remedies* (2003).

¹¹⁶ Exclusivity clauses in particular constitute a problem in several DEEs; see most notably the position in different sectors of the Mexican economy, including that of soft drinks.

Box 5. The Use of Behavioural Remedies in Korea

In recent years, the Korean Fair Trade Commission (KFTC) has heavily relied on behavioural remedies as part of merger clearance in a number of cases. Two examples offer interesting case studies.

The first concerns the acquisition in 2007 by CJ Cable Net of a stake in Chungnam Broadcasting System and Modu Broadcasting System¹¹⁷ which led to the integration of the provision of cable-TV by these firms in six cities in Korea. The KFTC cleared the transaction subject to a rigorous and sophisticated remedies package. This included a prohibition on: direct or indirect price increases; reduction in the number of channels offered per subscription class of customers; refusal to make information available on cheapest products or refusal to supply such products; and refusal of applications to convert subscriptions to cheaper services.

In the second case, the 2005 acquisition by Hite Brewery Co. of Jinro Ltd¹¹⁸, the KFTC made use of extensive behavioural remedies. These remedies included: a prohibition on raising the prices of alcoholic beverages by the merged entity by more than the average inflation rate during a five year period; an agreement that any price increase must be approved by the KFTC in advance; a prohibition on unfair coercion or inducement by the merged entity of wholesalers to deal with it on unfair terms by taking advantage of its position; and an obligation on the merged entity to submit to the KFTC information concerning transactions entered into with liquor wholesalers.

A number of characteristics which make behavioural remedies appealing and particularly relevant for DEEs can be identified. Among these characteristics, the flexibility of behavioural remedies is noteworthy. In the absence of a jurisdiction-specific structural remedy, a behavioural remedy enables competition authorities in DEEs to adopt a solution which suits the circumstances and needs of the jurisdiction in question. This should also enhance the willingness of merging parties in cross-border operations to comply with the conditions and obligations imposed on them as part of the merger clearance.

The types of behavioural remedies which should feature in the toolbox of remedies available to competition authorities in DEEs depends on the characteristics of local markets and the enforcement experience and regulatory perspectives of the authorities. Nonetheless, a number of behavioural remedies will be particularly relevant to DEEs. These include: (i) behavioural remedies designed to address issues of vertical restraints (including those related to exclusivity clauses); (ii) non-structural access remedies in the form of licensing of intellectual property rights; and (iii) granting access to facilities¹¹⁹. It should be noted, however, that these issues present a more difficult remedy for competition authorities in general, including those of DEEs.

DEEs should not rely excessively on behavioural remedies as there is a cost attached. The demands of monitoring compliance can be very high especially given these authorities suffer from limited resources. However, on balance, the benefits resulting from using behavioural remedies in some cases to address a competition issue may outweigh or justify the inevitable cost. This should be a consideration for these authorities to take into account when designing their policy on merger remedies.

¹¹⁷ KFTC Decision no. 2007-274, 7.5.2007.

¹¹⁸ KFTC Decision no. 2006-009, 24.1.2006.

¹¹⁹ In some cases, competition authorities may 'condition' the relevant merger using other behavioural tools. See for example the conditional clearance given by the Competition Commission of Zimbabwe in the *Coca-Cola Company/Cadbury-Schweppes* merger (mentioned in note 45 above). The relevant conditions included an undertaking by Coca-Cola to maintain the local *Mazoe* and *Calypso* brands on the Zimbabwean market and develop them into regional brands with wider circulation; and to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.

4.3.2 Consultation and co-operation

Recent developments in the area of merger control have established the value of consultation and co-operation between competition authorities on the question of remedies in merger cases. This is especially important in light of the serious potential for conflicts between competition authorities which can arise in a number of contexts. These contexts include:

- first, the relevant competition authorities might reach conflicting conclusions concerning the need for remedies in the same cross-border merger case;
- second, the jurisdiction in which the merger has its ‘centre of gravity’ might decide not to regulate the merger and allow it on non-competition grounds, whereas one or more other jurisdictions may seek to impose remedies under their merger control laws; and
- third, two competition authorities could identify competitive concerns with respect to different aspects of the same merger operation in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority.

Bilateral co-operation in this context brings a number of important benefits to both the competition authorities and the merging parties.¹²⁰ The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case where co-operation enhances the prospects for effective design and implementation of a remedy in a particular case.

The prospects of consultation and co-operation between competition authorities of DEEs and experienced competition authorities cannot be taken for granted. However, at the same time, they cannot be completely ruled out.¹²¹ Co-operation between competition authorities in the remedies phase can be of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussion at the OECD and in other fora¹²² explored different options for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities. This idea might deserve further examination though so far there has been a lack of consensus over the best way forward in this case. This can be seen in light of the difference in views over the viability and practicability of the ‘lead jurisdiction’ idea.

4.3.3 Monitoring and Enforcement

Where behavioural remedies are used as a condition to clear a merger, it is important that the relevant competition authority puts in place a means for the effective monitoring of the remedies implementation. This is vital for ensuring full compliance by merging firms and guaranteeing the effectiveness of the relevant behavioural remedy. Monitoring is also important, though to a lesser extent, in the case of

¹²⁰ See OECD Issues Paper on *Cross-border remedies in merger review* (2005).

¹²¹ See note 92 above.

¹²² It should be noted that this was not the first time when this idea has been discussed. The idea was examined in the 2000 report of the International Competition Policy Advisory Committee (ICPAC). The report expressed strong support in favour of co-operation here. It put forward two different possibilities for having such arrangements: first, through joint negotiation (here every relevant competition authority would express its concerns over the transaction and a remedies package would be agreed through joint negotiation); and secondly, by designating one jurisdiction as ‘lead jurisdiction’ which negotiates remedies with the merging parties.

structural remedies.¹²³ The same holds true for enforcement: competition authorities must have the necessary powers and tools to be able to take enforcement actions where merging parties fail to comply with conditions or obligations featuring in remedies agreed with the parties.

Monitoring and enforcement are not an easy task and the requirements for these functions are not unique to the area of merger control. Competition authorities require adequate financial and human resources, which is a constraint relating to the field of competition law in general and not only the area of merger control.

Competition authorities face a serious hurdle in their monitoring efforts of remedies in cross-border mergers on two fronts. The first is limited access to the necessary information, and the second is the limited recourse to enforcement actions if the merging firms fail to comply with the conditions and obligations set out under the remedies. There are two possible avenues for enhancing the effectiveness of the function of monitoring. These include (i) taking actions against a local subsidiary of the merging parties (which may not always exist) and (ii) relying on co-operation. The latter avenue might be more promising although co-operation may have to be particularly extensive for it to work.

In some cases, achieving success in enforcement actions by one competition authority in cross-border merger cases requires the assistance of foreign competition authorities also involved in the transaction.¹²⁴ This assistance is more likely to be given where the two competition authorities in question operate within a framework of close co-operation. As noted above, such frameworks are lacking in the case of competition authorities in DEEs. As a consequence, engaging in effective enforcement actions in cross-border merger cases becomes much harder to achieve.

One final issue to be discussed in the present context concerns non-competition factors. In the relevant DEE, industrial policy and other types of considerations – such as those related to foreign direct investment – may be paramount.¹²⁵ The relevant competition authority may feel that such considerations should guide its work in the area of merger control. As a consequence, the authority may be concerned that the prospects of effective monitoring and enforcement of remedies may prove unattractive to foreign firms. Alternatively, government concerns may exist and pressure may be put on the authority to prioritise attracting foreign participation in local markets. The authority may therefore choose to develop or implement a policy approach based on these consideration(s).

5. Conclusions

Among all of the branches of competition law and policy, merger control is the area that has had the most impact on the globalised economy. Yet, it is the area which, in geographical terms, has expanded the least. There is a significant scope for further developments to occur in the area: whether in terms of building effective merger control mechanisms in all existing competition law regimes around the world or in terms of developing merger control at the regional and international levels.

Impressive progress has been made in pushing for and achieving convergence and harmonisation in the area, most notably using soft law instruments. There has also been an increase in the number of bilateral co-operation links established between different competition authorities which have direct relevance to the regulation of cross-border mergers. This is in addition to the expansion in regional efforts to address competition law and policy in many parts of the developing world.

¹²³ In the case of structural remedies, monitoring will be important to ensure that divestiture occurs according to the terms and conditions agreed between the competition authority and the merging parties. Once it has been completed, no on-going monitoring will be necessary.

¹²⁴ See note 106 above.

¹²⁵ See the discussion above in relation to these two issues.

DEEs occupy a unique position in the area of merger control. Most of these economies do not have effective merger control regimes; although some have established competition law regimes. They are also not active participants in bilateral co-operation.

In relation to multilateral co-operation, some competition authorities in DEEs have taken part in important proceedings, within the OECD, the ICN and UNCTAD.

Only in relation to regional co-operation have some of these economies achieved notable success in building some form of regional framework for regulating cross-border mergers (and for addressing competition issues more generally). However, none of these regional efforts have proved to be fully effective and they are still some way from reaching maturity.

This state of affairs raises the question of how DEEs should go about designing their strategies in the area of merger control. A number of points should be made in this regard. Cross-border mergers clearly impact many DEEs around the world. Provisions should therefore be made for dealing with cross-border mergers within current competition rules in DEEs. Competition authorities in DEEs should develop strategies which incorporate elements of multilateral, regional and bilateral co-operation and which reflect the unique positions and circumstances of these economies.

Competition authorities would benefit from becoming more actively involved in international proceedings in the area of merger control within bodies such as the OECD and ICN. This will widen their learning curve and offer them important insights into this highly complex area. This approach will bring about important benefits for these authorities: of achieving convergence and harmonisation and interacting with many other competition authorities, including those more experienced.

In relation to regional co-operation, this type of co-operation can be helpful for the purposes of building a mechanism for dealing with cross-border mergers affecting a number of countries in the relevant region. Such a mechanism will enable the countries to become a more significant force, individually and collectively, in regulating cross-border mergers and to enjoy more weight *vis-à-vis* powerful firms involved in these mergers.

In relation to bilateral co-operation, the chances for competition authorities in DEEs to engage in this kind of co-operation in enforcement actions in individual cases – especially with experienced competition authorities – are not particularly high. Nonetheless, bilateral links may be possible and useful to establish for the purposes of sharing experience, technical assistance and capacity building and for undertaking policy dialogues more generally. All of these activities should yield considerable benefits for competition authorities in DEEs.

At the most fundamental level, however, action should be taken by DEEs to ensure the existence of a fully effective framework for regulating mergers domestically. This includes ensuring that: the law contains adequate provisions dealing with the key aspects of merger control (including those dealing with jurisdiction); proper practicable and transparent procedures are in place (particularly in relation to the issues of merger notification and merger remedies); appropriate guidance is provided from which merging firms and their advisors can benefit; and an independent competition authority with the relevant expertise in handling merger control is established.

Moreover, it must be recognised that building effective merger control in a DEE requires the existence of an effective competition law regime in the first place, unless of course the relevant country establishes a merger control regime on sectoral basis as has been the case in countries such as Hong Kong.

These are crucial pre-conditions for enabling DEEs to address cross-border mergers. Only once the domestic frameworks are in place will engaging in any of the different types of co-operation, whether multilateral, regional or bilateral, be meaningful.

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1. Introduction

Le présent document vise à identifier certains des principaux défis liés au contrôle des fusions transnationales dans les pays en développement et les économies émergentes. Il développe une approche analytique et critique du sujet axée sur un certain nombre de thèmes sous-jacents. Ce document se propose d'établir un cadre pour l'examen de ces thèmes non seulement sous un angle théorique et pratique et mais aussi du point de vue de la loi et de l'action des pouvoirs publics. Il souligne l'importance du contrôle des fusions transnationales dans les pays en développement et les économies émergentes, en particulier dans le contexte de leur intégration croissante dans l'économie mondiale. Ce faisant, il se focalise sur les défis à relever par ces économies pour réglementer les fusions transnationales.

Ces dix dernières années, le contrôle des fusions a revêtu une importance sans cesse croissante. Beaucoup de pays, y compris de nombreux pays en développement et économies émergentes, ont, d'une façon ou d'une autre, mis en place un régime de contrôle des opérations de fusion. Cependant, les différents régimes de droit de la concurrence existant de par le monde ne prévoient pas tous un contrôle des fusions, et de manière plus générale, tous les pays ne sont pas dotés d'un droit de la concurrence. La présente note de référence ne portera donc pas sur les défis à relever par les pays dépourvus de régime de fusion, même si certains des aspects qu'elle aborde pourront néanmoins intéresser les pays dotés d'un droit de la concurrence, mais où il n'existe aucun mécanisme spécifique en matière de contrôle des fusions.

Le rapport s'articule de la façon suivante. La Partie 2 propose une présentation générale du sujet. La Partie 3 est consacrée aux défis spécifiques aux pays en développement et aux économies émergentes dans le domaine du contrôle des fusions. La Partie 4 traite trois aspects fondamentaux de la question à l'étude, à savoir la coopération, la compétence et les mesures correctives. Enfin, les conclusions de cette note de référence sont présentées en Partie 5.

2. Contrôle des fusions transnationales

2.1 Définition du concept de « fusion transnationale »

Le concept de fusion transnationale¹ peut être défini de plusieurs façons en se fondant soit sur la « structure » de la fusion, soit sur son « effet ».

En termes de structure, on peut considérer qu'une fusion présente une dimension transnationale si elle implique des entreprises établies dans plusieurs juridictions. En termes d'effets, la dimension transnationale peut être retenue si, quel que soit le lieu d'implantation des entreprises à la fusion, l'opération affecte les marchés de plusieurs juridictions. Par ailleurs, on peut déterminer qu'une fusion présente une dimension transnationale sans tenir compte de sa structure ou de ses effets. Par exemple, dans sa Recommandation de 2005 sur le contrôle des fusions, l'OCDE qualifie de « fusion transnationale » toute fusion soumise à contrôle au titre des lois sur les fusions de plusieurs juridictions.

Quel que soit le motif justifiant la dimension transnationale d'une fusion, les avis divergent quant au nombre de juridictions qu'une telle opération devrait couvrir. Certains parleront de fusion transnationale dès lors qu'une fusion concerne au moins deux juridictions, tandis que pour d'autres, cette qualification sous-entend une opération de plus grande envergure et doit donc être réservée aux fusions relevant de plus de deux juridictions. Le premier point de vue (le moins restrictif) peut sembler plus sensé, étant donné que la différence entre ces deux approches est quantitative et non qualitative. Cela signifie que lorsqu'il s'agit de réglementer ces fusions, les mêmes questions (ou problèmes) sont susceptibles de se poser dans une

¹ Voir plus bas le paragraphe 21 qui établit différents types de fusions transnationales dans les pays en développement et les économies émergentes.

situation comme dans l'autre. Parmi ces points communs, on notera le fait que la notification de la fusion doit être effectuée dans plusieurs juridictions, ainsi que le risque d'incohérence entre les décisions prises par les différentes autorités de la concurrence concernées.

2.2 *Nature et spécificités du contrôle des fusions*

Le contrôle des fusions est un aspect très particulier du droit de la concurrence². Les opérations de fusion sont des transactions d'affaire à part entière et se distinguent par conséquent fondamentalement d'autres comportements anticoncurrentiels tels que les ententes et les abus de position dominante³. Les fusions soulèvent des questions structurelles plutôt que des problèmes de comportements passagers. Elles peuvent potentiellement conditionner toute l'évolution future d'un pan entier de l'économie puisqu'elles modifient la structure même de tout un secteur d'activité. Par ailleurs, du point de vue de l'intérêt du public, les fusions ne sauraient être classées parmi les comportements anticoncurrentiels préjudiciables tels que les ententes et les abus de position dominante, du fait qu'elles produisent souvent à terme des effets positifs⁴.

Les fusions comportent habituellement des risques commerciaux et financiers non négligeables et ont souvent un impact sur les marchés financiers et les bourses. Cela augmente leur valeur aux yeux des entreprises et nécessite que soit développée pour elles une approche spéciale au sein du cadre réglementaire général de la concurrence. Dans ce contexte, il est important d'insister sur le rôle que le contrôle des fusions devrait jouer dans la pratique. S'il permet certes d'éviter les phénomènes anticoncurrentiels, le contrôle des fusions aide également les entreprises à prendre des décisions judicieuses dans l'élaboration de leurs stratégies commerciales et d'affaires à long terme. Ce point est d'ailleurs crucial s'agissant des pays en développement et des économies émergentes : le contrôle des fusions dans ces économies peut avoir un impact positif sur la restructuration de différents secteurs de l'économie et améliorer les perspectives de performances économiques, tout en préservant la concurrence et en protégeant les consommateurs⁵.

Le contrôle des fusions transnationales est un sujet à multiples facettes. Il est intéressant de souligner l'interaction de tous les éléments suivants : politique de la concurrence et autres considérations relevant des pouvoirs publics ; questions de compétence, de procédure et de fond liées au contrôle des fusions ; régimes juridiques et intérêts commerciaux ; et préoccupations et intérêts nationaux, régionaux et mondiaux. Cette interaction particulière renforce l'importance du contrôle des fusions et accentue les difficultés qui y sont associées, notamment pour ce qui est des opérations de fusion impliquant des éléments transnationaux.

Le contrôle des fusions a vocation à rendre possible la réalisation d'objectifs de politique publique concernant la structure de tel ou tel secteur d'activité dans une juridiction donnée⁶. Il porte sur conséquences commerciales et économiques d'une fusion pour la juridiction concernée plutôt que sur les

² Voir de manière générale le rapport spécial publié par le Forum mondial sur la concurrence et la politique commerciale de l'IBA, *Policy Directions for Global Merger Review*.

³ Il convient toutefois de rappeler que les fusions et ces autres phénomènes anticoncurrentiels peuvent parfois se confondre partiellement. Par exemple, il peut être considéré qu'une fusion constitue un abus de position dominante si elle contribue à renforcer une telle position. Voir l'affaire C-6/72 *Europemballage Corporation et Continental Can Company Inc. c. Commission* [1973] REC 215.

⁴ Voir Dabbah, Maher et Lasok, Paul, *Merger Control Worldwide* (Cambridge, 2005), ch. 1.

⁵ Voir « The analytical framework for merger control » conçu par la Commission britannique de la concurrence (Office of Fair Trading) pour le Groupe de travail du RIC sur les fusions, consultable à l'adresse <http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>.

⁶ Voir *Mussati, Giuliano, Mergers, Markets and Public Policy* (Kluwer, 1995).

processus en amont de la transaction. Contrôler les opérations de fusion peut permettre de maintenir en place certaines structures de marché et de garantir une concurrence réelle. Mais le contrôle des fusions peut cacher des objectifs plus spécifiques qui diffèrent d'une juridiction à l'autre⁷. Néanmoins, selon le consensus qui se dégage à l'échelon mondial, l'objectif du contrôle des fusions est de maintenir des structures de marché favorables à la concurrence dans l'optique de garantir le bien-être du consommateur.

Un certain nombre d'évolutions intervenues ces dernières années ont conduit de nombreux pays et plusieurs organes et organisations internationaux à inscrire le contrôle des fusions à leur ordre du jour. Parmi ces évolutions, il convient de citer les suivantes.

Premièrement, comme précisé plus haut, le contrôle des fusions trouve sa justification dans des considérations relevant de la politique de la concurrence ou de la politique industrielle. Par conséquent, un pays doit présenter un niveau de développement social et politique suffisant avant de pouvoir mettre en place un contrôle des fusions⁸. De plus en plus de pays – dont beaucoup de pays en développement et d'économies émergentes – ont depuis quelques années atteint ce niveau, d'où la place importante qui lui est désormais accordée. Les fusions devraient donc être abordées selon deux angles de vue opposés. D'un côté, elles sont des opérations essentielles pour stimuler le développement des économies locales et, de l'autre, ces mêmes opérations sont susceptibles de provoquer des bouleversements, d'introduire de nouvelles structures concurrentielles, de modifier les formes d'emploi et d'impacter le consommateur, l'environnement ainsi que d'autres aspects économiques et sociaux importants⁹.

Deuxièmement, depuis les années 1980, il est reconnu dans le monde entier que le caractère très particulier des opérations de fusion nécessite que soient imaginés des règles et des instruments spécifiques sur mesure pour les réglementer¹⁰. L'expérience d'un certain nombre de juridictions clés a mis en exergue le caractère inadéquat des dispositions classiques du droit de la concurrence, comme par exemple celles applicables à l'abus de position dominante et aux ententes horizontales, si elles sont utilisées comme des instruments de contrôle des fusions¹¹.

Troisièmement, en raison du phénomène de mondialisation engagé depuis le milieu des années 1990, un nombre considérable d'opérations de fusion comportent d'ordinaire des éléments transnationaux, y

7 Par exemple, protéger des concurrents locaux ou de petite et de moyenne taille, réaliser divers objectifs socioéconomiques ou sociopolitiques, sauvegarder l'emploi, encourager l'esprit d'entreprise et atteindre divers objectifs de politique industrielle, notamment promouvoir la compétitivité internationale de l'économie locale et développer des entreprises nationales solides.

8 Voir Hamner, Kenneth, « The globalization of law: international merger control and competition law in the United States, the European Union, Latin America and China » (2002) *The Florida State University Journal of Transnational Law & Policy* 385.

9 Cowling, Keith, Stoneman, Paul, Cubbin, John, Cable, John, Hall, Graham, Domberger, Simon, et Dutton, Patricia, *Mergers and Economic Performance* (Cambridge, 1980).

10 Voir *Ibid.*

11 Voir, par exemple, l'expérience de l'Union européenne avant l'adoption du premier règlement relatif aux opérations de concentration entre entreprises, le Règlement 4064/89. Jusqu'à 1989, la Commission européenne se fondait sur les articles 101 (interdisant les accords anticoncurrentiels) et 102 (interdisant les abus de position dominante) du Traité sur le fonctionnement de l'Union européenne pour réglementer les opérations de fusion. Voir l'affaire *Continental Can*, mentionnée à la note 3 ci-dessus, pour ce qui est du recours à l'article 102 à cet égard. Bien qu'il ait été considéré que ces deux articles pouvaient être invoqués en cas d'opérations de fusion, il est apparu clairement qu'ils n'étaient pas adaptés à cette finalité. Il a donc été jugé nécessaire de prévoir un instrument spécifique au contrôle des fusions.

compris lorsqu'il s'agit de transactions entre des entreprises locales¹². Dans la pratique, de telles opérations peuvent facilement affecter des marchés locaux de divers pays des cinq continents. Beaucoup de ces pays sont des pays en développement et des économies émergentes situés dans différentes régions.

Quatrièmement, un certain nombre d'organismes et d'organisations internationales se sont employés à promouvoir l'importance du contrôle des fusions transnationales. Le Réseau international de la concurrence (RIC) y a consacré presque exclusivement ses premières années d'existence, et l'Organisation pour la coopération et le développement économiques (OCDE) a organisé ces vingt dernières années de nombreuses tables rondes importantes à ce sujet¹³. La Recommandation de 2005 de l'OCDE sur le contrôle des fusions est d'ailleurs l'un des principaux fruits de ce grand débat de politique publique (voir Encadré 1)¹⁴. La Conférence des Nations unies sur le commerce et le développement (CNUCED) a, elle aussi, pris des initiatives dans le domaine du contrôle des fusions¹⁵. Le travail de ces organismes a non seulement permis la constitution d'une « banque d'informations », mais a également apporté aux pays en développement et aux économies émergentes des éclairages très précieux sur la question du contrôle des fusions, et leur a fourni une plateforme pour élaborer leurs règles nationales et concevoir leurs politiques dans ce domaine¹⁶.

¹² Voir Holmstrom, Bengt et Kaplan, Steven, « Corporate governance and merger activity in the United States: making sense of the 1980s and 1990s » (2001) *The Journal of Economic Perspectives* 121.

¹³ Les résultats de ces tables rondes ont été extraordinaires. Voir les tables rondes suivantes : *La concurrence, la concentration et la stabilité dans le secteur bancaire* (2010) ; *L'argument de l'entreprise défaillante* (2009) ; *La norme de contrôle des fusions* (2009) ; *Les problèmes de lutte contre les monopoles en cas de participation minoritaire et de cumul de mandats d'administrateur* (2008) ; *Les gains d'efficacité dynamique dans l'analyse des fusions* (2007) ; *La gestion des fusions complexes* (2007) ; *Les fusions verticales* (2007) ; *Les fusions dans les médias* (2003) ; *Les correctifs à apporter aux fusions* (2003) ; *L'examen des fusions sur les marchés émergents très innovants* (2002) ; *Les critères de fond utilisés pour l'évaluation des fusions* (2002) ; *Les effets de portefeuille dans les fusions conglomerates* (2001) ; *Les entreprises communes* (2000) ; *Les fusions dans le secteur des services financiers* (2000) ; *Les fusions et les alliances des compagnies aériennes* (1999) ; *Notification des fusions transnationales* (1999) ; *L'argument de l'entreprise défaillante utilisé dans le cadre des fusions* (1995).

¹⁴ Voir également la très utile note du Secrétariat de l'OCDE sur *La coopération internationale en matière de fusions transnationales* (2001).

¹⁵ Dans le cadre de la CNUCED ont été réalisées un certain nombre de publications traitant du contrôle des fusions, certaines d'entre elles étant plus spécifiquement focalisées sur les pays en développement. Voir, par exemple : Correa, Paulo et Aguiar, Frederico, « Le contrôle des fusions dans les pays en développement : Leçons tirées de l'expérience du Brésil » (CNUCED, 2002) ; et la note du Secrétariat de la CNUCED, « Sensibilisation aux questions de concurrence, contrôle des fusions et application effective du droit en période de difficultés économiques » (CNUCED, 2010).

¹⁶ Ce point particulier sera abordé plus en détail au paragraphe 54 ci-dessous dans le cadre de la coopération multilatérale.

Encadré 1. Recommandation de 2005 de l'OCDE sur le contrôle des fusions

La Recommandation de 2005 sur le contrôle des fusions propose un éventail de suggestions dont l'objectif est, d'une part, de rendre le contrôle des fusions efficace et efficient et, d'autre part, de faire en sorte qu'il intervienne en temps opportun. Il s'agit par exemple de veiller à ce que les autorités de la concurrence puissent obtenir les informations nécessaires à leur évaluation de la fusion ; de réduire les coûts inutiles imposés aux parties à la fusion ; de permettre une plus grande souplesse dans le processus d'examen de la fusion ; et d'utiliser des critères objectifs pour (i) déterminer si et quand une fusion doit être notifiée et (ii) arrêter les paramètres d'attribution de compétence sur les opérations de fusion.

La Recommandation souligne également combien il est important que les pays veillent au respect de principes fondamentaux tels que la transparence du processus d'examen de la fusion et l'équité procédurale, ainsi que le droit pour les parties d'être entendues pendant la procédure (lequel droit devrait être étendu aux tiers ayant un intérêt légitime dans la fusion examinée). Un autre principe cité en particulier est celui de non-discrimination entre les entreprises nationales et étrangères.

La Recommandation souligne la nécessité et l'importance d'une coopération et d'une coordination bilatérale ou multilatérale entre les autorités de la concurrence en matière de contrôle des fusions. Elle aborde un certain nombre de questions liées à la coopération et à la coordination, essentiellement celle de la confidentialité des informations. La Recommandation encourage les parties à la fusion à envisager des déclarations de renonciation à leur droit de confidentialité, lorsque la situation le permet. Parallèlement, cependant, elle insiste sur la nécessité pour les autorités de la concurrence de disposer des mesures de sauvegarde nécessaires concernant l'échange d'informations confidentielles.

La Recommandation invite les pays à examiner régulièrement leurs lois en matière de fusions en vue de les améliorer et de les faire converger vers les meilleures pratiques reconnues dans ce domaine.

La large couverture médiatique consacrée aux opérations de fusion complexes explique également l'attention croissante accordée au contrôle des fusions¹⁷.

L'attention internationale portée au contrôle des fusions a eu l'effet d'un catalyseur sur les discussions menées non seulement sur l'impact socioéconomique des fusions pour le secteur concerné, mais aussi sur la nature juridico-politique du processus même de contrôle de ces transactions. Ce dernier point pose un certain nombre de questions, et notamment : (i) la nature des pouvoirs et du mandat confiés à l'autorité de la concurrence, y compris son indépendance vis-à-vis du gouvernement en fonction ; (ii) si cette dernière se doit d'évaluer les fusions purement et simplement du point de vue de la concurrence ou si des objectifs socioéconomiques plus larges doivent être pris en considération ; (iii) jusqu'à quel point elle pourra ou souhaitera collaborer avec d'autres autorités de la concurrence (ce point est abordé plus en avant dans le contexte de la coopération internationale) ; et (iv) fondamentalement, dans quelle mesure un régime de contrôle des fusions répond aux objectifs de telle ou telle politique économique nationale.

Ces questions revêtent une importance accrue lorsque de multiples autorités nationales de la concurrence interviennent dans une même opération de fusion. La coexistence de multiples examens est l'occasion de mettre en comparaison différentes approches, et notamment la compatibilité des objectifs visés, les déficiences des procédures de mise en œuvre et la protection des consommateurs locaux. Ces approches peuvent dans certains cas s'avérer très divergentes. Les points de vue adoptés par les différents

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Le prestige dont jouissent certaines fusions est lié aux espoirs que suscitent ces transactions souvent considérées comme une solution à des problèmes sectoriels majeurs ou comme une tentative audacieuse de récolter des bénéfices commerciaux (comme de nouvelles synergies) et de faire jaillir de nouvelles sources de revenus.

pays en matière de politique de contrôle des fusions sont le reflet des préférences politiques et économiques nationales. Par conséquent, le degré d'intervention des autorités visant à pallier certaines imperfections du marché variera souvent considérablement.

Les questions relatives aux opérations de fusions transnationales sont importantes pour tous les types d'économies de par le monde, qu'elles soient petites ou grandes, très développées ou émergentes. Cela étant, ce sujet revêt pour les pays en développement et les économies émergentes une importance particulière, qui devrait aller crescendo au cours de la prochaine décennie. Ces économies se trouvent cependant confrontées à des obstacles de taille lorsqu'elles souhaitent mettre en place des régimes efficaces de contrôle des fusions capables de répondre aux défis posés par les opérations de fusion transnationales.

Les pays en développement et les économies émergentes présentent des caractéristiques économiques, politiques et sociales tout à fait particulières¹⁸. Il convient de ce fait d'aborder la question du contrôle des fusions dans ces pays avec le plus grand discernement. Il est essentiel de laisser de côté tout présupposé acquis dans ce domaine de par la connaissance ou l'expérience du monde développé. En matière de contrôle des fusions, l'expérience des pays en développement et des économies émergentes et celle des économies développées et avancées présentent en effet des différences notables. Nonobstant, les pays en développement et les économies émergentes peuvent s'inspirer de l'expérience de ces économies plus avancées pour se familiariser avec leurs meilleures pratiques dans ce domaine et améliorer la coopération internationale.

On peut imaginer un certain nombre de scénarios dans lesquels les caractéristiques uniques des pays en développement et des économies émergentes ont un impact sur les fusions transnationales.

- Premièrement, une fusion transnationale peut impliquer deux entreprises étrangères ou plus, situées dans la même juridiction étrangère, mais dont une au moins réalise des activités dans le pays en développement ou l'économie émergente concerné.
- Deuxièmement, une même fusion transnationale peut impliquer deux entreprises ou plus, situées dans des juridictions étrangères différentes.
- Troisièmement, les entreprises étrangères en question peuvent n'avoir aucune présence dans le pays en développement ou l'économie émergente concernée, mais leur fusion (en particulier par la création d'une entreprise commune de plein exercice)¹⁹ peut leur conférer ou conférer à l'entité née de la fusion une telle présence.
- Quatrièmement, l'une au moins des entreprises à la fusion peut être située dans le pays en développement ou l'économie émergente concerné.

Les caractéristiques particulières des pays en développement et des économies émergentes rendent plus complexe le contrôle des fusions dans ces économies, ce qui accentue d'autant les défis auxquelles ces dernières sont confrontées.

¹⁸ Voir Dabbah, Maher, « Competition policy, abusive dominance and economic development » in Hawk, Barry, *International Antitrust Law and Policy* (Juris Publishing, 2010).

¹⁹ Également appelées, dans certains cas, entreprises commune concentratives. Cette opération implique la création d'une nouvelle entité, indépendante de ses entités mère, et à laquelle seront transférés des éléments d'actif et du personnel, de sorte qu'elle soit en mesure de développer ses activités comme une entité autonome. Le concept de l'entreprise commune de plein exercice est défini à l'article 3(4) du règlement CE 139/2004.

3. Défis spécifiques à relever par les pays en développement et les économies émergentes

Les pays en développement et les économies émergentes se heurtent à des défis colossaux lorsqu'ils cherchent à mettre en place des régimes de contrôle des fusions et, de manière plus générale, des régimes de droit de la concurrence efficaces²⁰. Ces dix dernières années plus particulièrement ont vu paraître pléthore de publications universitaires, d'études et de rapports de diverses organisations internationales abordant et définissant en détail les défis que suppose la mise en place de régimes de droit de la concurrence efficaces dans ces pays. Cela étant, la question plus spécifique des défis liés au contrôle des fusions n'a pas reçu toute l'attention nécessaire.

Ce constat est en contradiction avec l'essor que les opérations de fusion – et notamment les fusions transnationales – connaissent à la fois en termes de valeur et de volumes depuis deux décennies, et qui s'accompagne d'une prolifération des régimes de contrôle des fusions dans le monde. Qui plus est, comme souligné plus haut, ce problème concerne au premier plan les pays en développement et les économies émergentes.

Cette partie du présent document se propose d'aborder les divers défis à relever pour les pays en développement et les économies émergentes dans le domaine du contrôle des fusions, ainsi que les efforts que ces derniers déploient pour traiter les opérations de fusion transnationales. L'objectif poursuivi ici n'est pas d'examiner de manière exhaustive tous les défis possibles, mais plutôt de se concentrer sur les défis d'importance majeure. Pour la plupart, cependant, ces défis ne sont pas spécifiques au contrôle des fusions, mais concernent également le droit et la politique de la concurrence de manière plus générale.

3.1 Absence d'une véritable culture de la concurrence

La majorité, si ce n'est la totalité des pays en développement et des économies émergentes sont dépourvus d'une culture de la concurrence profondément enracinée. Cela s'explique par un ensemble de facteurs. Il apparaît avant tout que de nombreux pays en développement et économies émergentes ont pendant longtemps subi un fort contrôle de l'État et une forte planification étatique. Par conséquent, les acteurs privés n'ont pas été autorisés à jouer un rôle important sur les marchés. De plus, en raison de leur culture dominante, ces économies ne considèrent pas suffisamment la concurrence comme un processus économique²¹. Cette culture se traduit souvent par une défense la concurrence déloyale plutôt que du droit de la concurrence, car l'idéologie la plus communément partagée en la matière revient à considérer la concurrence comme quelque chose dont tous rivaux doivent se débarrasser par des moyens illicites²².

L'absence d'une véritable culture de la concurrence a un impact direct sur le rôle et la signification accordés dans la pratique au droit de la concurrence. Elle diminue considérablement la possibilité de voir émerger une application efficace du droit de la concurrence, et peut même mettre en doute la nécessité réelle d'un régime de droit de la concurrence fort, assorti d'une autorité de la concurrence puissante et indépendante. De toute évidence, moins le droit de la concurrence sera jugé important et pertinent, plus

²⁰ Voir Dabbah, Maher, « Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime » (2010) *World Competition: Law and Economics Review* 457.

²¹ Voir Gal, Michal, « The Ecology of antitrust preconditions for competition law enforcement in developing countries » (2004), *New York University Law and Economics Working Papers*, Paper 10, consultable à l'adresse http://lsr.nellco.org/nyu_lewp/10.

²² Ces tendances culturelles s'observent dans des régions entières du monde, et notamment en Amérique latine, en Afrique et au Moyen Orient. Voir Dabbah, Maher, *Competition Law and Policy in the Middle East* (Cambridge, 2007) ; Fox, Eleanor et Sokol, Daniel, *Competition Law and Policy in Latin America* (Hart Publishing, 2009).

grand sera le risque de voir les pays en développement et les économies émergentes ne pas accorder au contrôle des fusions toute l'attention qu'il mérite.

La pression internationale et celle exercée par les pairs – parallèlement à une prise de conscience interne – ont amené les pays en développement et les économies émergentes à multiplier le nombre d'initiatives concrètes visant à promouvoir la concurrence et à créer à l'échelon national une culture de la concurrence. Néanmoins, des progrès nécessaires restent à accomplir pour accélérer le processus de privatisation et permettre aux entreprises privées de jouer un rôle accru sur les marchés.

3.2 *Difficultés de la transition vers une économie de marché*

Le processus de concurrence ne peut avoir de sens que si une économie de marché est mise en place dans le pays concerné. La transition de la Chine vers une économie de marché illustre bien ce principe. Au fur et à mesure que le système de marché a été introduit dans des pans de plus en plus importants de l'économie chinoise, diverses lois ont été adoptées pour lutter contre les pratiques anticoncurrentielles et réglementer les fusions²³. Ce processus a abouti à l'adoption en 2007 de la loi antimonopole (Anti-monopoly Law - AML), la première loi chinoise spécifiquement consacrée à des questions de concurrence et applicable aux entreprises publiques, privées, nationales et étrangères. Les dispositions de l'AML sont en substance similaires à celles que l'on retrouve dans le droit de la concurrence des pays développés. Alors que l'AML n'était entrée en vigueur que depuis deux ans, le ministère chinois du Commerce (MOFCOM), en charge du contrôle des fusions, avait déjà adopté des lignes directrices²⁴ et des règlements²⁵, et arrêté un grand nombre de décisions concernant des fusions, dont l'autorisation conditionnelle ou l'interdiction de certaines transactions notables²⁶.

3.3 *Prépondérance de la politique industrielle*

Les pays en développement et les économies émergentes accordent une place prédominante aux considérations industrielles, qui sous-tendent chacun des processus de prise de décision et d'élaboration des politiques²⁷ dans le domaine économique. Par conséquent, les questions de concurrence ou celles liées à la concurrence peuvent se retrouver reléguées au second plan. Dans ces économies, les problèmes tels que l'emploi, le développement économique et diverses autres considérations relevant de la politique industrielle, comme la promotion de la compétitivité internationale de l'économie, figurent parmi les

²³ Notamment, par exemple, la loi de 1993 sur la lutte contre la concurrence déloyale.

²⁴ Voir les lignes directrices édictées en 2009 : *Lignes directrices pour l'examen des opérations de concentration* ; *Lignes directrices pour la notification des opérations de concentration* ; et *Lignes directrices sur la documentation à remettre pour la notification des opérations de concentration*.

²⁵ Voir les *Dispositions relatives aux seuils déterminant la notification préalable des concentrations d'entreprises*, publiées par le Conseil d'État de la République populaire de Chine (2008) ; les *Mesures relatives au calcul du chiffre d'affaires dans la procédure de notification des concentrations dans le secteur financier*, publiées conjointement par le MOFCOM et par d'autres instances de réglementation du secteur financier (2009) ; les *Mesures relatives à la notification des concentrations des opérateurs*, publiées par le MOFCOM (2010) ; et les *Mesures de contrôle des concentrations des opérateurs*, publiées par le MOFCOM (2010).

²⁶ Parmi les affaires de fusions célèbres, il convient de citer la fusion *Panasonic/Sanyo* de 2010, ainsi que la décision d'interdiction rendue par le MOFCOM en 2008 concernant la proposition de fusion *Coca-Cola/Huiyuan Juice Group Ltd.*

²⁷ Voir Smith, Stephen, *Industrial Policy in Developing Countries* (Economic Policy Institute, 1991).

priorités des pouvoirs publics²⁸. Ces questions revêtent un caractère hautement politique dans toutes les économies, mais peut-être davantage encore dans les pays en développement et dans les économies émergentes²⁹.

Au fil du temps, de nombreux pays se sont plus particulièrement concentrés sur leur politique industrielle. L'approche suivie par la Corée jusqu'à la fin des années 1980 en est un bon exemple³⁰. Pour certains observateurs, cette approche s'est traduite par une marginalisation des considérations relatives à la concurrence, et a donné lieu à des distorsions de concurrence sur les marchés locaux, comme en témoignent les subventions accordées à des entreprises nationales et la protection qui leur a été offerte face à la concurrence étrangère³¹. Il convient néanmoins de noter que certains n'ont pas considéré d'un œil négatif ce traitement de faveur accordé aux champions nationaux, d'aucuns ayant en effet argué que cette approche de politique publique avait apporté des avantages non négligeables³².

Lorsqu'une large place est faite à des considérations autres que de concurrence, les opérations de fusions impliquant des entreprises locales peuvent être considérées comme des outils particulièrement importants pour mettre en pratique ces considérations. Mais dans ce cas, il n'est pas tenu compte des effets négatifs possibles que ces fusions peuvent avoir sur la concurrence à l'échelon local. Par conséquent, le contrôle des fusions – du point de vue de la concurrence – peut ne pas être vu d'un bon œil, en particulier par les politiciens qui peuvent privilégier des considérations autres que de concurrence plutôt que de favoriser le contrôle de ces fusions pour des motifs de concurrence³³.

3.4 *Le manque de ressources*

Le contrôle des fusions nécessite de très grands moyens à la fois humains et financiers. Sans ces moyens, l'autorité de la concurrence concernée sera tout simplement incapable de mener à bien ses missions dans ce domaine. Cela est d'autant plus vrai lorsqu'est utilisé un mécanisme de notification obligatoire³⁴. Presque toutes les autorités de la concurrence des pays en développement et des économies émergentes sont confrontées à un problème majeur de manque de moyens humains et financiers adaptés. Les réservoirs de compétences des marchés locaux de l'emploi dans ces économies ne disposent pas toujours de profils présentant l'expertise nécessaire dans le domaine du droit de la concurrence. Toutefois, depuis quelques années, cette situation évolue peu à peu dans un certain nombre de pays en développement et d'économies émergentes. De plus en plus d'étudiants et de jeunes professionnels de ces économies

²⁸ Tel est d'ailleurs le cas dans les pays développés également. Voir notamment les expériences de pays tels que le Japon et l'Allemagne. Dans cette dernière, une décision de l'Office fédéral des ententes bloquant une fusion pour des motifs de concurrence peut être annulée par le ministre concerné – en vertu d'un mécanisme d'autorisation ministérielle prévu par la loi – si la fusion est jugée bénéfique pour la compétitivité internationale de l'économie allemande.

²⁹ Voir la table ronde de l'OCDE, *Politique de la concurrence, politique industrielle et champions nationaux* (2009).

³⁰ Voir *Ibid.*

³¹ Hyundai est un exemple significatif d'entreprise nationale bénéficiant d'un tel traitement de faveur.

³² Voir Rodrik, Dani, « Getting interventions right: how South Korea and Taiwan grew rich » (1995) *Economic Policy* 20. L'auteur fait valoir que le traitement de faveur accordé au groupe Hyundai a été bénéfique en ce qu'il a permis au groupe d'incorporer des facteurs externes au marché du travail et l'a encouragé à devenir plus efficace face à ses rivaux internationaux.

³³ Voir également plus bas la partie sur le lien entre contrôle des fusions et investissements directs à l'étranger.

³⁴ Voir plus bas la question de la notification.

cherchent à se spécialiser en droit de la concurrence. Il s'agit d'une évolution positive qui, dans le long terme, permettra d'améliorer nettement la situation actuelle.

Beaucoup d'autorités de la concurrence dans les pays en développement et les économies émergentes consacrent des efforts soutenus au recrutement et au maintien de leur personnel, ainsi qu'à la réduction des incitations susceptibles de pousser leurs jeunes fonctionnaires à quitter leur poste pour d'autres opportunités de carrières dans les secteurs privé ou universitaire³⁵. Par ailleurs, sur le plan financier, ces autorités sont souvent soumises à d'importantes contraintes budgétaires qui les forcent à définir des priorités dans leur travail. Le contrôle des fusions n'est pas considéré comme une première priorité, et l'accent est habituellement mis sur d'autres domaines tels que la répression des ententes, la promotion de la concurrence et la lutte contre les abus de position dominante³⁶.

L'application de la réglementation des fusions doit être confiée à des fonctionnaires de la concurrence possédant toute l'expertise nécessaire en droit et en économie. Cette expertise devrait inclure une bonne connaissance du fonctionnement de différents secteurs de l'économie, et les fonctionnaires de la concurrence devront intégrer les pratiques et les enjeux internationaux dans leur approche du contrôle des fusions. Cet aspect est important lorsqu'il s'agit d'évaluer efficacement une fusion transnationale et d'interagir avec des homologues étrangers s'employant eux aussi à évaluer la même fusion, éventuellement via des liens bilatéraux. À tout cela s'ajoute la nature spéciale de l'évaluation des fusions, qui doit se faire dans des délais stricts, d'où une pression considérable. Cette activité exige également une étroite communication entre les fonctionnaires en charge de l'examen de la fusion et les entreprises à la fusion, ainsi que tous tiers, et éventuellement d'autres instances publiques (telles que les instances de réglementation sectorielle) au sein d'un même pays.

Le manque de ressources adéquates – notamment vu la nature particulière du contrôle des fusions – explique en partie le peu d'attention dont bénéficie ce domaine dans de nombreux pays en développement et de nombreuses économies émergentes. Cette réalité vient s'ajouter au fait que, comme souligné plus haut, les fusions ont souvent été considérées comme des outils de développement économique et des moteurs de compétitivité internationale.

De nombreuses autorités de la concurrence dans le monde en développement estiment peut-être aussi qu'il ne leur est pas nécessaire de s'intéresser aux fusions transnationales. En effet, lorsque des fusions sont réglementées par des autorités de la concurrence étrangères plus expérimentées, les problèmes de concurrence peuvent être identifiés et résolus rapidement et efficacement sans que les pays en développement et les économies émergentes n'aient besoin d'intervenir³⁷. Certaines autorités de la concurrence (et même certains tribunaux) ont toute confiance dans les actions et les décisions étrangères pour ce qui est d'appliquer efficacement le droit³⁸. Il se peut que certaines de ces autorités dans les pays en développement et dans les économies émergentes préfèrent s'en remettre aux actions étrangères afin d'éviter d'éventuels conflits avec des autorités de la concurrence plus expérimentées. D'autres autorités de ces pays

³⁵ Voir note 20 ci-dessus.

³⁶ Tel est ce qui ressort de l'expérience de Singapour, ainsi que de nombreux autres pays dans le monde.

³⁷ Voir plus bas la section 4.2.2 sur l'établissement de la compétence extraterritoriale concernant l'obtention d'informations.

³⁸ Voir par exemple le point de vue de l'Autorité israélienne de la concurrence (IAA) en l'affaire portée devant la Cour suprême israélienne (siégeant en qualité de Haute cour de justice) concernant un abus de position dominante : Affaire 6623/03 Oded Lavie c. le directeur de l'autorité de la concurrence (2003). Selon l'IAA, il n'y avait aucun sens à engager des poursuites contre le comportement abusif d'une entreprise lorsqu'il avait été globalement mis fin à ce comportement suite à l'action d'une autorité de la concurrence étrangère.

peuvent préférer se limiter à assister les autorités étrangères. Toutefois, ce cas de figure n'est peut-être pas très fréquent dans le domaine du contrôle des fusions.

En outre, l'option parfois choisie par les autorités de la concurrence des pays en développement et des économies émergentes de s'en remettre à des actions engagées par des autorités étrangères n'est peut-être pas une solution adéquate pour régler les problèmes potentiels susceptibles de résulter d'une fusion transnationale. Ces autorités sont soucieuses de protéger la concurrence et de sauvegarder les structures de marché concurrentielles nécessaires à leur économie locale. Une action étrangère peut ne pas traiter de manière efficace la totalité des problèmes potentiels de concurrence posés par une fusion donnée, et certains de ces problèmes peuvent être spécifiques à la juridiction locale concernée. Cela signifie que, dans ce cas, aucune action étrangère ne peut se substituer à une action locale.

Signalons enfin que dans certaines situations, une fusion transnationale peut avoir lieu sans que l'autorité de la concurrence du pays en développement ou de l'économie émergente concernée n'en ait connaissance³⁹. Cela a été le cas dans plusieurs pays africains, et notamment au Kenya et au Zimbabwe. Dans ce dernier pays, il est estimé qu'un certain nombre de fusions préjudiciables impliquant un élément étranger sont intervenues à l'insu de la Commission de la concurrence. Cette situation s'est nettement améliorée depuis 2002 avec le renforcement du mécanisme de contrôle des fusions et l'introduction d'une obligation de notification.

3.5 *Cadre juridique inadapté*

Lorsque le droit de la concurrence d'un pays en développement ou d'une économie émergente n'encadre pas de manière adéquate le contrôle des fusions ou ne prévoit que des dispositions de base (par exemple que la loi s'applique également aux fusions), les autorités de la concurrence éprouvent des difficultés à contrôler ces transactions. L'exemple du régime égyptien du droit de la concurrence est intéressant à cet égard (voir Encadré 2).

Pour être efficace, un régime de contrôle des fusions nécessite plus qu'une simple disposition de loi interdisant les fusions qui comporteraient des effets néfastes ou exigeant simplement la notification de toute fusion. Dans la pratique, cela nécessite un mécanisme complet de réglementation des fusions, et notamment : des procédures de notification bien établies ; une interaction entre les autorités de la concurrence, les parties à la fusions et tous tiers ; ainsi que des règles et des principes établissant clairement les pouvoirs de l'autorité de la concurrence et les obligations de chacun (l'autorité, les parties à la fusion et les tiers intéressés).

³⁹

Voir Kububa, Alexander, « Issues in market dominance: merger control in Zimbabwe », discours prononcé lors de la *Regional Conference On Competition Policy, Competitiveness, and Investment in A Global Economy* (Tanzanie, 10 mai 2004), consultable à l'adresse : [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/\\$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf). Voir également Dabbah, Maher, chapitre consacré aux questions juridictionnelles sur le « Kenya », in Dabbah et Lasok, note 4 ci-dessus.

Encadré 2. Contrôle des fusions en Égypte

L'article 11(2) de la loi égyptienne de 2005 sur la protection de la concurrence et l'interdiction des pratiques monopolistiques prévoit simplement que l'une des fonctions de l'Autorité égyptienne de la concurrence (Egyptian Competition Authority - ECA) est de recevoir les notifications de fusions. L'article 44 du texte définissant les attributions de l'Exécutif reprend d'ailleurs cette idée, quoique de manière plus détaillée. Il dispose en effet que l'« Autorité devra, dans un délai de 30 jours, recevoir notification par les entités impliquées, de l'acquisition de tous actifs, droits de propriété, usufruits ou actions, de la création de tous syndicats, de la réalisation de toutes fusions, concentrations ou gestions communes impliquant au moins deux entités ». L'article 45 du même texte dresse uniquement une liste succincte du type d'informations qui devraient être communiquées dans le cadre de la notification. Aucun mécanisme spécifique n'a été mis en place dans la pratique, même si un formulaire de notification très simple, mais insuffisant, a été conçu. Concrètement, les notifications reçues donnent lieu à des actions très restreintes. Les informations soumises par les parties à une fusion sont archivées par l'ECA, mais ne sont pas exploitées en vue d'évaluer formellement la fusion en question.

3.6 Problèmes de mise en œuvre

La mise en œuvre d'un régime de droit de la concurrence dans un pays en développement ou une économie émergente peut représenter un véritable défi. Ce processus s'accompagne souvent de diverses difficultés, dont celles de configurer les institutions, de doter l'autorité de la concurrence de l'expertise nécessaire ou encore de gérer les relations entre l'autorité et le gouvernement ou d'autres organes publics. L'opération peut s'avérer extrêmement lente et chronophage⁴⁰, en particulier lorsque le contrôle des fusions ne figure pas parmi les priorités des pouvoirs publics et des autorités de la concurrence de ces pays. Par conséquent, la lenteur de la mise en œuvre complète d'un régime de droit de la concurrence peut dans la pratique se traduire par un retard significatif dans la mise en œuvre et le fonctionnement efficace du contrôle des fusions.

3.7 Rôle des investissements directs à l'étranger

Dans les pays en développement et les économies émergentes, les investissements directs à l'étranger (IDE) sont cruciaux sur le plan économique et politique⁴¹, comme l'ont reconnu elles-mêmes bon nombre de ces économies, ainsi que plusieurs organisations internationales. Certaines de ces organisations – et principalement la Banque mondiale – ont vivement préconisé la facilitation des flux d'IDE vers les pays en développement et les économies émergentes afin d'amener ces économies à s'ouvrir à l'international et de les voir s'intégrer dans l'économie mondiale.

La question de savoir si les IDE sont perçus de manière positive par tous les pays en développement et toutes les économies émergentes dans le monde reste cependant ouverte. Les attitudes de ces économies semblent diverger sur ce point. À une extrémité du spectre se trouvent les économies qui accueillent les IDE à bras ouverts et invitent chaleureusement les entreprises étrangères (et leurs pouvoirs publics) à s'aventurer dans leur paysage économique (et éventuellement politique)⁴². Ces économies tendent à

⁴⁰ La Chine, qui a mis vingt ans à se doter d'un droit de la concurrence, est l'un des exemples les plus flagrants à cet égard. Voir, plus récemment, la position de Hong-Kong, où a été rédigé un projet de loi qui devrait être adopté en 2011. On trouvera également d'autres exemples du même type dans le Moyen Orient et en Afrique.

⁴¹ Voir De Mello, Luiz, « Foreign direct investment in developing countries and growth: a selective survey » (1997) *Journal of Development Studies* 1.

⁴² Voir Dabbah, note 22 ci-dessus.

considérer les IDE comme un moteur de développement technologique et de compétitivité internationale⁴³. À l'autre extrémité du spectre, d'autres pays ne semblent pas partager le même enthousiasme et tendent à contrôler de manière stricte les participations étrangères dans différents secteurs et marchés de leur économie nationale⁴⁴.

D'ordinaire, les pays en développement et les économies émergentes favorables à l'entrée d'IDE adoptent à cette fin des mesures soigneusement conçues pouvant inclure de fortes incitations fiscales ou d'importantes concessions d'ordre financier ou concernant les taxes douanières. Cela étant, une attitude positive vis-à-vis des IDE peut aller de pair avec une approche davantage non interventionniste de la réglementation plus généralement. Plus des pouvoirs publics s'emploient à encourager les IDE, plus ils risquent de se montrer réticents à l'idée d'adopter pleinement un système de contrôle des fusions et d'opter pour un mécanisme de nature à réglementer efficacement les fusions transnationales.

La fusion transnationale est l'une des multiples formes que peuvent prendre les IDE. Il s'agit du cas de figure où une entreprise étrangère sans aucune présence dans le pays concerné acquiert une entreprise locale établie (ou une autre entreprise étrangère développant ses activités) dans cette économie. Cependant, il se peut que la ou les entreprises étrangères impliquées dans une fusion transnationale soient déjà présentes dans le pays en question. Dans un cas comme dans l'autre, bien que la fusion puisse poser des problèmes de concurrence, il se peut que les pouvoirs publics concernés choisissent malgré tout de ne pas réglementer une telle transaction, par crainte de voir les entreprises étrangères impliquées décider en retour soit de ne pas « investir », soit de quitter le marché national. La ou les entreprises étrangères impliquées dans une opération de fusion peuvent décider ou menacer de désertir le marché intérieur d'un pays en développement ou d'une économie émergente si l'autorité de la concurrence de ce pays choisit de subordonner cette fusion à certaines conditions.

Les pouvoirs publics et/ou l'autorité de la concurrence d'un pays en développement ou d'une économie émergente peuvent estimer ne pas être en position de force dans leurs rapports avec la ou les entreprises impliquées dans une fusion transnationale. Cette perception peut être d'autant plus prononcée si le pays a mis particulièrement l'accent sur les IDE et sur la nécessité de les attirer.

L'existence de régimes efficaces de contrôle des fusions dans les pays en développement et dans les économies émergentes ne peut pas être dans tous les cas considérée comme un obstacle qui entraverait partiellement ou totalement l'entrée d'IDE. Un contrôle efficace des fusions et, plus généralement, une application efficace du droit de la concurrence peuvent, en effet, être perçus comme complémentaires des IDE en ce qu'ils constituent un mécanisme qui permet de lever les restrictions à ces investissements tout en améliorant la sécurité juridique de l'environnement des entreprises et du cadre réglementaire⁴⁵. Il y a lieu

⁴³ Dans certains pays en développement et certaines économies émergentes, le droit de la concurrence peut lui-même être utilisé afin d'attirer des IDE. On constate en effet dans beaucoup de ces économies une prise de conscience croissante du fait qu'un droit de la concurrence devrait être adopté et utilisé dans cette optique.

⁴⁴ Parmi les différentes conditions susceptibles d'être posées figurent le fait que ces IDE devraient favoriser la croissance économique, le développement technologique et l'amélioration de la qualité des biens ou des services, augmenter les opportunités d'emploi ou stimuler l'entrée du pays sur les marchés internationaux. Dans certains cas, le droit concerné peut comporter d'autres conditions strictes visant à éviter que l'entreprise bénéficiant des IDE n'acquière une position de monopole sur les marchés locaux.

⁴⁵ Voir à ce propos l'exemple pertinent de l'initiative prise par Coca-Cola pour moderniser l'usine d'embouteillage de Schweppes Zimbabwe Limited avant de la transférer à Fidelity Life Asset Management Company (Pvt) Limited, une entreprise locale. Cette opération a été réalisée dans le cadre de la fusion autorisée sous certaines conditions en 1998 par la Commission de la concurrence du Zimbabwe dans la fusion *Coca-Cola Company/Cadbury-Schweppes*.

de rappeler que, dans bien des cas, les entreprises étrangères (et les dirigeants de leurs pays) comptent sur les marchés des pays en développement et des économies émergentes tout autant que ces derniers ont besoin de ces entreprises et des pouvoirs publics de leurs pays. Cependant, l'idée prévaut que l'absence d'un tel contrôle ou d'une telle répression peut s'avérer particulièrement attirante pour ces entreprises, qui y voient un bon environnement dans lequel investir⁴⁶.

4. Coopération, compétence et mesures correctives

Après les défis auxquels sont confrontés les pays en développement et les économies émergentes en matière de contrôle des fusions, après les caractéristiques spéciales avec lesquelles ils doivent composer, il convient de s'intéresser aux questions dont la portée pratique est éminemment importante dans ce domaine. Cette partie du document abordera trois thèmes clés qui sont au cœur même de la réglementation des fusions transnationales, à savoir : la coopération entre autorités de la concurrence ; la compétence (y compris pour ce qui est de la notification de la fusion) ; et les correctifs à apporter à certaines fusions. Ces aspects sont essentiels au bon fonctionnement global d'un mécanisme de contrôle des fusions. L'étude de ces questions permet également d'illustrer de manière concrète de nombreux défis auxquels sont confrontés les pays en développement et les économies émergentes.

4.1 Coopération entre autorités de la concurrence

Au fil des ans, et plus particulièrement depuis les années 1980, la coopération entre autorités de la concurrence a fait l'objet d'une attention particulière dans le monde. Cette coopération peut prendre diverses formes. Il est d'usage de distinguer trois principaux types de coopération : la coopération multilatérale ; la coopération régionale ; et la coopération bilatérale. Toutes ces formes de coopération concernent directement les pays en développement et les économies émergentes, même si certaines présentent pour eux légèrement plus d'intérêt que d'autres.

4.1.1 Coopération multilatérale

La coopération multilatérale dans le domaine du droit de la concurrence est le plus ancien des trois types de coopération évoqués ci-dessus. Elle est née des efforts accomplis dès la première moitié du vingtième siècle dans le but de créer une organisation internationale du commerce, dont le rôle escompté était de réglementer les pratiques commerciales restrictives⁴⁷. Cette initiative particulière a abouti à la mise en place d'une coopération généralement appelée coopération fondée sur des dispositions juridiques contraignantes. Elle reposait en effet sur des obligations juridiquement contraignantes imposées aux pays dans le cadre d'un accord multilatéral ayant vocation à créer un organe international compétent dans le domaine du droit de la concurrence. La tentative (infructueuse) menée dans les années 1990 d'introduire le droit de la concurrence au sein de l'Organisation mondiale du commerce est une variante de la même idée.

La coopération multilatérale de type contraignant n'est cependant pas la seule qui existe. La coopération peut également prendre la forme de dispositions juridiques non contraignantes. Il s'agit en d'autres termes d'une coopération sans engagements contraignants de la part des pays. Les origines de ce

⁴⁶ Voir Kee, Hiau Looi et Hoekman, Bernard, « Imports, entry and competition law as market disciplines » (Centre for Economic Policy Research, 2003).

⁴⁷ Voir le projet de Charte de la Havane instituant une Organisation internationale du Commerce, UN Doc. E/Conf. 2/78 1948.

type de coopération remontent, dans les années 1980, à l'adoption par la CNUCED de son ensemble de principes et de règles convenus au niveau multilatéral⁴⁸.

Avec l'intensification de la contribution de l'OCDE dans le domaine du droit de la concurrence depuis les années 1990 et la création du Réseau international de la concurrence en 2001, le modèle non contraignant est devenu la principale forme de coopération multilatérale. Une importance particulière lui a été accordée en ce qu'elle représente une stratégie internationale efficace, notamment dans le domaine du contrôle des fusions, comme en témoignent les résultats impressionnants obtenus par l'OCDE et le RIC depuis le milieu des années 1990⁴⁹.

La coopération multilatérale non contraignante concerne directement les pays en développement et les économies émergentes dans le domaine du contrôle des fusions. Ce type de coopération présente l'avantage de répondre aux différents intérêts et caractéristiques de ces pays. L'expérience du RIC montre comment cette forme de coopération incite fortement les autorités de la concurrence de ces économies à mettre en œuvre des principes ou des recommandations générés à l'échelon international⁵⁰. Cette expérience montre également comment ces autorités peuvent se voir proposer de participer au processus de délibération et d'y jouer un rôle important. Le principe de flexibilité qui sous-tend le concept de coopération multilatérale est un argument déterminant pour les pays en développement et les économies émergentes.

La coopération multilatérale non contraignante aide à promouvoir des règles uniformes, quelles que soient les différences entre pays développés et moins développés. Cette notion est particulièrement importante dans le domaine du contrôle des fusions transnationales, où les autorités de la concurrence d'un pays en développement peuvent tout à fait être amenées à réglementer des fusions transnationales avec des autorités de la concurrence établies de plus longue date et plus expérimentées⁵¹. Ce type particulier de coopération présente certains avantages évidents, surtout par rapport à d'autres formes de coopération, notamment la coopération bilatérale. Elle est susceptible de faire émerger une convergence et une harmonisation sans pour autant imposer ni règles ni principes ou normes aux pays en développement ou à leurs autorités de la concurrence. Elle ouvre également la voie à l'élaboration de politiques publiques de qualité dans ces pays en facilitant la constitution d'une vaste banque de principes et d'idées dont ces économies peuvent s'inspirer lorsqu'elles développent leur propre expérience dans le domaine du contrôle des fusions.

4.1.2 Coopération régionale

4.1.2.1 Généralités

⁴⁸ Il convient de noter que cet ensemble a été élaboré grâce à d'importants efforts accomplis par les pays en développement. Néanmoins, il ne fait que brièvement référence au contrôle des fusions.

⁴⁹ Outre les résultats de l'OCDE visés à la note 13 ci-dessus, voir la *Recommandation révisée du Conseil sur la coopération entre pays membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux* (1995) ; et, pour ce qui est du RIC, les *Principes directeurs pour l'examen des fusions* (2002), entre autres travaux.

⁵⁰ Voir, par exemple, les changements introduits par le Brésil concernant ses seuils de notification sur la base des principes de l'OCDE et du RIC, expliqués dans l'Encadré, 4 ci-après.

⁵¹ Voir le rapport Whish / Wood de 1994 pour l'OCDE sur *Les procédures de contrôle des fusions*, qui présente des études de cas dans lesquels des pays en développement et des économies émergentes ont été impliqués dans l'examen de fusions transnationales. Voir plus particulièrement les études de cas de deux fusions intervenues en 1989, à savoir la fusion *Gillette/Wilkinson* et la fusion *Coats Viyella/Tootal*.

La coopération régionale en matière de droit de la concurrence a connu un essor important dans les pays en développement. Bien que ce type de coopération ne se soit pas avéré pleinement efficace, un certain nombre d'initiatives ont été lancées. Les plus connues sont les suivantes : l'Association des nations de l'Asie du Sud-Est (ASEAN) ; le Marché commun du Sud (MERCOSUR) ; le Marché commun d'Afrique orientale et australe (COMESA) ; et l'Union économique et monétaire ouest-africaine (UEMOA). Elles sont d'ailleurs les seules communautés régionales qui existent aujourd'hui⁵².

La coopération régionale dans le domaine du droit de la concurrence en général et dans celui du contrôle des fusions plus particulièrement peut se faire selon différents modèles, dont il convient d'en décrire trois.

- Premièrement, la coopération régionale peut prendre la forme d'un forum de consultation et de partage d'expérience entre pays concernés, facilitant aussi l'offre d'assistance technique ou l'aide au renforcement des compétences dans ces pays. Ce forum peut être utilisé par les pays concernés dans le but spécifique de mettre en place chez eux un droit national de la concurrence ou des régimes nationaux de contrôle des fusions.
- Deuxièmement, il existe le modèle de l'Union européenne (UE), qui consiste à créer une ou plusieurs institutions ayant compétence en matière d'application du droit à l'échelon régional, ainsi qu'un réseau régional rassemblant les autorités de la concurrence nationales et régionales concernées (comme le Réseau européen de la concurrence – REC).
- Troisièmement, la coopération régionale peut reposer sur des approches visant à faire émerger une convergence et une harmonisation du droit procédural et/ou positif des régimes de droit de la concurrence des pays concernés.

Les avis divergent quant à la capacité de la coopération régionale de favoriser concrètement le développement du contrôle des fusions (dans le cadre du droit de la concurrence) dans les pays en développement et les économies émergentes. D'un côté, cette coopération a été jugée particulièrement adaptée à ces économies pour toute une série de raisons. Premièrement, il convient de rappeler les caractéristiques spécifiques de ces économies. Deuxièmement, la politique de la concurrence est perçue comme étant en adéquation avec, plus généralement, la coopération économique entre les pays, et comme un complément de la politique commerciale. Ces deux domaines – la coopération économique et la politique commerciale – constituent la pierre angulaire de la coopération régionale. Troisièmement, l'idée est largement répandue que la création d'un « centre de gravité » à un échelon régional renforce le statut et l'importance du droit de la concurrence au sein des différents pays concernés. Cela peut contribuer à faciliter la fourniture d'une assistance technique entre les autorités de la concurrence participantes afin de renforcer les compétences nationales en la matière. Un tel centre de gravité présenterait aussi l'avantage d'harmoniser les différentes règles et normes nationales, ce qui bénéficierait au monde des entreprises, soucieuses de réduire les coûts, de pouvoir compter sur une plus grande sécurité juridique et d'évoluer dans des environnements réglementaires similaires⁵³. Quatrièmement, la coopération régionale est perçue comme un

⁵² Voir Dabbah, Maher, *International and Comparative Competition Law* (Cambridge, 2010), pp. 366-7 pour une liste complète de toutes les organisations et communautés régionales dans ce domaine.

⁵³ Une façon d'y parvenir est de recourir au principe du guichet unique, selon lequel, lorsqu'une transaction est examinée à l'échelon supérieur (régional), elle sera exclue de la juridiction des autorités de la concurrence à l'échelon inférieur (national). Voir le règlement (CE) 139/2004 pour la définition et le fonctionnement de ce principe.

moyen efficace de régler des problèmes de concurrence graves (en particulier ceux de nature transnationale) dans les pays concernés dépourvus de régimes nationaux efficaces en matière de contrôle des fusions⁵⁴.

L'expérience de l'Union européenne, dont les efforts dans le domaine du contrôle des fusions ont été couronnés de succès, illustre parfaitement les avantages décrits au paragraphe précédent. Cette expérience est la preuve qu'une approche régionale peut contribuer à la mise en place d'une application efficace et efficiente du droit en matière de fusions transnationales.

De nombreuses initiatives de coopération régionale dans le monde se sont inspirées du modèle de l'UE, en particulier dans une période de mondialisation intense accompagnée d'une recrudescence des problèmes de concurrence présentant une dimension transnationale. Force est de constater que la coopération régionale peut, dans certains cas, constituer un instrument utile pour régler (et, le cas échéant, régler) des questions de concurrence de nature transnationale plus efficacement que ne peut le faire l'application du droit national.

Néanmoins, mettre en place une coopération régionale efficace dans le domaine du contrôle des fusions dans les pays en développement et les économies émergentes est un objectif extrêmement difficile à atteindre et ambitieux. En témoigne le fait qu'à ce jour, pas une seule initiative régionale ne s'est avérée efficace ou pleinement viable. La création d'une coopération régionale en matière de réglementation des fusions transnationales nécessite aussi que suffisamment de progrès soient accomplis dans le domaine plus général du droit de la concurrence. L'efficacité d'un mécanisme régional de contrôle des fusions requiert l'existence d'un contrôle des fusions dans au moins une partie (si ce n'est la totalité) des pays concernés en premier lieu. Or, il se peut que ces points ne figurent pas parmi les priorités des ordres du jour régionaux, eux-mêmes dominés par d'autres questions économiques et politiques plus urgentes, telles que les conflits régionaux et la pauvreté. Par ailleurs, il n'est pas certain – étant donné l'absence de régimes efficaces de contrôle des fusions dans de nombreux pays en développement et économies émergentes – qu'une approche descendante permettrait d'établir avec succès des mécanismes de contrôle des fusions dans les pays composant le groupement régional en question.

L'approche dite descendante repose sur l'idée que l'existence à l'échelon régional d'un cadre réglementaire de concurrence solide et élaboré pourrait inciter les pays concernés à renforcer leurs propres régimes nationaux et à veiller à harmoniser leurs normes au sein de ces régimes. On peut néanmoins s'interroger sur la pertinence de cette approche, étant donné que les efforts déployés pour atteindre cet objectif seraient, de toute façon, sapés par l'absence ou la non-exécution du droit de la concurrence dans certains des pays concernés.

En outre, il serait indispensable que le régime régional et les régimes nationaux fonctionnent en harmonie pour garantir une coopération totale et efficace. Dans la pratique, cela suppose que soient bien définies d'une part les relations entre les acteurs régionaux et nationaux, et d'autre part celles entre les différents régimes nationaux des pays concernés.

Enfin, il convient d'ajouter un dernier commentaire sur les avantages de l'harmonisation des règles nationales en matière de fusion dans les pays en développement et les économies émergentes appartenant à une même structure régionale (comme évoqué ci-dessus). Même dans le cadre d'une approche régionale globale de l'harmonisation, le succès ne peut être garanti tant que les pays concernés présentent des divergences majeures dans leurs régimes juridiques, politiques et économiques, ainsi que dans leurs caractéristiques. Or, il est évident que les pays en développement membres d'organisations ou de communautés régionales présentent des différences de taille. Dans ces circonstances, la réussite de toute initiative d'harmonisation sera donc d'autant plus difficile. Par ailleurs, les pays appartenant à une même

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Voir Gal, Michal, « Regional competition law agreements: an important step for antitrust enforcement » (2010) *University of Toronto Law Journal* 239.

communauté peuvent avoir atteint des stades de développement économique différents, avec des degrés de puissance économique et commerciale divers. Toute tentative d'harmonisation – quel que soit le mécanisme utilisé à cette fin – risque fort d'aboutir à une situation où un pays ou un nombre restreint de pays dominant le processus, d'où de probables objections de la part des pays moins avancés. À l'inverse, il se peut qu'une stratégie d'harmonisation suive une approche du plus petit dénominateur commun, d'où un mécanisme peu productif dans la pratique.

4.1.2.2 Évaluation des initiatives régionales actuelles

Il n'est peut-être pas inutile à ce stade de proposer une évaluation des initiatives régionales actuelles, et notamment des quatre exemples cités plus haut : l'Association des nations de l'Asie du Sud-Est (ASEAN) ; le Marché commun du Sud (MERCOSUR) ; le Marché commun de l'Afrique orientale et australe (COMESA) ; et l'Union économique et monétaire ouest-africaine (UEMOA).

- **Association des nations de l'Asie du Sud-Est (ASEAN)**⁵⁵

Divers documents de l'ASEAN font allusion au droit et à la politique de la concurrence⁵⁶. Plus concrètement, des mesures ont été prises dans l'objectif de mettre en place une forme de coopération régionale. Parmi ces dernières figurent l'adoption des lignes directrices de l'ASEAN sur la politique de la concurrence (ASEAN Regional Guidelines on Competition Policy) et la publication du manuel à l'attention des entreprises sur la politique et le droit de la concurrence au sein de l'ASEAN en 2010 (Handbook on Competition Policy and Law in ASEAN for Businesses in 2010)⁵⁷. Cela étant, aucun cadre spécifique n'a été créé à cette fin⁵⁸.

⁵⁵ L'Association des nations de l'Asie du Sud-Est (ASEAN) a été créée en 1967 à Bangkok et compte actuellement dix États membres. L'ASEAN a pour but de renforcer l'intégration politique, socioculturelle et économique de ses membres. Dans la pratique, l'accent a néanmoins été mis sur le troisième de ces aspects. Voir la proposition de création de la Communauté économique de l'ASEAN (AEC).

⁵⁶ Voir le paragraphe 41 de l'*ASEAN Economic Community Blueprint 2007*, aux termes duquel tous les pays membres « s'efforcent d'introduire une politique de la concurrence... d'ici 2015 ». Le même paragraphe prévoit également la création d'un « réseau d'autorités ou d'agences en charge de la politique de la concurrence, qui tiendra lieu de forum pour discuter et coordonner les politiques de concurrence » et encourager l'organisation « d'activités/programmes de renforcement des compétences destinés aux pays membres de l'ASEAN dans le cadre de l'élaboration de leur politique nationale de la concurrence ». Le programme est consultable à l'adresse : <http://www.aseansec.org/21083.pdf>

⁵⁷ L'adoption des Lignes directrices repose sur l'idée, exprimée dans le programme, de publier des « lignes directrices régionales sur la politique de la concurrence en s'inspirant des expériences des pays et des meilleures pratiques internationales dans l'optique de créer les conditions d'une saine concurrence ». Voir le paragraphe 41, *ibid.* Les Lignes directrices abordent un certain nombre de questions, parmi lesquelles figurent les objectifs de la politique de la concurrence, de l'application du droit, de la promotion de la concurrence et de la coopération internationale. Les Lignes directrices sont consultables à l'adresse : <http://www.aseansec.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf>.

Le manuel s'adresse aux entreprises opérant dans la région ASEAN. Il fournit des informations de base et des explications concernant les principes et concepts clés de la politique et du droit de la concurrence. Il donne aussi un aperçu du droit positif et procédural de la concurrence dans les pays membres de l'ASEAN.

⁵⁸ Il convient de noter qu'à ce jour, l'ASEAN ne s'est dotée d'aucune autorité de la concurrence officielle. Néanmoins, en 2007, les dirigeants de l'ASEAN sont parvenus à un accord prévoyant la création d'un réseau d'autorités locales de la concurrence qui pourrait tenir lieu de forum pour discuter et faciliter la coordination sur les questions de concurrence et développer un cadre de politique régionale. Un groupe d'experts – le groupe d'experts ASEAN sur la concurrence (ASEAN Experts Group on Competition - AEGC) – a été constitué à cette fin, avec pour mission d'étudier le droit et la politique de la concurrence, et notamment l'application du droit à l'échelon régional, et de formuler des recommandations à cet égard. Le

À ce jour, seuls cinq membres de l'ASEAN ont adopté un droit de la concurrence, dont certaines dispositions couvrent le contrôle des fusions⁵⁹. Cela étant, le droit et la politique de la concurrence figurent parmi les priorités de l'association, et la situation est susceptible d'évoluer à l'avenir⁶⁰.

- **Marché commun du Sud (MERCOSUR)**⁶¹

Un effort spécifique a été déployé au sein du MERCOSUR dans le but d'harmoniser les régimes nationaux de droit de la concurrence de ses différents pays membres. Cette tentative particulière était perçue comme une étape incontournable vers l'intégration régionale. Pourtant, peu de progrès ont été enregistrés dans la pratique jusqu'en 1996⁶², lorsque l'Argentine, le Brésil, le Paraguay et l'Uruguay ont adopté dans le cadre du MERCOSUR le protocole *Fortaleza*⁶³, par lequel ils se sont engagés à se doter d'un cadre institutionnel commun pour résoudre les problèmes de concurrence. Ce protocole prévoyait à cette fin un éventail d'outils de coopération entre autorités nationales de la concurrence⁶⁴. Il préconise également une plus grande harmonisation entre les régimes nationaux du droit de la concurrence des pays du MERCOSUR dans le domaine du contrôle des fusions. Néanmoins, bien que ce protocole soit officiellement entré en vigueur depuis 2000, il n'a toujours pas réellement été mis en œuvre dans la pratique (Voir Encadré 3).

Encadré 3. Le protocole du MERCOSUR

Le Brésil et le Paraguay sont les seuls pays à avoir ratifié ce protocole, l'Argentine et l'Uruguay devant encore donner leur accord. Par ailleurs, seuls le Brésil et l'Argentine sont dotés d'un droit de la concurrence assorti d'un régime des fusions, ainsi que d'autorités de la concurrence qui se consacrent entièrement à leurs activités de concurrence. Bien que le protocole n'ait pas été totalement ratifié, il convient de noter qu'un « réseau » informel existe entre les autorités nationales de la concurrence des États membres du MERCOSUR. À titre d'exemple, on citera en 2007 la décision du Conseil administratif brésilien de défense économique (Conselho Administrativo de Defesa Econômica - CADE) de bloquer la fusion entre Saint Gobain et Owens Corning en raison des effets néfastes potentiels que l'opération présentait pour la concurrence dans les marchés pertinents, compte tenu des risques de concentration sur ces marchés (plus particulièrement sur le marché de la fabrication du verre) au Brésil. Le CADE a pris l'initiative d'en informer les autorités de la concurrence des États membres du MERCOSUR concernés.

groupe a concentré ses travaux sur des questions telles que le renforcement des compétences au sein des autorités nationales de la concurrence, la promotion de la concurrence, l'institution de nouvelles autorités de la concurrence et la définition des priorités de ces autorités.

⁵⁹ Il s'agit de l'Indonésie, de Singapour, de la Thaïlande, du Vietnam et de la Malaisie.

⁶⁰ Voir Dabbah, ch. 7, note 52 ci-dessus.

⁶¹ Le marché commun du Sud (MERCOSUR) a été créé en 1991. Le MERCOSUR repose sur un accord de libre-échange régional conclu entre quatre nations sud-américaines (Argentine, Brésil, Paraguay et Uruguay). Le Venezuela a signé un accord d'adhésion et attend actuellement sa ratification avant d'être formellement admis en qualité d'État membre à part entière. La Bolivie, le Chili, la Colombie, l'Équateur et le Pérou ont le statut de membres associés.

⁶² Certaines des évolutions intervenues en matière de concurrence avant 1996 s'annonçaient pourtant prometteuses. On notera par exemple le protocole *Ouro Preto*, signé en 1994, qui prévoyait un mécanisme de règlement de différend.

⁶³ Voir http://www.cade.gov.br/internacional/Protocolo_de_Ouro_Preto.pdf.

⁶⁴ Voir Andrade, Maria, « Competition law in Mercosur: Recent developments » (2003) *Global Competition Review* 1.

La charge d'appliquer et de faire respecter le protocole a été confiée à la Commission du commerce (CC) du MERCOSUR et à la Commission de défense de la concurrence (CDC)⁶⁵.

Cela étant, le protocole n'a pas encore atteint son plein potentiel⁶⁶. Pour y « remédier », un protocole d'accord a été signé en 2003 dans le but de stimuler la coopération au sein du MERCOSUR. Ce protocole d'accord aborde les points suivants : les procédures de notification ; le partage d'informations ; et l'assistance technique. Il a été mis en œuvre au sein des systèmes juridiques des États membres du MERCOSUR⁶⁷.

- **Marché commun de l'Afrique orientale et australe (COMESA)⁶⁸**

Le COMESA s'est, à de nombreux égards, inspiré du modèle de l'UE. La majorité des États membres du COMESA ayant engagé une transition économique, la nécessité d'un droit de la concurrence s'est fait sentir, et le droit de la concurrence a par conséquent été l'une des premières pierres de ce marché commun⁶⁹. Cette transition semble avoir permis de mettre en lumière et d'exprimer le besoin d'un cadre régional pour résoudre des situations potentiellement anticoncurrentielles⁷⁰.

Certains États membres du COMESA disposent de régimes nationaux de contrôle des fusions, mais ces derniers ont été jugés inadéquats pour traiter des questions transnationales et multi juridictionnelles

⁶⁵ La CDC est censée être composée d'autorités nationales de la concurrence. La CC et la CDC ne sont pas des organes supranationaux. La CDC a été créée dans le but de mener des investigations intra régionales, lesquelles se déroulent en trois étapes. La procédure est tout d'abord déclenchée à la demande d'une partie « intéressée », qui s'adresse pour cela à l'autorité de la concurrence du pays directement concerné. Après avoir rendu une décision préliminaire déterminant s'il existe ou non des implications pour le MERCOSUR, cette autorité décide de soumettre ou non l'affaire à la CDC pour une deuxième décision. Lors de la deuxième étape, la CDC doit établir s'il y a infraction au protocole et recommander l'imposition de sanctions et/ou d'autres mesures. Enfin, par le biais d'une directive, la décision de la CDC est soumise à la TC en vue de l'adoption d'une décision finale.

⁶⁶ En 2004, la CC a demandé une révision du protocole, avec pour objectif final la création de la CDC. Cette révision visait également à renforcer la coopération entre les autorités nationales de la concurrence et à offrir à l'Uruguay et au Paraguay l'assistance technique de l'Argentine et du Brésil. Voir Rosenberg, Barbara et Tavares de Araújo, Marianna, « Implementation costs and burden of international competition law and policy agreements », in Brusick, Philippe, Alvarez Ana Maria, et Cernat, Lucian (éd.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (Nations unies, 2005).

⁶⁷ Voir Jenny, Frederic et Horna, Pierre, « Modernization of the European legal system of competition law enforcement: lessons from other regional groupings » in Brusick, Alvarez et Cernat, *ibid*.

⁶⁸ Le traité instituant le Marché commun de l'Afrique orientale et australe (COMESA) a été signé le 5 novembre 1993 et rassemble 18 nations africaines. Le COMESA ressemble davantage à une structure générale, étant donné qu'il coiffe d'autres organisations régionales telles que la Communauté d'Afrique de l'Est (East African Community - EAC) et la Communauté de développement de l'Afrique australe (Southern African Development Community - SADC). L'impact du COMESA sur ces organisations régionales est clair. Par exemple, un protocole d'accord a été signé avec l'EAC, aux termes duquel l'EAC s'est engagée à adopter et à mettre en œuvre le programme de facilitation et de libéralisation du commerce du COMESA. Un groupe de travail conjoint a également été constitué avec la SADC afin d'harmoniser ses programmes avec ceux du COMESA.

⁶⁹ Voir *Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition* (COMESA, 2008).

⁷⁰ Voir *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (CNUCED, 2005).

complexes⁷¹. Il a été reconnu que la coopération au niveau bilatéral pourrait permettre de remédier à certains de ces problèmes, mais qu'un cadre régional serait plus adapté et plus durable.

Le droit et la politique de la concurrence du COMESA prévoient un mécanisme d'harmonisation des règles et des politiques de concurrence de ses États membres, dont le but est de réduire au minimum et d'éviter les conflits. Aux termes de l'article 55(3) du traité du COMESA, un droit régional de la concurrence a été adopté sous forme de règles dites règles de concurrence du COMESA. Un organe expressément désigné, la Commission de la concurrence du COMESA – compétente en matière de droit de la concurrence⁷² – est chargé de faire appliquer ces règles⁷³.

Pour ce qui est du contrôle des fusions, les règles du COMESA ont un vaste champ d'application, qui couvre notamment la notification et le contrôle des fusions et des acquisitions. Le contrôle des fusions est traité à la partie 4 des règles, qui contient des dispositions relativement détaillées. Toutefois, ces dernières n'ont pas un caractère exhaustif et s'avèrent incomplètes à de nombreux égards⁷⁴. La Commission de la concurrence du COMESA a compétence en matière de « fusions notifiables ».

Une fusion notifiable est une fusion présentant une dimension régionale, selon le concept défini à l'article 23(2), qui requiert pour cela deux conditions : (i) l'une au moins des deux entreprises impliquées opère dans au moins deux États membres du COMESA, *et* (ii) les seuils de chiffres d'affaires annuels cumulés ou d'actifs cumulés – prévus à l'article 23(3) des Règles – sont dépassés⁷⁵. La notification de ces fusions à la Commission est obligatoire. La Commission peut cependant exiger la notification d'une fusion qui ne remplirait pas ces deux conditions si elle estime que l'opération est susceptible de restreindre sensiblement la concurrence ou de porter atteinte à l'intérêt du public⁷⁶. La Commission utilisera le test de diminution significative de la concurrence pour évaluer les fusions sur le fond dans un délai de 120 jours pouvant être étendu si la Commission le juge nécessaire pour mener à bien ses investigations⁷⁷. L'article 26 des Règles traite des procédures utilisées par la Commission pour réaliser son examen, des facteurs pris en compte dans le cadre de son évaluation de la fusion, et des conclusions éventuelles auxquelles une enquête peut aboutir. Le même article définit les pouvoirs conférés à la Commission pour réaliser son évaluation d'une fusion.

- **Union économique et monétaire ouest-africaine (UEMOA ou WAEMU)^{78,79}**

⁷¹ Voir, par exemple, les points de vue du Kenya, de la Zambie et du Zimbabwe qui, préalablement à la création du COMESA, ont ouvertement reconnu l'insuffisance des règles nationales de concurrence pour lutter contre les pratiques anticoncurrentielles constatées à l'échelon régional.

⁷² La Commission est une personne morale dotée d'une personnalité juridique internationale.

⁷³ Ces règles sont censées prévaloir sur les lois nationales : en cas de conflit, les règles du COMESA doivent l'emporter sur le droit national concerné (article 5(2) des Règles). Cette notion de primauté du droit régional sur le droit national a été empruntée à l'UE.

⁷⁴ Voir ci-dessous, par exemple, les délais octroyés à la Commission pour l'examen des fusions (article 25 des Règles).

⁷⁵ Les détails de ces seuils n'ont pas encore été publiés.

⁷⁶ Voir l'article 23(5) des Règles.

⁷⁷ Voir l'article 25 des Règles, qui ne donne cependant aucune précision sur la durée d'une telle extension.

⁷⁸ Acronyme anglais *West Africa Economic and Monetary Union*.

⁷⁹ L'Union économique et monétaire ouest-africaine a été créée en 1994 en tant qu'union rassemblant huit pays africains. Ses objectifs sont principalement de nature économique et de portée générale.

Un régime régional de droit de la concurrence a été mis en place au sein de l'UEMOA. La Commission de l'UEMOA a compétence pour faire appliquer les règles de concurrence⁸⁰ sous le contrôle de la Cour de Justice, elle-même habilitée à statuer sur les décisions rendues et sur les amendes infligées par la Commission⁸¹.

En 2002, le conseil des ministres de l'UEMOA a adopté la législation communautaire sur la concurrence, entrée en vigueur en janvier 2003. Cette législation s'articule autour de cinq éléments : (i) le contrôle des pratiques anticoncurrentielles à l'intérieur de l'UEMOA ; (ii) les règles et procédures applicables aux ententes et aux abus de positions dominantes à l'intérieur de l'UEMOA ; (iii) le contrôle des aides d'État à l'intérieur de l'UEMOA ; (iv) la transparence des relations financières d'une part entre les États membres et les entreprises publiques, et d'autre part entre les États membres et les organisations internationales ou étrangères ; et (v) la coopération entre la Commission et les structures nationales de concurrence des États membres pour l'application de la législation de l'UEMOA.

Le traité instituant l'UEMOA ne fait donc aucune allusion spécifique au contrôle des fusions. Néanmoins, la position de l'UEMOA a été de dire que cela n'excluait pas pour autant la possibilité de contrôler les opérations de fusion. Elle considère en effet que ces opérations peuvent être contrôlées en vertu des dispositions relatives à l'abus de position dominante⁸².

4.1.2.3 Remarques concernant les initiatives régionales actuelles

L'objectif d'une pleine coopération régionale dans le domaine du contrôle des fusions dans les pays en développement est ambitieux, et la mise en place d'un cadre à part entière pour le contrôle des fusions à l'échelon régional ne saurait faire l'économie – au minimum – de certaines étapes préliminaires. La première de ces étapes consiste à supprimer les sérieux obstacles politiques auxquels se heurtent les pays en développement et les économies émergentes. Les progrès que les pays concernés accompliront à la fois en termes d'application du droit de la concurrence et, plus généralement, d'intégration économique participeront à promouvoir les questions relevant du droit de la concurrence sur les ordres du jour régionaux. Vu la nature hautement complexe du processus d'intégration économique, il est très probable qu'éclatent des désaccords politiques, qui auront un impact sur le droit de la concurrence, et en fin de compte, sur le contrôle des fusions.

Au-delà des dissensions politiques potentielles, certaines contraintes « fonctionnelles » posent aussi de sérieux problèmes. S'agissant de leur expérience du contrôle des fusions, les pays concernés présentent des disparités considérables. Il serait par conséquent prématuré d'imaginer qu'une coopération régionale puisse suffire à introduire un contrôle efficace des fusions dans toute une région et surmonter les contraintes nationales. Dans un premier temps, la priorité devrait aller à l'introduction et à l'application efficaces au plan national de règles régissant le contrôle des fusions dans les pays concernés. Il est indispensable que les pays partagent un même niveau de développement pour que la coopération régionale

⁸⁰ La Commission agit via le département des Politiques fiscales, douanières et commerciales, par l'entremise de la direction du Commerce et de la Concurrence. Elle vérifie la conformité des règles nationales de concurrence avec celles de l'UEMOA et ; (i) reçoit des plaintes provenant directement des structures nationales ; (ii) engage des actions en justice et mène des enquêtes ; et (iii) prend des mesures provisoires sous la forme de restrictions et d'amendes. Avant d'agir, la Commission prend conseil auprès du comité consultatif de la Concurrence.

⁸¹ La Cour de Justice connaît des actions en justices engagées par des organes de l'UEMAO et des appels formés contre des décisions de la Commission, et a le pouvoir de les amender ou de les annuler si elle le juge opportun.

⁸² L'article 88 (b) interdit les pratiques « assimilables » à des situations d'abus de position dominante et a été imaginé dans le but de servir de base juridique à un certain degré de contrôle des fusions.

fonctionne efficacement dans ce domaine. Une solution pourrait consister à faire évoluer de manière ascendante les règles en matière de contrôle des fusions dans les différentes régions du monde en développement. En d'autres termes, chaque pays mettrait au point son propre régime en la matière et s'emploierait à améliorer sa mise en application. Cette façon de faire permettrait plus aisément de parvenir à une coopération significative à l'échelon régional.

Les communautés régionales de par le monde en développement manquent souvent des outils nécessaires pour résoudre les questions et problèmes inhérents à l'exercice de la compétence par certaines autorités régionales⁸³. Il est surtout important de disposer d'outils adéquats pour ce qui suit : (i) la répartition des compétences entre le niveau « communautaire » et les niveaux « nationaux » ; (ii) l'attribution du rôle et des pouvoirs des autorités régionales en matière d'exécution du droit (par exemple, si elles seront habilitées (et si oui, comment) à consulter et à recueillir des informations dans telle ou telle affaire auprès d'entreprises opérant dans les différents pays) ; et (iii) la mise en place de garanties nécessaires en cas d'accroissement de la charge de travail au-delà des capacités des autorités régionales (par exemple, la possibilité d'impliquer les autorités nationales de la concurrence afin d'alléger la charge de travail pesant sur les autorités régionales).

La question est d'autant plus complexe que certains pays en développement ou certaines économies émergentes sont membres de plusieurs communautés régionales⁸⁴ à la fois. Cela pose certaines difficultés quant à la question de savoir si tel ou tel pays donnera la priorité au cadre de contrôle des fusions d'une communauté plutôt que d'une autre. L'existence de chevauchements d'adhésions peut saper les perspectives réelles de création d'un régime de contrôle des fusions pleinement efficace à l'échelon régional.

De toute évidence, les communautés régionales dénombrées parmi les pays en développement et les économies émergentes se sont inspirées du modèle de l'UE. S'il est avantageux de s'appuyer sur l'expérience de l'UE, il convient néanmoins d'être bien conscient que toute tentative de transposition du modèle européen a aussi ses limites. Il a fallu à l'UE plus de cinq décennies (y compris 20 longues années de travail intensif dans le domaine du contrôle des fusions) pour atteindre son niveau de développement actuel dans le domaine du droit de la concurrence et plus particulièrement du contrôle des fusions. Le développement du droit de la concurrence dans de nombreux pays en développement ou économies émergentes n'en est encore qu'à ses balbutiements, et les caractéristiques de ces pays, ainsi que leur histoire diffèrent aussi significativement de ceux de l'UE.

Une grande partie des travaux et des discussions menés sur la coopération régionale est restée purement académique. Des efforts considérables doivent être faits pour promouvoir les programmes de coopération régionale. Plus particulièrement, la « mise en œuvre » à l'échelon national des règles et principes régionaux est pour cela bien souvent cruciale. Comme précisé plus haut, cela passe par la mise en place de régimes nationaux de contrôle des fusions dans les pays concernés⁸⁵. Une autre contrainte majeure qui pèse sur toutes les organisations régionales du monde en développement est l'extrême lourdeur de la

⁸³ Voir *La répartition des compétences entre les autorités communautaires et nationales chargées des questions de concurrence dans l'application des règles de concurrence*. (CNUCED, 2008).

⁸⁴ Ce cas de figure se rencontre surtout sur le continent africain.

⁸⁵ Par exemple, la mise en œuvre du protocole du MERCOSUR nécessiterait l'introduction de régimes de droit de la concurrence et l'institution d'autorités nationales de la concurrence en Uruguay et au Paraguay, qui sont tous deux des États membres.

bureaucratie, qui rend beaucoup plus difficile toute prédiction quant à l'évolution future de la coopération régionale et à sa mise en application efficace⁸⁶.

L'incertitude quant à la question de savoir si ces communautés régionales devraient se concentrer davantage sur des objectifs économiques ou politiques exacerbe les problèmes auxquels se heurte la coopération régionale. La question du contrôle des fusions ne peut être appréhendée à travers le seul filtre du droit de la concurrence, et ne peut être dissociée de l'interaction de questions économiques et politiques plus larges. Par conséquent, la coopération ne peut être une question isolée et, dans presque tous les cas, elle dépendra des circonstances économiques et politiques plus générales qui prévaudront dans la région et dans chacun des pays concernés.

Un dernier commentaire concerne les contraintes en termes de capacités, dont souffrent bon nombre des communautés régionales dans les pays en développement. Comme indiqué dans la partie précédente du document, les membres de ces communautés sont généralement des économies de petite taille qui manquent des ressources nécessaires pour être en mesure de mettre en place des régimes nationaux de contrôle des fusions efficaces, et à plus forte raison pour consacrer des moyens à un régime régional de contrôle des fusions. Or ces besoins peuvent être extrêmement élevés. Beaucoup de ces pays ne considèrent pas l'investissement de ressources dans le contrôle des fusions à l'échelon régional comme une priorité nationale⁸⁷.

4.1.3 Coopération bilatérale

La coopération bilatérale est devenue l'un des outils préférés des autorités de la concurrence pour s'engager dans toute une palette d'activités de mise en application du droit ou d'activités connexes. La coopération bilatérale peut être formelle (sur la base d'un accord) ou informelle (sans la conclusion d'aucun accord, voire de facto). Les paragraphes suivants font référence à des accords de coopération bilatéraux concernant spécifiquement la concurrence, qu'il convient de distinguer des liens bilatéraux plus larges qui existent entre les pays, comme les accords de libre-échange et les protocoles d'accords. Bien que ces derniers contiennent souvent des dispositions relatives au droit de la concurrence, ils ne peuvent néanmoins faire office de support adéquat pour engager une coopération bilatérale dans le domaine du droit de la concurrence.

Le nombre d'accords de coopération bilatérale a augmenté de manière assez remarquable depuis les années 1990. Cependant, vu le nombre d'autorités de la concurrence qui existent, ce chiffre reste relativement peu élevé. La grande majorité des accords et des liens bilatéraux ont été conclus entre des agences expérimentées dans le droit de la concurrence, dans le monde développé. On constate donc une absence d'accords de coopération bilatérale en matière de droit de la concurrence dans les pays en développement et les économies émergentes. Cela mérite d'ailleurs d'être souligné, étant donné la force des liens qui existent, comme cela a été dit plus haut, entre nombre des pays de ces régions. Cette absence peut s'expliquer par exemple par le fait que le droit de la concurrence a été introduit seulement récemment dans ces différents pays, et que l'application du droit de la concurrence (sans parler du contrôle des fusions) n'est pas encore parvenue à une maturité suffisante pour rendre possible la conclusion de tels accords ou pour qu'elle soit jugée nécessaire. Cela étant, compte tenu de l'ampleur du commerce « transnational » ou « interrégional » dans ces régions et vu le nombre d'entreprises qui opèrent dans les différents pays qui les composent, la probabilité de fusions comportant des éléments transnationaux est réelle.

⁸⁶ Il est important d'établir à l'échelon national une structure institutionnelle appropriée, dotée de ressources financières et d'une expertise suffisantes pour garantir une mise en œuvre réussie.

⁸⁷ Voir Stewart, Taimoon, « Is flexibility needed when designing competition law for small open economies? A view from the Caribbean » (2004) *Journal of World Trade* 725.

L'absence de liens bilatéraux des autorités de la concurrence dans les pays en développement et les économies émergentes peut aussi s'expliquer par la nature des relations que ces autorités entretiennent avec les autorités de la concurrence plus expérimentées des pays développés. L'absence de règles du jeu uniformes entre ces deux groupes de pays y est pour beaucoup. S'y ajoute le fait que les autorités expérimentées sont souvent soumises à des contraintes de temps lorsqu'elles enquêtent sur des fusions. Toute coopération bilatérale avec les autorités des pays en développement et des économies émergentes risque d'être perçue par les autorités des pays développés comme étant contraire à l'objectif d'efficience qui leur est imposé dans leurs investigations.

Des accords de libre-échange bilatéraux ont été conclus entre différents pays d'une même région. Certains de ces accords comportent des dispositions de concurrence, bien que ce type de support ne constitue sans doute pas le meilleur moyen de mettre en place une coopération bilatérale dans le domaine du contrôle des fusions. L'absence d'accords de coopération bilatérale formels ou spécifiques à la concurrence ne signifie par pour autant qu'il n'existe aucune coopération. La coopération bilatérale peut en effet prendre diverses formes : réunions conjointes entre fonctionnaires de la concurrence, séminaires de formation, ou encore ateliers organisés de manière informelle.

La coopération bilatérale apporte un certain nombre d'avantages non négligeables aux pays, et plus particulièrement à leurs autorités de la concurrence. Ces derniers ont été recensés et mis en avant par l'OCDE dans sa Recommandation de 1995⁸⁸. La Recommandation énumère les avantages spécifiques suivants : (i) atteindre une meilleure efficience dans l'application de la réglementation et le déroulement des enquêtes ; (ii) éviter les conflits de compétence ; (iii) protéger les intérêts légitimes des pays ; (iv) réduire le besoin d'échange d'informations confidentielles ; (v) favoriser les intérêts des parties à la fusion et promouvoir la sécurité juridique ; et (vi) créer des liens plus étroits entre l'autorité de la concurrence concernée et la fusion en question⁸⁹.

Ces avantages présentent un intérêt direct pour les pays en développement et les économies émergentes. La coopération bilatérale devrait donc être une avancée positive pour ces économies. En réalité, cependant, les pays en développement et les économies émergentes se heurtent à de sérieux obstacles lorsqu'ils cherchent à faire de la coopération bilatérale un outil efficace de contrôle des fusions. En particulier, comme expliqué plus haut, les chances qu'une autorité de la concurrence expérimentée accepte de conclure un tel accord avec une autorité de la concurrence d'un pays en développement sont très minces. Dans une certaine mesure, il est vrai qu'une autorité de la concurrence d'un pays développé envisagera de conclure un accord de coopération bilatérale uniquement avec des pays en développement et des économies émergentes dont le régime de contrôle des fusions a été conçu sur le modèle des pays développés et à la condition que le pays en question présente par ailleurs des caractéristiques économiques et politiques de nature à faciliter une telle coopération.

La coopération bilatérale ne peut fonctionner que si les deux parties à l'accord tirent des avantages ou au moins estiment qu'elles tireront des avantages d'une telle coopération. Les exemples de coopération bilatérales UE-États-Unis⁹⁰ et Australie-Nouvelle-Zélande⁹¹ le prouvent clairement. Ces deux exemples

⁸⁸ Voir la Recommandation du Conseil de l'OCDE sur la *Coopération entre pays membres dans le domaine des pratiques anticoncurrentielles affectant les échanges internationaux* (1995).

⁸⁹ L'idée sous-jacente à ce dernier point est qu'une fusion donnée sera évaluée par l'autorité de la concurrence qui lui correspond.

⁹⁰ La coopération UE-États-Unis repose sur deux accords de coopération : les accords de 1991 et de 1998.

⁹¹ La coopération entre l'Australie et la Nouvelle-Zélande s'appuie sur l'accord de rapprochement économique (Australia New Zealand Closer Economic Relations Trade Agreement – ANZCERTA) de 1983 et sur un accord de coopération de 2007.

sont les plus réussis en matière de coopération bilatérale dans le domaine du droit de la concurrence. Le succès de ces deux expériences est en grande partie dû aux similitudes entre les parties. Pour ce qui concerne l'UE et les États-Unis, il convient de rappeler qu'il s'agit des deux régimes de droit de la concurrence les plus évolués au monde, avec qui plus est de nombreux et importants chevauchements de compétences, notamment s'agissant des opérations de fusion. Quant à l'Australie et à la Nouvelle-Zélande, ces deux pays ont atteint un niveau de développement économique similaire, noué des liens politiques étroits et établi une confiance mutuelle.

Malgré les inconvénients que présente la coopération bilatérale pour les pays en développement et les économies émergentes qui souhaiteraient s'ouvrir à l'international, il peut néanmoins s'avérer bénéfique pour ces économies d'essayer d'établir entre elles ou avec des pays développés des liens bilatéraux dans le domaine du droit de la concurrence. Ces liens ne doivent pas forcément concerner exclusivement la coopération dans le cadre d'actions ponctuelles d'application du droit⁹², mais peuvent porter sur la formation technique ou le renforcement des compétences. De telles initiatives seraient particulièrement utiles dans le domaine du contrôle des fusions, vu les besoins spécifiques que ces activités requièrent (voir plus haut), notamment en termes de ressources, et plus particulièrement d'expertise⁹³. Par ailleurs, le resserrement de tels liens bilatéraux pourrait également stimuler les perspectives de rapprochement et d'harmonisation.

4.2 Questions juridictionnelles

La question des champs de compétences est au cœur même du mécanisme de contrôle des fusions. Le processus de contrôle des fusions commence lui-même par la question de la compétence, qui consiste à déterminer si une transaction donnée relève de tel ou tel régime et si les exigences juridictionnelles correspondantes sont respectées. Ce sont les réponses à ces questions qui déclencheront dans la pratique l'évaluation d'une fusion. Lorsque les seuils juridictionnels ne sont pas atteints, la notification de la fusion ne sera pas nécessaire et, par conséquent, l'autorité de la concurrence concernée ne procédera pas à l'évaluation de l'opération⁹⁴.

La question de la compétence revêt une importance particulière s'agissant des opérations de fusion transnationales en raison de la forte probabilité que ces opérations doivent être notifiées *ex ante* dans de nombreuses juridictions. Cette question revient entre autres choses à déterminer si ces fusions, lorsqu'elles impliquent des entreprises étrangères, devraient dans tous les cas tomber sous le coup des règles locales établies en matière de fusions dans une juridiction donnée ou si ce principe devrait être subordonné à certaines circonstances⁹⁵. Pour les pays en développement et les économies émergentes, cette question est particulièrement pertinente dans le contexte du contrôle des fusions transnationales.

⁹² Il est important de souligner que cette perspective ne saurait être complètement exclue, même en l'absence d'accord de coopération formel. Voir par exemple les consultations menées entre la Commission de la concurrence du Zimbabwe et la Commission australienne de la concurrence et du consommateur dans le cadre de la fusion *Coca-Cola Company/Cadbury-Schweppes*, citée à la note 45 ci-dessus.

⁹³ Voir ci-dessus.

⁹⁴ Il convient de garder à l'esprit que la compétence peut toutefois être exercée dans ce cas par l'autorité de la concurrence concernée. Voir par exemple la disposition des Règles du COMESA à ce propos, note 73 ci-dessus et texte correspondant. Voir également les cas où existe un mécanisme de notification facultative, et où l'autorité de la concurrence peut choisir d'examiner une fusion *ex post*.

⁹⁵ Dans certaines juridictions, il existe une exemption pour certains types de fusions dites « étrangères ». Voir, par exemple, l'exemption prévue par le régime états-unien de contrôle des fusions.

4.2.1 Notification

La grande majorité des régimes de contrôle des fusions comportent un mécanisme de notification obligatoire. Seules quelques juridictions de par le monde (dont le Royaume-Uni, le Chili, l'Australie et la Nouvelle-Zélande) sont dotées d'un mécanisme de notification volontaire. Lorsqu'il élabore ou met en œuvre un régime de contrôle des fusions, un pays en développement ou une économie émergente doit déterminer s'il utilisera une notification obligatoire ou volontaire et, plus important encore, quel sera le niveau des seuils juridictionnels qui déclencheront la notification à l'autorité de la concurrence compétente. C'est une question complexe qui mérite une réflexion approfondie. Ces seuils devraient, d'une part, refléter la taille de l'économie en question et les niveaux de sensibilité du pays et, d'autre part, tenir compte comme il se doit des intérêts des entreprises engagées dans des opérations de fusion.

Il est particulièrement difficile de fixer les seuils juridictionnels au niveau approprié, le risque étant d'établir des seuils trop élevés, ou au contraire trop bas. Il existe dans un cas comme dans l'autre un certain nombre d'implications. Si les seuils sont trop élevés, certaines fusions problématiques (qui justifieraient normalement une évaluation sur le fond), risquent d'échapper à tout contrôle. Si ces mêmes seuils sont en revanche fixés à un niveau trop bas, le nombre de fusions tombant sous le coup des règles de notification augmentera considérablement⁹⁶. Il est possible que certaines de ces fusions ne présentent pas un lien suffisamment important avec la juridiction concernée (Voir Encadré 4), ce qui aura de sérieuses répercussions en termes de moyens, vu les ressources très limitées dont disposent les autorités de la concurrence dans les pays en développement et les économies émergentes. Ce problème viendra s'ajouter aux réglementations superflues auxquelles les parties à des fusions transnationales seront soumises. Ce point mérite d'être souligné tout particulièrement, étant donné que la plupart des fusions n'entraînent pas de problèmes de concurrence.

⁹⁶

Voir Lorenz, Moritz, « Legislative comment: the new Chinese competition act » (2008) *European Competition Law Review* 257.

Encadré 4. Réforme des seuils de notification au Brésil

Il est intéressant de citer le changement intervenu au Brésil.

Aux termes de la section 54 de la loi sur la concurrence de 1994, la notification est obligatoire pour toutes les fusions, acquisitions, créations d'entreprises communes, ou de tout autre type de groupement constitué en société dans la mesure où : la transaction génère des effets au Brésil ; *et* où elle se traduit par une part de marché égale ou supérieure à 20 % du marché pertinent ; *ou* si l'une des parties à la transaction a réalisé un chiffre d'affaires supérieur à 400 millions R \$ au titre de l'exercice précédent.

Pendant longtemps, les autorités brésiliennes de la concurrence ont opté pour une interprétation large du concept d'« effets au Brésil ». Ce choix était encouragé par le libellé de la section 54, qui omet toute référence géographique au Brésil pour ce qui est des seuils de part de marché et de chiffre d'affaires. Avec des seuils aussi bas, beaucoup de fusions qui n'avaient aucun impact sur la concurrence dans les marchés locaux devaient être notifiées au Conseil administratif brésilien de défense économique (CADE).

Dans une décision phare rendue le 19 janvier 2005, le CADE a donné une nouvelle interprétation du concept des effets et du critère du chiffre d'affaires. Il a en effet déclaré à cette occasion que la notification devrait intervenir en cas de transactions impliquant des entités économiques dont le chiffre d'affaires dépasse les 400 millions R\$ – *au Brésil* – au titre de l'exercice précédent. Ce changement significatif a été facilité par l'adoption du principe de pertinence du lien juridictionnel, conformément aux préconisations de l'OCDE et du RIC. Ce changement de position a entraîné une diminution sensible du nombre de fusions qui auraient sinon dû être notifiées au Brésil. Par conséquent, aujourd'hui, seules devraient être notifiées les fusions pour lesquelles le chiffre d'affaires au Brésil est supérieur au seuil mentionné.

Il convient de préciser qu'une proposition de modification de la loi est actuellement débattue au Brésil (Projet de loi 06/2009), laquelle vise à faire établir la compétence sur la seule base des seuils de chiffre d'affaires, à l'exclusion des seuils de part de marché. Cette proposition suit également les meilleures pratiques de l'OCDE et du RIC (voir note 97 ci-dessous et le texte correspondant).

Les travaux de l'OCDE et du RIC montrent toute la difficulté que suppose la détermination de la pertinence du lien juridictionnel et la fixation du niveau approprié des seuils devant déclencher la notification. Les principes du RIC publiés sur cette question⁹⁷ font apparaître que la définition des critères de fixation de tels seuils est difficile. Cela tient en partie au caractère général des critères proposés par ces principes, à savoir qu'ils doivent être clairs, compréhensibles et fondés sur des facteurs quantitatifs et non pas subjectifs mais objectifs⁹⁸.

La Recommandation de 2005 de l'OCDE sur le contrôle des fusions apporte un éclairage supplémentaire sur cette question. Selon cette Recommandation, les pays membres de l'OCDE devraient affirmer leur compétence uniquement lorsqu'une fusion présente un lien pertinent avec leur juridiction. Elle préconise également que les critères utilisés pour déclencher la notification soient clairs et objectifs. Il est évident que ces recommandations témoignent d'une volonté de réduire les coûts et la charge qui pèsent sur les entreprises à une fusion et les tierces parties. Elles sont donc bienvenues.

⁹⁷ Voir les pratiques recommandées du RIC *Merger notification and review procedures*.

⁹⁸ Les critères tels que le montant du chiffre d'affaires et des actifs sont considéré comme étant objectifs, tandis que celui de la part de marché est jugé subjectif.

4.2.2 *Obtenir des informations et partager des informations avec d'autres autorités de la concurrence*

Une autre question relative à la répartition des compétences, et qui a une importance pratique de premier plan, concerne les outils et les pouvoirs nécessaires pour la recherche et la collecte d'informations dans les affaires de fusion et pour le partage d'informations entre autorités de la concurrence. D'ordinaire, dans les affaires de fusion, les parties à la fusion fournissent elles-mêmes les informations lorsqu'elles notifient l'opération. Cependant, les autorités de la concurrence des pays en développement et des économies émergentes éprouvent certaines difficultés d'une part à obtenir des informations des entreprises impliquées dans des fusions transnationales et d'autre part à échanger avec elles des informations. Pour bien cerner toute cette question, il convient de la replacer dans le contexte plus général de l'affirmation de la compétence extraterritoriale des autorités de la concurrence (en particulier de celles des pays en développement et des économies émergentes) sur ces opérations.

La doctrine de l'extraterritorialité a suscité le débat chez les professionnels du droit de la concurrence⁹⁹. L'usage agressif de cette doctrine dans certaines régions du monde a engendré des différends et des conflits entre pays et a poussé certains pays et leurs autorités à prendre des mesures visant à bloquer les initiatives extraterritoriales lancées par d'autres pays¹⁰⁰.

Il n'en reste pas moins que la doctrine de l'extraterritorialité a un rôle important à jouer dans le domaine du droit de la concurrence et plus particulièrement dans celui du contrôle des fusions. Sans cette doctrine, quelques-unes au moins des transactions potentiellement néfastes pour la concurrence pourraient échapper au contrôle des autorités. Le rôle de l'extraterritorialité est d'autant plus important en l'absence d'une stratégie multilatérale efficace dans le pays concerné et compte tenu des limites de la coopération bilatérale¹⁰¹.

Le concept d'extraterritorialité est indissociable de la notion de contrôle des fusions. Cette idée doit être appréciée au regard du libellé et de la nature des seuils juridictionnels – présents dans divers régimes de contrôle des fusions – qui déclenchent la notification (obligatoire ou volontaire) des fusions. Les confirmations judiciaires données aux États-Unis et en Europe renforcent cette idée¹⁰². Cependant, pour un

⁹⁹ Voir Dabbah, ch. 8, note 52 ci-dessus. On parle d'extraterritorialité dans les cas de figure où une autorité de la concurrence ou un tribunal se déclare compétent pour une situation impliquant des éléments étrangers (comme un comportement, des agissements ou des transactions d'entreprises étrangères). Un pays peut ainsi déclarer sa compétence sur la base d'« effets » produits sur la concurrence sur les marchés locaux, ou sur la base de la « mise en œuvre » du comportement, des agissements ou de la transaction dans la juridiction concernée ou encore (dans certains cas) sur la base de la doctrine de « l'entité économique unique » (selon laquelle, même si la ou les entreprises concernées sont étrangères, elles peuvent néanmoins posséder une filiale locale). Les doctrines des « effets » et de la « mise en œuvre » sont les plus invoquées pour affirmer une juridiction extraterritoriale. La première est utilisée dans les régimes des États-Unis (ainsi que de nombreux autres régimes), tandis que la deuxième est utilisée dans l'UE.

¹⁰⁰ Voir, par exemple, les tentatives de blocage – fondées sur la jurisprudence et la loi – du Royaume-Uni face aux déclarations de juridiction extraterritoriale des États-Unis. D'autres pays comme l'Australie et l'Afrique du Sud ont eux aussi adopté des législations visant à bloquer des actions extraterritoriales engagées par les États-Unis.

¹⁰¹ Voir la discussion ci-dessus des paragraphes 93 et 94.

¹⁰² Les jugements de la Cour suprême des États-Unis et de la Cour européenne de Justice ont joué un rôle décisif dans la reconnaissance de la doctrine de l'extraterritorialité. Voir, par exemple, le jugement rendu par le Tribunal de l'Union européenne (à l'époque Tribunal de première instance des Communautés européennes - TPICE) en l'affaire T-102/96 *Gencor c. Commission* (1999) Rec. II-753.

pays en développement ou une économie émergente, affirmer sa compétence hors de ses frontières dans le cadre d'affaires de fusions transnationales reste un défi¹⁰³.

Pour commencer, il se peut que les autorités de la concurrence dans les pays en développement et les économies émergentes éprouvent des difficultés à obtenir toutes les informations nécessaires pour réaliser l'examen de la fusion¹⁰⁴. Lorsque les informations pertinentes sont situées en dehors du pays en question, il peut s'avérer très difficile pour l'autorité de la concurrence concernée de les obtenir. La ou les entreprises visées peuvent refuser de se conformer aux instructions de l'autorité de fournir les informations pertinentes, et le seul moyen de se les procurer serait alors de solliciter l'assistance de l'autorité de la concurrence de ce pays. Mais, à moins qu'un accord de coopération bilatérale prévoie une assistance et un partage d'informations entre les juridictions concernées, toute coopération ad hoc de ce type est peu probable¹⁰⁵. Cela souligne la nécessité d'une coopération bilatérale, même si, comme expliqué plus haut, des obstacles de taille peuvent empêcher sa concrétisation.

Quand bien même l'autorité de la concurrence serait en mesure d'obtenir les informations nécessaires et déciderait que la fusion devrait être bloquée ou acceptée sous certaines conditions, elle peut encore avoir beaucoup de mal à faire appliquer sa décision si la ou les entreprises visées ne détiennent aucun actif sur les marchés locaux¹⁰⁶. La probabilité qu'une autorité réussisse à faire exécuter sa décision par la justice de la juridiction étrangère concernée est faible. La situation est d'autant plus compliquée lorsqu'existent des différences fondamentales entre deux juridictions, comme c'est le cas entre les juridictions de droit civil et celles de common law, ou lorsqu'une juridiction prévoit des sanctions pénales alors que l'autre prévoit uniquement des sanctions civiles¹⁰⁷.

4.3 Mesures correctives

Les mesures correctives jouent un rôle décisif dans le contrôle des fusions¹⁰⁸. Sans la possibilité d'imposer des mesures correctives, les instances de la concurrence n'auraient d'autre choix que de rejeter purement et simplement les fusions problématiques. Les mesures correctives permettent aux fusions problématiques qui présentent néanmoins des avantages évidents et non négligeables d'être autorisées lorsque ces avantages compensent les problèmes possibles de concurrence que l'opération risque d'entraîner. Avec les décisions d'autorisation sans condition et les interdictions, les mesures correctives constituent une troisième catégorie de verdict dans les affaires de fusion, à savoir l'autorisation conditionnelle.

¹⁰³ Cela ne signifie pas pour autant que cela soit impossible. Il existe un certain nombre d'exemples de déclarations de compétence extraterritoriale réussies, notamment dans la fusion *Coca-Cola Company/Cadbury-Schweppes* mentionnée à la note 45 ci-dessus.

¹⁰⁴ Ce qui souligne sans doute l'intérêt d'un mécanisme de notification obligatoire plutôt que volontaire.

¹⁰⁵ Voir les exemples cités par Dabbah, ch. 4, note 22 ci-dessus.

¹⁰⁶ Voir par exemple la fusion *Rabies-Vaccines* examinée par la Commission fédérale américaine du commerce (Affaire n° 891 0098, 55 Fed. Reg. 1614 (1990)). Cette affaire concernait l'acquisition de la firme française Connaught par Institut Mérieux au Canada. Malgré l'identification de problèmes de concurrence en cette affaire, les entreprises ne disposaient d'aucun actif aux États-Unis, ce qui a contraint la Commission fédérale américaine à faire appel à la coopération du Bureau de la concurrence canadien.

¹⁰⁷ Voir les décisions rendues en pratique dans certaines affaires notables, dont les suivantes : les décisions de la Chambre des Lords britannique (aujourd'hui devenue la Cour suprême) en l'affaire *Huntington c. Attrill* [1893] A.C. 150 et en l'affaire *Government of India c. Taylor* [1955] AC 491 ; ainsi que l'arrêt rendu par la Cour d'appel britannique en l'affaire *United States of America c. Inkley* [1988] 3 All ER 144.

¹⁰⁸ Voir en la matière les débats intéressants menés sous l'égide de l'OCDE lors de sa Table ronde sur les correctifs à apporter aux fusions (2003) et les principes du RIC concernant les mesures correctives.

4.3.1 *Types de mesures correctives possibles*

Différents types de correctifs peuvent être apportés aux fusions. De manière générale, on parlera de deux grandes catégories de mesures, les mesures structurelles et les mesures comportementales. Certains régimes de contrôle des fusions comportent cependant une typologie de mesures plus sophistiquée¹⁰⁹. Ces régimes distinguent les mesures correctives structurelles¹¹⁰, les « autres » mesures structurelles¹¹¹, les mesures comportementales¹¹² et les autres types de mesures correctives¹¹³.

Les autorités de la concurrence préfèrent de loin les mesures structurelles aux mesures comportementales. Les mesures structurelles sont en effet jugées plus efficaces que les mesures comportementales pour résoudre les problèmes de concurrence détectés au cours de l'évaluation d'une fusion. Par ailleurs, contrairement aux mesures comportementales, les mesures structurelles ne nécessitent pas un suivi continu. Néanmoins, imaginer des mesures correctives et élaborer une politique en la matière (y compris définir le type de mesures acceptables) est une lourde tâche pour une autorité de la concurrence, et ce plus particulièrement encore dans les pays en développement et les économies émergentes.

Dans le cadre de sa politique, l'autorité de la concurrence d'un pays en développement ou d'une économie émergente peut afficher une préférence pour les mesures structurelles. Dans la pratique, cependant, elle peut rencontrer certaines difficultés pour mettre en œuvre ce type de mesures correctives lorsque les parties à la fusion ne possèdent aucun actif pertinent dans la juridiction en question et (de manière plus générale) lorsque la ou les entreprises à la fusion sont en position de force dans leurs rapports avec elle¹¹⁴.

Il se peut aussi que la fusion nécessite la cession de certains éléments d'actif et que l'autorité de la concurrence du pays en développement ou de l'économie émergente en question ne dispose pas de l'expérience nécessaire pour traiter ce type d'affaires aussi complexes¹¹⁵. Il se peut également que les problèmes de concurrence mis en lumière par l'enquête soient liés à des questions à caractère comportemental comme des clauses d'exclusivité de contrats conclus entre une ou plusieurs des entreprises à la fusion et leurs clients¹¹⁶.

¹⁰⁹ Voir par exemple la classification faite par l'Office of Fair Trading et la Commission de la concurrence britanniques.

¹¹⁰ Les mesures structurelles prévoient la plupart du temps une cession.

¹¹¹ Les autres mesures structurelles peuvent inclure l'accès à des équipements d'infrastructure ou à des éléments protégés par des droits de propriété intellectuelle.

¹¹² Les mesures comportementales peuvent inclure la concession de licences sur des droits de propriété intellectuelle, le retrait de clauses d'exclusivité de contrats passés avec des clients ou encore des mesures de réglementation des prix.

¹¹³ Les autres types de mesures peuvent inclure la formulation de recommandations par l'autorité de la concurrence au gouvernement en place ou au parlement dans l'optique de modifier une loi ou une réglementation considérée comme une entrave à la concurrence sur le marché pertinent.

¹¹⁴ Si, par exemple, les entreprises sont en mesure de menacer de se retirer de la juridiction en question et/ou de développer des activités de lobbying auprès des pouvoirs publics afin d'exercer une pression importante sur les fonctionnaires de la concurrence, comme évoqué précédemment.

¹¹⁵ Voir par exemple le point de vue soumis par le Mexique lors de la Table ronde de l'OCDE sur les correctifs à apporter aux fusions (2003).

¹¹⁶ Les clauses d'exclusivité posent un réel problème dans plusieurs pays en développement ; voir principalement la situation dans différents secteurs de l'économie mexicaine, et notamment dans celui des boissons sans alcool.

Dans la pratique, les autorités de la concurrence des pays en développement peuvent donc être contraintes d'imposer des mesures correctives comportementales plus souvent qu'elles ne le souhaiteraient. C'est le choix qu'a fait la Corée (Voir Encadré 5). Cependant, en dépit de leurs inconvénients, il convient de ne pas négliger l'importance et la pertinence des mesures comportementales, ainsi que la nécessité d'opter d'emblée pour ces dernières dans certains cas ou de les intégrer dans un paquet de mesures élaboré.

Encadré 5. Le recours aux mesures comportementales en Corée

Ces dernières années, dans un certain nombre d'affaires, la Commission de la concurrence coréenne (Korean Fair Trade Commission - KFTC) a très souvent assorti de mesures comportementales ses autorisations de fusions. Deux exemples illustrent bien cette pratique.

La première concerne l'acquisition en 2007 par CJ Cable Net d'une participation dans Chungnam Broadcasting System et dans Modu Broadcasting System¹¹⁷, qui s'est traduite par l'intégration de la télévision câblée aux services fournis par ces entreprises dans six grandes villes coréennes. La KFTC a autorisé la transaction, qu'elle a conditionnée à un paquet de mesures correctives sévères et très élaborées. Ce paquet comprenait l'interdiction : d'augmenter directement ou indirectement les prix ; de réduire le nombre de chaînes proposées par catégorie d'abonnement ; de refuser de fournir des informations sur des produits meilleur marché ou de refuser de fournir ces produits ; et de refuser les demandes visant à transformer des abonnements en services meilleur marché.

Dans la deuxième affaire, qui concernait l'acquisition en 2005 par Hite Brewery Co. de Jinro Ltd¹¹⁸, la KFTC a largement recouru à des mesures comportementales. Parmi ces mesures figurait l'interdiction faite à l'entité née de la fusion d'augmenter les prix des boissons alcoolisées plus fortement que le taux d'inflation moyen, et ce pendant cinq ans ; l'engagement de soumettre préalablement à l'approbation de la KFTC toute augmentation de prix ; l'interdiction faite à l'entité née de la fusion d'inciter ou de contraindre de manière déloyale des fournisseurs à faire affaire avec elle dans des conditions déloyales en tirant parti de sa position ; et l'obligation pour la nouvelle entité de soumettre à la KFTC les informations concernant les transactions qu'elle conclue avec les fournisseurs de gros de boissons alcoolisées.

Les mesures comportementales présentent un certain nombre de caractéristiques qui les rendent attractives pour les pays en développement et les économies émergentes et particulièrement adaptées à ces derniers. Parmi ces caractéristiques, il convient de citer leur souplesse. En l'absence d'une mesure structurelle spécifique à une juridiction, une mesure comportementale permet aux autorités de la concurrence de ces pays de choisir une solution adaptée au profil et aux besoins de la juridiction en question. Cette souplesse devrait aussi inciter davantage les parties prenantes de fusions transnationales à se conformer aux conditions et obligations qui leur sont imposées en contrepartie de l'autorisation de l'opération.

Le type de mesures comportementales qui devraient figurer dans la boîte à outils de mesures correctives des autorités de la concurrence des pays en développement et des économies émergentes dépend des caractéristiques des marchés locaux, de l'expérience des autorités en matière d'application du droit et de leurs perspectives en termes de réglementation. Néanmoins, certaines mesures comportementales présenteront un intérêt tout particulier pour ces pays. Parmi ces dernières, on citera : (i) les mesures comportementales visant à résoudre des problèmes de restrictions verticales (y compris celles liées à des clauses d'exclusivité) ; (ii) les mesures non structurelles concernant des questions d'accès sous forme de concessions de licences de droits de propriété intellectuelle ; et (iii) l'octroi d'un accès à des

¹¹⁷ Décision n° 2007-274 de la KFTC, du 07.05.2007.

¹¹⁸ Décision n° 2006-009 de la KFTC, du 24.01.2006.

équipements¹¹⁹. Il convient toutefois de noter que, de manière générale et notamment dans les pays en développement, ces cas de figures appellent des mesures correctives plus difficiles à élaborer.

En raison de leur coût, les pays en développement et les économies émergentes ne devraient pas recourir excessivement aux mesures comportementales. Les demandes de suivi de conformité peuvent s'avérer très exigeantes, surtout compte tenu du fait que ces autorités disposent souvent de ressources restreintes. Cela dit, tout bien pesé, les avantages dans certains cas tirés des mesures comportementales pour régler un problème de concurrence peuvent compenser ou justifier ce coût inévitable. Les autorités concernées devraient en tenir compte lorsqu'elles élaborent leur politique en matière de mesures correctives dans les affaires de fusions.

4.3.2 Consultation et coopération

Les dernières évolutions en matière de contrôle des fusions ont mis en exergue l'importance de la consultation et de la coopération entre autorités de la concurrence sur la question des correctifs à apporter aux fusions. Ce point est d'autant plus important que la probabilité est grande de voir éclater des conflits entre autorités de la concurrence dans un certain nombre de contextes, dont les suivants :

- premièrement, les autorités de la concurrence concernées peuvent parvenir à des conclusions contradictoires concernant les mesures correctives nécessaires à imposer dans une même affaire de fusion ;
- deuxièmement, la juridiction dans laquelle se trouve le « centre de gravité » de la fusion peut décider de ne pas la réglementer et de laisser faire la fusion sur des motifs autres que de concurrence, alors qu'une ou plusieurs autres juridictions peuvent décider d'infliger des mesures correctives en vertu de leur législation relative au contrôle des fusions ; et
- troisièmement, deux autorités de la concurrence distinctes peuvent détecter des problèmes de concurrence ayant trait à différents aspects de la même fusion, auquel cas les mesures correctives jugées nécessaires par une autorité peuvent ne pas être compatibles avec celle souhaitées par l'autre.

La coopération bilatérale apporte dans ce cas certains avantages considérables à la fois aux autorités de la concurrence et aux parties à la fusion¹²⁰. Les avantages pour les autorités de la concurrence ne se limitent pas exclusivement à des avantages administratifs, mais se traduisent aussi dans la pratique en avantages pour le consommateur et pour les marchés locaux. Tel est du moins le cas lorsque la coopération permet d'élaborer et de mettre en œuvre plus efficacement une mesure corrective dans une affaire donnée.

La possibilité d'une consultation et d'une coopération entre l'autorité de la concurrence d'un pays en développement ou d'une économie émergente et une autorité de la concurrence plus expérimentée ne doit pas être tenue pour acquise. Cela étant, elle ne peut pas non plus être complètement exclue d'office¹²¹. La

¹¹⁹ Dans certaines affaires, les autorités de la concurrence peuvent poser d'autres conditions à la fusion en recourant à d'autres outils comportementaux. Voir par exemple l'autorisation conditionnelle accordée par la Commission de la concurrence du Zimbabwe dans la fusion *Coca-Cola Company/Cadbury-Schweppes* (citée à la note 45 ci-dessus). Les conditions posées incluaient l'engagement de Coca-Cola (1) de maintenir les marques locales *Mazoe* et *Calypso* sur le marché zimbabwéen et de les faire croître pour en faire des marques régionales commercialisées à plus grande échelle et (2) de recourir plus largement aux fournisseurs et fournitures zimbabwéens pour couvrir ses besoins en matières premières nécessaires pour fabriquer ses produits finis.

¹²⁰ Voir la note de réflexion du Secrétariat de l'OCDE sur les *Mesures correctives transfrontalières dans les affaires de fusion* (2005).

¹²¹ Voir note 92 ci-dessus.

coopération entre autorités de la concurrence dans la phase qui concerne les mesures correctives peut être essentielle, notamment pour renforcer la cohérence entre ces autorités. Les débats internationaux menés sous l'égide de l'OCDE et dans d'autres forums¹²² ont permis d'explorer diverses options de coopération, et principalement l'idée d'accords de partage du travail entre autorités de la concurrence. Cette idée mériterait d'être étudiée de manière plus approfondie, bien qu'à cette date aucun consensus n'ait émergé sur la meilleure voie à suivre dans ce domaine. Ce constat serait peut-être à rapprocher des divergences de vues sur la viabilité du concept de « juridiction responsable » dans la pratique.

4.3.3 *Suivi et mise en œuvre*

Lorsque l'autorisation d'une fusion est conditionnée par des mesures comportementales, il est important que l'autorité de la concurrence concernée prenne les moyens de suivre efficacement la mise en œuvre de ces mesures correctives. Ce point est vital pour veiller à ce que les entreprises à la fusion se conforment pleinement aux instructions qui leur ont été adressées, ainsi que pour garantir l'efficacité de la mesure corrective en question. Le suivi est aussi important, bien que dans une moindre mesure, dans le cas des mesures structurelles¹²³. Il en est de même quant à l'exécution des mesures prises : les autorités de la concurrence doivent disposer des outils et des pouvoirs nécessaires pour être en mesure de prendre des mesures coercitives lorsque des parties à une fusion ne respectent pas les conditions ou obligations prévues par les mesures correctives convenues avec ces dernières.

Le suivi et l'exécution ne sont pas des tâches aisées, et les moyens qu'exigent ces fonctions ne sont pas spécifiques du contrôle des fusions. Les autorités de la concurrence nécessitent en effet à cette fin des ressources humaines et financières adéquates, une contrainte qui se vérifie pour l'ensemble du domaine du droit de la concurrence, et pas seulement pour celui du contrôle des fusions.

Les autorités de la concurrence éprouvent de sérieuses difficultés à assurer le suivi des mesures correctives imposées dans le cadre de fusions transnationales, et à ce à deux égards. Le premier point concerne l'accès restreint aux informations nécessaires, et le second a trait au recours limité à des mesures coercitives dans le cas où les entreprises à une fusion ne respectent pas les conditions et obligations imposées au titre des mesures correctives. Il existe deux pistes possibles pour renforcer l'efficacité du suivi. On citera (i) la possibilité d'engager une action à l'encontre d'une filiale locale des parties à la fusion (s'il en existe une) et (ii) celle de recourir à la coopération. Cette dernière possibilité est peut-être plus prometteuse, bien que toute coopération doive être très étroite pour produire des résultats.

Dans certains cas, le succès de mesures d'exécution prises par une autorité de la concurrence dans des affaires de fusions transnationales nécessite l'assistance d'autorités de la concurrence étrangères également impliquées dans la transaction¹²⁴. Cette assistance a plus de chance d'être fournie si les deux autorités de la

¹²² Il convient de préciser que cette idée avait déjà été avancée. Elle avait effectivement été évoquée dans le rapport 2000 du Comité consultatif des États-Unis sur la politique de la concurrence internationale (International Competition Policy Advisory Committee - ICPAC). Ce rapport soutenait vigoureusement la coopération dans ce contexte et proposait la mise en place de tels arrangements de deux manières différentes : premièrement par la négociation conjointe (chaque autorité de la concurrence concernée ferait part de ses préoccupations quant à la transaction proposée, puis un ensemble de mesures correctives serait arrêté par la biais de négociations conjointes ; et deuxièmement en attribuant à une juridiction la fonction de « juridiction responsable », qui serait ainsi chargée de négocier les mesures correctives avec les parties à la fusion.

¹²³ En cas de mesures structurelles, le suivi sera important pour s'assurer que la cession est bien effectuée dans les conditions convenues entre l'autorité de la concurrence et les parties à la fusion. Une fois cette opération achevée, aucun suivi n'est plus nécessaire.

¹²⁴ Voir la note 106 ci-dessus.

concurrence en question agissent dans le cadre d'une étroite coopération. Comme précisé plus haut, les autorités de la concurrence des pays en développement et des économies émergentes ne sont pas dotées de tels cadres. Il y est par conséquent beaucoup plus difficile de voir aboutir des mesures d'application du droit prises dans le cadre d'affaires de fusions transnationales.

Un dernier point à aborder est celui des facteurs qui ne relèvent pas de la concurrence. Dans le pays en développement concerné, il se peut que la politique industrielle ou que des considérations d'un autre ordre – comme la question des investissements directs à l'étranger – soient prioritaires¹²⁵. L'autorité de la concurrence concernée peut alors estimer qu'elle doit orienter son travail en matière de contrôle des fusions en fonction de ces autres considérations. Par conséquent, l'autorité peut juger que la perspective de se voir imposer des mesures correctives assorties d'un suivi et de mesures coercitives efficaces repousse les entreprises étrangères. Il se peut aussi que les pouvoirs publics fassent valoir leurs préoccupations et exercent des pressions sur l'autorité de la concurrence pour attirer les entreprises étrangères sur les marchés locaux. L'autorité peut dans ce cas choisir de développer ou de mettre en œuvre une politique fondée sur ces considérations.

5. Conclusions

Parmi toutes les spécialités du droit et de la politique de la concurrence, le contrôle des fusions est celle qui a eu le plus d'impact sur l'économie mondialisée. Pourtant, en termes géographiques, ce domaine est celui qui a connu le moins d'expansion. La marge de progression y est donc très grande, qu'il s'agisse de mettre en place des mécanismes efficaces pour contrôler les fusions dans tous les régimes de concurrence existant de par le monde ou de développer le contrôle des fusions à l'échelon régional et international.

Des progrès impressionnants ont été accomplis dans le sens d'une convergence et d'une harmonisation dans ce domaine, par le biais notamment d'instruments juridiques non contraignants. Les liens de coopération bilatérale établis entre autorités de la concurrence et présentant un intérêt direct en matière de réglementation des fusions transnationales se sont aussi multipliés. Cela vient s'ajouter à l'intensification des efforts régionaux visant à prendre à bras le corps la question du droit et de la politique de la concurrence dans de nombreux pays en développement.

Les pays en développement et les économies émergentes se trouvent dans une position particulière vis-à-vis du contrôle des fusions. Bien que certaines de ces économies aient mis en place des régimes de droit de la concurrence, la plupart ne disposent pas de régime efficace de contrôle des fusions et ne participent pas non plus activement à la coopération bilatérale.

Pour ce qui concerne la coopération multilatérale, plusieurs autorités de la concurrence de ces pays ont pris part à certaines procédures importantes au sein de l'OCDE, du RIC et de la CNUCED.

Ce n'est qu'en matière de coopération régionale que certaines de ces économies ont vraiment réussi à mettre en place une forme de cadre régional leur permettant de réglementer les fusions transnationales (et, plus généralement, de résoudre les problèmes de concurrence). Toutefois, aucune de ces initiatives régionales ne s'est avérée totalement efficace, et toutes sont encore loin d'avoir atteint leur pleine maturité.

Cet état de fait pose la question de savoir comment les pays émergents devraient s'y prendre pour concevoir leurs stratégies en matière de contrôle des fusions. Un certain nombre de points devraient être éclaircis à ce propos. Il est évident que les fusions transnationales affectent de nombreux pays en développement et économies émergentes dans le monde. Des dispositions devraient donc être intégrées aux

¹²⁵

Voir la discussion menée plus haut sur ces deux questions.

règles de concurrence actuellement en vigueur dans ces pays pour traiter les fusions transnationales. Leurs autorités de la concurrence devraient élaborer des stratégies comportant des éléments de coopération multilatérale, régionale et bilatérale et reflétant la situation et les caractéristiques uniques de ces économies.

Les autorités de la concurrence gagneraient à s'investir plus activement dans les travaux menés à l'échelon international dans le domaine du contrôle des fusions sous les auspices d'organes tels que l'OCDE ou le RIC. Cela étofferait leur apprentissage et leur apporterait de précieux éclairages sur cette discipline hautement complexe. Cette approche apporterait à ces autorités des avantages considérables, parmi lesquels on citera la convergence et l'harmonisation, ainsi que l'interaction avec de nombreuses autres autorités de la concurrence, et notamment celles plus expérimentées.

Pour ce qui est de la coopération régionale, ce type de collaboration peut être utile pour mettre au point un mécanisme propre à gérer les fusions transnationales affectant plusieurs pays dans une même région. Un tel mécanisme permettra aux pays de s'unir au sein d'une force plus importante, aussi bien au niveau individuel que collectif, pour réglementer les fusions transnationales et peser davantage face aux puissantes entreprises impliquées dans ces fusions.

Quant à la coopération bilatérale, les chances de voir les autorités de la concurrence des pays en développement et des économies émergentes engager ce type de coopération pour telle ou telle affaire dans le cadre de mesures d'application du droit – et notamment avec des autorités de la concurrence expérimentées – ne sont pas très élevées. Néanmoins, des liens bilatéraux peuvent non seulement exister mais aussi s'avérer utiles pour mettre en place un partage des expériences, une assistance technique et un renforcement des compétences, ainsi que, de manière plus générale, pour engager des dialogues de politique publique. Toutes ces activités devraient apporter des avantages considérables aux autorités de la concurrence de ces pays.

Il est néanmoins plus que fondamental que les pays en développement et les économies émergentes veillent à disposer de cadres pleinement efficaces pour réglementer les fusions à l'intérieur de leurs frontières. Cela suppose : (1) de disposer d'une législation comportant les dispositions adéquates concernant les aspects essentiels du contrôle des fusions (notamment pour l'attribution de la compétence) ; (2) de pouvoir compter sur des procédures bien élaborées, applicables et transparentes (particulièrement concernant les questions de notification des fusions et de mesures correctives dans les affaires de fusion) ; (3) que tous les conseils et toutes les recommandations appropriés soient accessibles aux entreprises à une fusion et à leurs conseillers ; (4) qu'une autorité de la concurrence indépendante soit établie et dotée de l'expertise pertinente en matière de gestion du contrôle des fusions.

De plus, il convient de reconnaître que la mise en place d'un régime efficace de contrôle des fusions dans un pays en développement ou une économie émergente nécessite préalablement l'existence d'un régime de droit de la concurrence, à moins, bien sûr, que le pays concerné n'établisse un régime de contrôle des fusions de type sectoriel, comme cela a été le cas par exemple à Hong-Kong.

Il est essentiel pour un pays en développement ou une économie émergente de remplir ces conditions préalables afin de pouvoir s'atteler au problème des fusions transnationales. L'engagement dans des coopérations de type multilatéral, régional ou bilatéral n'aura de sens qu'une fois que les cadres nationaux nécessaires auront été correctement mis en place.

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AUSTRALIA

1. Overview of Australia's merger control regime

The legal framework for Australia's merger control regime is contained in section 50 of the *Competition and Consumer Act 2010* (formerly known as the *Trade Practices Act 1974*) (the CCA). Section 50 prohibits mergers or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia. The Australian Competition and Consumer Commission (ACCC) is responsible for administering and enforcing the CCA.

Section 50 applies to acquisitions of property¹ within Australia, and acquisitions made outside Australia so long as the purchaser is incorporated in Australia, carries on business in Australia, is an Australian citizen, or is ordinarily resident in Australia.

There is no compulsory pre-notification requirement for mergers in Australia. However, the ACCC's merger guidelines² recommend that mergers that may potentially raise competition concerns and are subject to the CCA be voluntarily notified to the ACCC. Merger parties are encouraged to notify the ACCC (well in advance of completing a merger) where the products of the merger parties are either substitutes or complements, and the merged firm will have a post-merger market share of greater than 20 per cent in the relevant market(s). Merger parties are also encouraged to approach the ACCC where the ACCC has indicated to a firm or industry that notification of mergers by that firm or in that industry would be advisable.

Merger parties are able to seek an informal view from the ACCC as to whether a merger raises competition concerns under section 50. While the ACCC's view does not provide parties with protection from legal action, it does provide merger parties with a reliable indication of whether the ACCC would seek an injunction under section 50 to prevent the merger from proceeding. Parties may seek an informal review either on a confidential³ or public basis. In addition, the ACCC may initiate reviews of mergers that have not been notified to it.

When merger parties ask the ACCC to confidentially review a proposal, the ACCC will endeavour to provide, on a confidential basis, an interim view as to whether the proposal is or is not likely to raise competition concerns. This view is necessarily qualified and in some cases no view will be able to be provided until the matter becomes public and market inquiries have been conducted. The advantages to merger parties in seeking a confidential review include:

¹ Including but not limited to shares in Australian companies, domestic businesses, local intellectual property and local plant and equipment.

² The *Merger Guidelines 2008* and the *Merger Review Process Guidelines 2006*. Copies of the guidelines are available here: <http://www.accc.gov.au/mergerguidelines> and <http://www.accc.gov.au/processguidelines>.

³ Merger parties can request the ACCC's indicative view of a proposed acquisition that is confidential—the ACCC will endeavour to provide, on a confidential basis, an interim qualified view as to whether the proposal is or is not likely to raise competition concerns, subject to information that arises when the matter is public and inquiries can be conducted.

- the potential for truncation, and occasionally elimination, of the need for any significant subsequent assessment process once the matter becomes public, and
- the pre-emptive identification by the ACCC of key issues and potential competition concerns.

The key advantage of the ACCC's informal merger review process is that it provides flexibility in terms of timeframes, information requirements and confidentiality. Further details about this process are contained in the *Merger Review Process Guidelines 2006*⁴.

Alternatively, the formal merger clearance process—introduced through legislation in 2007—provides an acquirer with the opportunity to obtain formal clearance, meaning that section 50 does not prevent the acquisition from proceeding in accordance with the clearance. Unlike the ACCC's informal merger review process described above, the formal merger clearance process requires payment of a fee, and has mandated timeframes as well as information and transparency requirements. To date, there have been no applications under the formal merger clearance process. Further details about the formal merger clearance process are contained in the *Formal Merger Review Process Guidelines 2008*⁵.

Not all mergers that lessen competition are prohibited by section 50; only those that lessen competition 'substantially' are prohibited. The term 'substantial' has been variously interpreted as meaning real or of substance⁶, not merely discernible but material in a relative sense⁷ and meaningful.⁸ Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable. For example, a merger will substantially lessen competition if it results in the merged firm being able to significantly and sustainably increase prices.⁹

In assessing whether a merger is likely to result in a significant and sustainable increase in market power, the ACCC must consider the 'merger factors'—a non-exhaustive list of factors set out in section 50(3). The merger factors provide insight as to the likely competitive pressure the merged firm will face following the merger and consideration of these factors facilitates an assessment of the likely competitive effects of the merger. The factors in section 50(3) are:

- the actual and potential level of import competition in the market
- the height of barriers to entry to the market
- the level of concentration in the market
- the degree of countervailing power in the market
- the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins

⁴ A copy of the guidelines is available here: <http://www.accc.gov.au/processguidelines>.

⁵ A copy of the guidelines is available here: <http://www.accc.gov.au/formalprocessguidelines>.

⁶ *Trade Practices Legislation Amendment Bill 1992*, explanatory memorandum, paragraph 12.

⁷ Australia, Senate 1992, *Debates*, vol. S157, p4776.

⁸ *RuralPress Limited v Australian Competition and Consumer Commission* [2003] HCA 75 at 41.

⁹ *Merger Guidelines 2008*, p 11.

- the extent to which substitutes are available in the market or are likely to be available in the market
- the dynamic characteristics of the market, including growth, innovation and product differentiation
- the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor
- the nature and extent of vertical integration in the market.

The analytical framework applied by the ACCC in assessing mergers under section 50 is explained in the *Merger Guidelines 2008*¹⁰.

A third option available to merger parties under Australia's merger control regime is to seek authorisation from the Australian Competition Tribunal (Tribunal). If a proposed merger is likely to fail the substantial lessening of competition test but the parties consider there are public benefits that outweigh any anti-competitive effects, application may be made for authorisation. The CCA provides that the Tribunal may authorise a proposed merger under section 50 if it is satisfied that the merger would result, or would be likely to result, in such a benefit to the public that the merger should be allowed to occur.¹¹ Like the formal merger clearance process, applications for merger authorisation must be accompanied by a fee. Once authorisation is granted, neither the ACCC nor any other party may take legal action under section 50 in respect of the merger for the period for which authorisation is granted.

2. Participation in international organisations in the area of merger control

Australia participates in a number of international organisations in the area of merger control, including the International Competition Network (ICN) and the Organisation for Economic and Cooperation Development (OECD). Involvement in these forums presents valuable opportunities for Australia to exchange knowledge and experience with counterparts, and to learn from and contribute to the development of international best practice in multijurisdictional merger review.

Over the last decade Australia's merger control regime has undergone some significant changes. These include modifications to the merger review process, the introduction of a formal merger clearance process and the continued evolution of the ACCC's analytical approach. These changes have been developed in line with international best practice, contemporary views on antitrust analysis and the ACCC's own experience.

In the ICN, the ACCC is an active member of the Merger Working Group. The ACCC is currently involved in both of the Group's Subgroups which deal with 'Notifications and Procedures' and 'Investigation and Analysis'. The ACCC participates in the Subgroups' teleconferences, annual Merger Workshops and the preparation of new work products. Some of the work products which the ACCC has drawn upon in developing Australia's merger regime are the *Recommended Practices for Merger Analysis* and *Recommended Practices for Merger Notification and Review Procedures*, as well as the *Merger*

¹⁰ A copy of the guidelines is available here: <http://www.accc.gov.au/mergerguidelines>.

¹¹ See sections 95AT to 95AZH of the CCA: <http://www.comlaw.gov.au>.

*Guidelines Workbook (April 2006) and Investigative Techniques Handbook for Merger Review (June 2005).*¹²

Australia is a long-time member of the OECD and a regular participant in its competition committees, groups and working parties. Like the ICN, OECD work products relating to merger control have assisted in the development of Australia's merger regime and its approach to multijurisdictional merger review.

3. Cooperation between Australia and other jurisdictions in cross-border merger control

3.1 Framework for cooperation

In recent years, cooperation between the ACCC and its counterparts in cross-border merger reviews has increased significantly. This has been due, in part, to the growing number of international merger transactions and associated requests for merger clearance, and to more frequent dialogue and interactions between competition regulators in the area of multijurisdictional merger review.

As noted already, the ACCC regularly discusses developments in cross-border merger control with counterparts at international forums organised by groupings such as the ICN and OECD. In addition, the ACCC has entered into a number of bilateral agreements which contain provisions dealing with cooperation and coordination in merger investigations and enforcement.

For example, in 2006 the ACCC entered into a *Cooperation Protocol for Merger Review* with the New Zealand Commerce Commission to help streamline transactions in the trans-Tasman business environment. The Protocol may apply where the regulators are reviewing the same merger transaction or where they exchange information in respect of a specific merger review or in respect of their merger review processes and functions. Objectives of the Protocol include reducing compliance costs for businesses and transaction costs for both regulators, as well as to increase the effectiveness of competition laws.¹³

The ACCC also maintains close relationships with its counterparts through informal bilateral discussions, often by telephone, regarding particular merger reviews. These discussions provide an opportunity to exchange information about current matters (to the extent permitted by confidentiality requirements), including details about the merger parties, the relevant markets, the status of the investigation and analytical approaches to transactions, and about general developments in merger policy.

The benefits of cooperation in cross-border merger control are considerable. In the ACCC's experience, working with counterparts, especially in the early stages of an international merger review, can enhance the efficiency and effectiveness of the review and help to achieve more effective outcomes.

For instance, receiving prompt notification of a multijurisdictional transaction from a counterpart may alert the ACCC to transactions earlier than would otherwise have occurred. This is particularly valuable where the focus of the parties is directed towards notifying and responding to the requirements of regulators operating within a compulsory notification framework.

The coordination of review timelines and procedural steps may be extremely helpful in cross-border merger reviews. For example, coordinating the timing of information requests between jurisdictions may

¹² These documents are available from the Merger Working Group webpage on the ICN website: <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx>.

¹³ A copy of the Protocol and the ACCC's cooperation agreements are available here: <http://www.accc.gov.au/content/index.phtml/itemId/564911>.

help to ensure that all relevant information is obtained and provided to regulators in a timely manner. This also has the benefit of reducing transaction and compliance costs for the merger parties.

Further, the ability to share substantive merger information with counterparts early on in a review may increase other regulators' knowledge of how particular industries operate and provide insight into how markets have been defined and which markets are likely to raise competition concerns. Sharing such information may also be important throughout a review to help avoid inconsistent outcomes, or the imposition of remedies which could be inconsistent, duplicative or ineffective.

The ACCC has been involved in a number of cross-border merger reviews where close cooperation was vital to ensuring all regulators were able to address competition concerns resulting from a merger. This has often been the case in matters where key plant or assets of one of the merger parties is located outside Australia. By liaising with counterparts on proposed remedies and outcomes, the ACCC is able to ascertain whether the other regulators' proposals are likely to have any adverse competitive effects in Australia, or preclude a satisfactory outcome, before commitments are signed by the parties. Examples of four such cases are set out below (including cases where the ACCC agreed to accept remedies which involve commitments to regulators in other jurisdictions).¹⁴

3.2 Case examples of cooperation in cross-border merger control

3.2.1 Scandinavian Tobacco Group A/S - proposed acquisition of Swedish Match AB (2010)

On 30 September 2010 the ACCC accepted an undertaking from Swedish Match AB (SM) and Scandinavian Tobacco Group A/S (STG) in relation to the ACCC's decision not to oppose STG's proposed acquisition of SM.

The undertaking required STG to divest a number of cigar brands to a purchaser approved by the ACCC. The objective of the undertaking was to address the ACCC's competition concerns by creating or strengthening a viable, effective, stand-alone, independent and long term competitor for the supply of the divested products.

The acquisition was considered by a number of international competition agencies and the ACCC consulted closely with the New Zealand Commerce Commission regarding the acquisition and the divestitures occurring at the international level.

3.2.2 Agilent Technologies Inc - proposed acquisition of Varian Inc (2010)

On 31 March 2010 the ACCC accepted an undertaking from Agilent Technologies Inc and Agilent Technologies Australia Pty Ltd (together Agilent) in relation to the ACCC's decision not to oppose Agilent's proposed acquisition of Varian Inc.

The undertaking required Agilent to comply with its commitments to the European Commission to divest a number of businesses.

The ACCC liaised closely with other competition regulators in other jurisdictions during the course of its review, in particular the European Commission and the US Federal Trade Commission.

¹⁴ A summary of the ACCC's decision in each matter is available here: <http://www.accc.gov.au/content/index.phtml/itemId/501191>.

3.2.3 Pfizer Inc - proposed acquisition of Wyeth Corp (2009)

On 30 September 2009 the ACCC accepted an undertaking from Pfizer Inc (Pfizer) in relation to Pfizer's proposed acquisition of Wyeth Corp.

The undertaking required Pfizer to divest a companion animal vaccine business in Australia to the approved purchaser Boehringer Ingelheim Vetmedica Inc and to divest a livestock vaccine business in Australia to a purchaser to be approved by the ACCC.

In conducting its review the ACCC coordinated closely with agencies in other countries which were also reviewing the transaction, including the European Commission and the US Federal Trade Commission.

3.2.4 WPP Group - proposed acquisition of Taylor Nelson Sofres plc (2008)

On 8 October 2008 the ACCC accepted an undertaking from WPP Group plc (WPP) in relation to the ACCC's decision not to oppose WPP's proposed acquisition of Taylor Nelson Sofres plc.

The previous month, WPP had given an undertaking to the European Commission to resolve competition concerns in Europe.

The undertaking to the ACCC required WPP to comply with its obligations under the EU undertaking, and to carry out a number of additional obligations. The ACCC considered that the two undertakings would address the ACCC's competition concerns.

The ACCC conducted market inquiries with a range of industry participants, including competition authorities in other jurisdictions.

3.2.5 Challenges to cooperation in cross-border merger control

Although cooperation between the ACCC and its counterparts has become a mainstay of cross-border merger reviews in Australia, some challenges to achieving a fully effective cooperation framework remain.

Being a smaller jurisdiction, Australia is often one of the last (if not the last) jurisdictions to receive notification from the parties in cross-border merger matters. Delays in notification make it more difficult for the ACCC to conduct efficient and effective reviews and can increase the risk of inconsistent analyses and remedies across jurisdictions. The ACCC has responded to this challenge by encouraging regular liaison with key counterparts on relevant transactions, and close monitoring of markets to identify new merger activity.

Another challenge exists where information is given by a party to a regulator either in confidence or with specific restrictions which limit the regulator's ability to share the information with other regulators. Restrictions on a particular regulator's ability to access relevant information may reduce the potential for analytical and procedural convergence between regulators, and increase the risk of inconsistent/ineffective/duplicative outcomes and remedies.

Legislative provisions in some countries allow regulators to disclose information obtained in the course of a merger investigation to other competition regulators. For example, in Australia the ACCC is permitted under section 155AAA of the CCA to disclose 'protected information' to a foreign government

body if it decides that such disclosure will enable or assist the body to perform its functions, or exercise its powers, and if it is considered appropriate to disclose the information in the circumstances.¹⁵

Information may also be shared between regulators through the use of confidentiality waivers provided by the merger (and other) parties. The ACCC's practice is to seek waivers from relevant parties to permit the exchange of information that may be of a confidential nature with other regulators. The ACCC's experience has been that at times, particularly when the parties are not familiar with dealing with the ACCC on such processes, or when waivers are required in relation to multiple jurisdictions, the process of obtaining waivers can be somewhat onerous. To assist in remedying this issue the ACCC has introduced a standard form confidentiality waiver.

4. Conclusion

Australia is an active participant and contributor to international organisations in the area of merger control and has benefited from the work undertaken by these organisations. Australia's merger review processes and the ACCC's analytical approach to conducting merger reviews are consistent with international best practice.

As a small country with a voluntary merger notification regime, Australia faces some practical challenges in cross-border merger reviews. The early notification of merger transactions, cooperation by merger parties during investigations and greater dialogue between competition regulators will continue to assist in helping to address these challenges. Given the prevalence of increasingly globalised transactions, close cooperation between regulators is vital, particularly to ensure that remedies adopted in one jurisdiction are effective and do not adversely affect remedy outcomes in other jurisdictions.

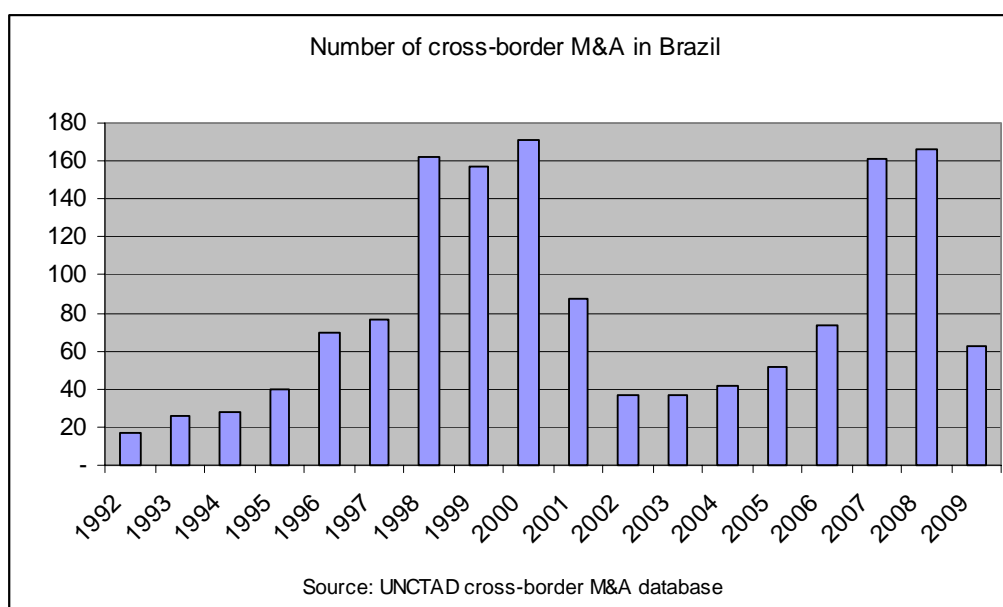
¹⁵

See section 155AAA of the CCA: <http://www.comlaw.gov.au>.

BRAZIL

1. Introduction

In the past twenty years, a remarkable increase of cross-border mergers, both in number and value, occurred in Brazil. Among several reasons, it resulted from the worldwide economic globalization, the liberalization of the Brazilian economy and the country's significant economic growth during the past few years. Thus, the increase in international merger activity was a natural consequence. The graphic below demonstrates the evolution of cross-border mergers in Brazil over the last two decades.



It is not possible to precisely quantify the number of cross-border mergers that were submitted to the Brazilian competition agencies, since only those that meet Brazilian legal thresholds are subject to mandatory notification. In recent years, important mergers were announced in the banking and telecommunications sectors, giving them an important weight among the major cross-border mergers in Brazil. Examples of these transactions can be found in the international merger between the Brazilian *Itaú* and the American *Bank of Boston*, and the one between the Swiss *UBS* and the Brazilian *Pactual* – both transactions took place in 2006.

This paper intends to provide a summary of cross-border mergers control in Brazil. Firstly, it makes a short overview of the Brazilian Merger Review System. Then, it presents an outline of Brazilian international agreements on cooperation with other competition agencies on merger control. Subsequently, a few cases were selected to illustrate some recent cross-border mergers analyzed by Brazilian competition agencies. Finally, the paper is completed by a brief conclusion.

2. Overview of the Brazilian Merger Review System

The Brazilian Merger Review System is governed by Law n° 8.884 of June 11, 1994. The “Brazilian Competition Policy System” (hereinafter, “BCPS”) is composed of three agencies: the Administrative Council for Economic Defense (“CADE”), the Secretariat of Economic Law (SDE) of the Ministry of Justice, and the Secretariat of Economic Monitoring (SEAE) of the Ministry of Economy. In merger control, CADE has adjudicative authority, while SDE and SEAE are primarily responsible for providing legal and economic opinions. All decisions taken by these agencies may be subject to judicial review in Brazilian courts.

Pursuant to the Brazilian legislation, any merger that may limit or otherwise restrain competition must be notified to the BCPS and submitted to CADE for review. The notification is mandatory if any of the merging parties had at least R\$ 400 million (approximately €175 million) in Brazilian revenues in the last fiscal year, or if the market share of the parties, in the relevant market as defined by the parties themselves, is equal to or in excess of 20%. There is no exception to the notification requirement where the thresholds are met. As a result, foreign-to-foreign transactions or transactions that do not involve overlap are subject to these same rules. The Brazilian merger review system may be considered *a posteriori* because mergers may operate before CADE’s final approval, and even before the notification to competition agencies. Nevertheless, considering the nature of this merger review system, the risk of denying approval and consequently undoing mergers that were already implemented exists, as it was the case with the merger between *Nestlé* and *Garoto* in 2002.

3. Co-operation among competition authorities

3.1 Bilateral

Nowadays, the BCPS has entered into bilateral agreements with seven foreign agencies, namely with those from Portugal (2010 and 2005), Russia (2009 and 2001), European Union (2009), Canada (2008), Chile (2008), USA (2003) and Argentina (2003). Six of these agreements are applicable to cross-border merger control and five of them have explicit provisions on cooperation and avoidance of conflicts in order to minimize any potentially adverse effects of one country’s competition law enforcement on other countries’ interests in the enforcement of its respective competition laws.

3.2 Regional: MERCOSUR

Member States of MERCOSUR have entered an agreement that includes provisions on cross-border merger control. The “Agreement for the Protection of Competition in MERCOSUR” was signed in the City of Fortaleza in Brazil, through the Common Market Counsel’s Decision n° 18/96, of December 17, 1996, and it serves as an umbrella agreement for competition policy in the region. The main purpose of this Agreement is the protection of competition in MERCOSUR. Its regulations are applicable to all practices, originated from either individuals or legal entities (from private or public sectors), that cause or intend to cause harmful effects on the competition of the region and on commerce between Member States.

In regard to merger review, three aspects of the Agreement deserve to be highlighted. First, the Agreement compels Member States to establish common rules on merger control but does not determine how such common merger review system should be. Second, it creates a regional Competition Protection Committee in MERCOSUR, composed by the national competition agencies which are parts of the Agreement. Third, it sets forth general procedural rules for the execution of the Agreement, which includes the general guidelines for cooperation between the MERCOSUR’s institutions and national competition agencies.

In 2006, a specific agreement was entered by MERCOSUR's Member States, namely the "Agreement for Cooperation between Competition Agencies for Regional Merger Review". It was approved by its Common Market Counsel through the Decision n° 15 of July 20, 2006. The purpose of this agreement is to set out in detail the cooperation mechanisms between national competition agencies on merger review matters. This agreement defines some important key-concepts for the control of regional dimensions mergers. Among other provisions, this Agreement establishes that if one competition agency is notified of a merger that may affect another Member State, it shall inform its homologous counterpart of this merger within fifteen days in order to start the cooperation proceedings (Article II). Furthermore, competition agencies may request at any time the execution of cooperation proceedings if it is believed that a merger taking place in another country's territory may affect its national market. The competition agency that receives such request is not bound to start cooperation proceedings but it is under a legal obligation to analyze such request, and to send a formal response to the requesting competition agency (Article IV). The Agreement also provides that competition agencies shall contemplate the convenience of coordinating their control procedures while examining the same or connected mergers, and shall take into consideration the goals set by the competition policy of other Member States (Article V).

These regional provisions within MERCOSUR do not impede divergent decisions regarding cross-border mergers. However, cooperation mechanisms facilitate exchanges and improve coordination between competition agencies.

3.3 *International: ICN, OECD and UNCTAD*

Brazil holds a strong participation in ICN's work and activities. Brazilian competition agencies integrate ICN's Steering Group and co-chair both the Agency Effectiveness Group (namely CADE) and the Cartels Group (namely SDE). Furthermore, Brazil has been recently chosen to host the ICN's Annual Conference in 2012, to be held in the City of Rio de Janeiro. The Brazilian contributions in the Mergers Group and Unilateral Conducts Group are made mainly through the participation in Annual Conferences, Workshops, and through Non-Governmental Agencies (NGAs) from different backgrounds (academics, lawyers, economists, etc.).

In respect to OECD activities, the Peer Review of Competition Law and Policy in Brazil, jointly published by the OECD and the IDB, was launched in São Paulo on 14th May 2010. This is the second Peer Review of Brazil's Competition Policy System undertaken by OECD in partnership with the IDB. The first Report was issued in 2005 and recommended changes to improve the system, including legislative amendments to Competition Law that would promote and protect competition throughout the Brazilian economy. The 2010 Report describes the considerable progress made since 2005 and highlights further actions that could be done to implement the structural changes envisaged in the proposed amendments and modifications to Brazil's Competition Law. The analysis and recommendations contained in the Peer Review will hopefully prove useful to this reform process and strengthen Brazil's competition regime.

In regard to UNCTAD, Brazil has naturally played an important role as developing country, in particular as a regional leader in Competition Policy in South America. For instance, CADE participated in the Conference for Competition Protection held in November 2009 in Asunción, Paraguay, side-by-side with UNCTAD and the Chilean competition agency. The main goal of the event was to discuss the importance of the approval of Paraguay's first Competition Law which waited Congress endorsement. Brazil has also presented the following papers during UNCTAD's Intergovernmental Meeting held in November 2004 in Geneva, Switzerland: Institutional Advocacy, Antitrust Compliance Programs as Effective Instruments for Competition Advocacy, and Cooperation and Dispute Mediation Mechanisms in MERCOSUR related to Competition Law and Policy.

4. Case Law

4.1 *Borg Warner / Eaton (2006)*

It concerns the acquisition of the entire shares of *Eaton s.a.m, Monaco* (“Eaton Monaco”) by *Borg Warner Transmission Systems Inc.* (“Borg Warner”), a U.S. based company. The cross-border merger took place on September 17, 2006 and it was notified to the BCPS on October 05, 2006.¹ The companies were not based in Brazil and they did not have any direct activity in the Brazilian market. In this case, an important debate was held within BCPS regarding the effects doctrine. While SDE sustained that the merger should not have been notified to BCPS since no direct effects were produced in the Brazilian territory, CADE’s former Commissioner Luis Fernando Schuartz explained in his vote that the enforcement of the Brazilian legislation is justified when it is foreseeable that a proposed merger may have an immediate or potential effect in its territory. In spite of this debate, the merger was unanimously approved with no restrictions because no significant competition concerns were raised in the Brazilians markets.

4.2 *DuPont / Chemtura (2008)*

In this case, CADE analyzed an interesting cross-border merger between two U.S. companies: *E.I DuPont de Nemours and Company* (“DuPont”) and *Chemtura Corporation* (“Chemtura”).² DuPont is operating in approximately ninety countries and offers a wide range of innovative products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel. Chemtura is a global specialty chemicals company with leading positions in several markets worldwide. DuPont and Chemtura were both 100% U.S.-held companies and operated in Brazil through their Brazilian wholly-owned subsidiaries, particularly *Du Pont do Brasil S/A* and *Chemtura Indústria Química do Brasil Ltda*. The merger was notified to the BCPS on February 25, 2008, since it indirectly affected the Brazilian market. After the legal and economic opinions, respectively from SDE and SEAE, the case was submitted to CADE.

The first issue to point out is the vote of Commissioner Olavo Chinaglia to justify the Brazilian jurisdiction based on the effects doctrine. Even though the effects doctrine is largely used in competition law worldwide, its provisions and delimitations in national case law enables a better understanding of this important international subject. Another international aspect to point out relates to the BCPS’ territorial limits to enforce its rulings. In his vote, Commissioner Olavo Chinaglia recognized that the merger could have certain adverse effects in the competition environment of a specific Brazilian market (namely, the Brazilian market of “gas HFC 227ea” used in fire extinguishers). This concern was due to the high horizontal concentration found in the Brazilian relevant market (nearly 80%). This product (gas HFC 227ea) is not produced in Brazil and it is only commercialized in Brazilian markets through importations. Commissioner Chinaglia pointed out that, in such cases, the BCPS ability to intervene is significantly reduced for two reasons. First, any structural or behavioural remedies imposed on the U.S. merging companies would surpass the merger’s effects in Brazil. Secondly, any remedy in practice would face a clear enforcement problem. Thus, he concluded that any intervention would exceed the territorial limits of BCPS jurisdiction and, finally, the merger was approved without condition. The U.S. Federal Trade Commission (FTC) was also notified so that any remedy that it eventually found appropriate could be imposed, considering the risk of monopolization of a specific relevant market. However, neither a direct cooperation nor coordination was established between the Brazilian and the U.S. competition authorities in this particular case.

¹ BCPS Merger file n° 08012.009358/2006-74.

² BCPS Merger file n° 08012.001312/2008-79.

4.3 *Dow / Rohm and Hass (2008)*

The companies *Dow Brasil S/A* (“Dow”) and *Rohm and Haas Química Ltda.* (“Rohm and Haas”) merged on July 10, 2008 and notified the BCPS on July 31, 2008.³ These holding companies are based in the U.S. and develop worldwide activities (including Brazil and MERCOSUR) in the chemical and the petrochemical markets. By the time CADE analyzed the merger, it had already been submitted and approved by several other agencies (South Africa, Turkey, Canada, Taiwan, China, Mexico and European Union). This fact enabled BCPS to review this merger taking into consideration decisions from foreign agencies. For instance, SEAE decided not to analyze a particular market based mostly on information and conditions imposed by the FTC in its decision (FTC compelled the Dow Group to sell its productive assets in this particular market to a competitor). CADE also considered the FTC’s decision in its reasoning. In his vote, Commissioner Carlos Emmanuel Joppert Ragazzo justified that a vertical integration analysis of the merger would not be necessary because the conditions imposed by FTC eliminated the Brazilian competition concerns in this regard. Hence, this case seems an example of coordination in cross-border mergers since elements of a foreign decision, in particular certain conditions imposed by the FTC to authorize the merger in the U.S., were taken into consideration in the BCPS merger control analysis.

5. Conclusion

The number of cross-border mergers increased considerably in Brazil in the past twenty years. In the international scenario, many improvements have been made in order to solve or at least minimize problems related to this matter. At the bilateral level, Brazilian competition agencies have entered into several international agreements with other competition agencies worldwide, which include provisions of cooperation on cross-border merger control. At the regional level, Brazilian competition agencies have entered into an important agreement within MERCOSUR, which imposes an obligation of cooperation between its Member States. At the multilateral level, Brazilian competition agencies have also effectively participated in various international forums worldwide, such as ICN, OECD and UNCTAD.

³ BCPS Merger file nº 08012.007982/2008-07.

BULGARIA

1. Historical development of merger control regime in Bulgaria

A merger control regime was established in Bulgaria with the introduction of the first Law on Protection of Competition (LPC) back in 1991. Since then, the competition rules, including the provisions on merger control, have undergone several major amendments, notably the adoption of new LPC in 1998 (significantly amended in 2003) and the now acting Law on Protection of Competition, which entered into force in December 2008 and repealed the law of 1998.

The LPC of 1991 provided as its aim “to create conditions for free entrepreneurship in industry, trade and provision of services, as well as for free setting of prices and protection of the interests of consumers”. In order to guarantee the fulfillment of its aim, the law stated that it would provide “protection against abuses of monopoly position on the market, against unfair competition and other actions, which might lead to restriction of the competition in the country”. As it could be seen, the first Bulgarian Law on Protection of Competition of 1991 was focused on possible abuses of monopoly position and on infringements, constituting unfair competition practices (e.g. misleading advertising, impairing the good name of a competitor, etc.). This focus of the law entailed from the state of the development of Bulgarian economy at that time. The economic changes in Bulgaria, namely the transition to market economy and the emergence of private companies in parallel to the existing state enterprises and monopolies had just started at the time of the adoption of the first competition law.

Even though the LPC of 1991 put a major focus in areas other than merger control, the law included special provisions on this matter. First, it was stated that those mergers, leading to the establishment of monopoly position, thus significantly restricting the free competition or the free setting of prices, should be forbidden. Second, a mandatory prior notification regime was established, requiring the parties to the merger to notify the Commission on Protection of Competition and to wait for authorization/non-opposition from the Commission in order to finalize the deal. It should be noted that during period of enforcement (1991-1998) of this first Law on Protection of Competition, merger cases were almost non-existent, which was due to the stage of development of Bulgarian economy.

By the end of the period however, significant changes in Bulgarian society began to take place. At the level of economy, the private sector was growing more and more steadily, foreign investors were coming to Bulgaria, the government put a focus on fast and overwhelming privatization of state-owned enterprises. At a political level, Bulgarian government took a steady course toward Bulgaria becoming an EU Member State. In the beginning of 1998, the Council of Ministers adopted a Strategy for Bulgaria’s accession to the EU. Comprehensive legislative amendments, leading to the harmonization of Bulgarian national legislation with the EU *acquis communautaire*, were one of the major developments in Bulgaria in the following 10 years, leading to the country becoming an EU Member State as of 1 January 2007.

In the process of legislative alignment of the national legislation with the EU *acquis*, the competition law is a good example of following the European and international best practices. In 1998, a new Law on Protection of Competition was adopted, repealing the LPC of 1991. The LPC of 1998 was a major and big step forward toward the establishment of modern competition law regime in Bulgaria. The LPC of 1998, as structure and with a view of the substantial rules, incorporated all areas of competition law, namely:

prohibition of abuse of dominant or monopoly position, of restrictive agreements, decisions and concerted practices, as well as detailed provisions on merger control. The basic notions and the provisions of the LPC of 1998 in the area of anti-trust were based on the Art. 81 and 82 of EC Treaty and the corresponding EU regulations, directives, etc. As regards the merger control regime, the basic provisions of the LPC of 1998 were harmonized with the then acting EU Merger Regulation (EEC) No 4064 of 21 December 1989.

In particular, the new merger control regime under the LPC of 1998 included:

- Detailed definition of the deals, which fall within the scope of merger control;
- Obligation for prior notification of the concentration for the parties to the deal;
- Threshold of 15 million BGN (EUR ~ 7.5 million) for the total turnover of the merging parties in order for the deal to be subject to merger control;
- Detailed information on the data to be included in the notification form;
- Set deadlines for the CPC to issue decision – 1 month for mergers, which do not raise competition concerns, and additional 3 months for mergers, going to second stage investigation;
- Possibility for the CPC to impose remedies on the parties as condition for the authorization of the deal;
- Imposition of sanctions in case of failure to notify a merger before the CPC;
- Prohibition for the parties to the merger to perform any actions related to the deal before the CPC decision.

The law provided that a merger might be authorized if it did not lead to establishment or to strengthening of dominant position, which in turn might hinder the effective competition on the relevant market. At the same time, the law contained a provision for 35% market share of the relevant market as a threshold, pointing to the potential existence of dominant position¹.

The LPC of 1998 previewed also the possibility for the CPC to authorize mergers, for which the benefits (modernization of the production or of the economy as a whole, improvement of the market structures, attraction of investments, increase of the competitiveness on external markets, creation of new jobs, better satisfying the interests of the consumers) outweighed the negative impact on competition on the relevant market (creation or strengthening of a dominant position). The law stipulated that the appraisal of the merger should take into account considerations of: the position of the undertakings on the relevant market before and after the concentration, their economic and financial power, access to supply of and markets for the respective goods and services, the legal or other barriers to entry to the markets.

¹

Law on Protection of Competition of 1998, amended in 2003 (repealed)-Art. 17. (1) The position of an undertaking which, in view of its market share, financial resources, possibilities for access to the market, level of technology and economic relations with other undertakings may hinder competition in the relevant market, since it is independent of its competitors, suppliers or purchasers shall be dominant. (2) An undertaking shall be considered to have a dominant position if it has a market share higher than 35 per cent of the relevant market, unless the conditions under paragraph 1 are satisfied.

2. Current national legislative framework in the area of merger control

In December 2008 a new Law on Protection of Competition entered into force. This law introduced major amendments to Bulgarian competition legislation following Bulgaria's accession to the European Union as of 01.01.2007. Even though the most significant amendments to the law, compared with the repealed LPC of 1998 (amended in 2003) relate to the procedural provisions, most of the very few amended substantial provisions refer to merger control regime.

In the area of merger control the new LPC took into account the provisions of Council Regulation (EC) No. 139/2004, as well as the recommendations and best practices from international organizations like International Competition Network (ICN).

Mergers, which fall within the scope of Article 1 of Council Regulation (EC) No. 139/2004 have a Community dimension and the EC has the exclusive competence of appraising them. The concentrations that do not have a Community dimension could fall within the jurisdiction of the respective Member States and shall be reviewed in accordance with the national law and the legislation on the control on concentrations. Therefore the LPC merger control regime applies and the CPC powers are confined to concentrations, which are of national dimension.

The law provides that mergers shall be subject to mandatory prior notification to the CPC where the aggregate combined turnover of all undertakings participating in the concentration in the territory of the Republic of Bulgaria in the preceding year exceeds the threshold of BGN 25 million and the turnover of each of at least two of the undertakings participating in the concentration or the turnover of the undertaking – subject to acquisition in the territory of the Republic of Bulgaria during the preceding fiscal year exceeds BGN 3 million.

As it could be seen, the new LPC increased significantly the merger notification threshold from BGN 15 million to BGN 25 million. In addition to the turnover threshold, the local nexus criterion was added as second cumulative criterion, namely the requirement each of at least two of the undertakings participating in the concentration or the undertaking – subject to acquisition in the territory of the Republic of Bulgaria to have operated on Bulgarian market (turnover exceeding BGN 3 million during the preceding fiscal year).

These important amendments were introduced following a detailed analysis of the CPC enforcement practice in the area of merger control under the LPC of 1998 (amended in 2003). This analysis revealed that the majority of the merger cases assessed by the CPC in the period 2003-2007 were not of the scale to seriously impede competition or concerned undertakings, which were not active on Bulgarian market. Due to these reasons, the turnover thresholds were increased and the local nexus criterion was added. Such an approach was based on ICN Recommended Practices for Merger control.

Another major amendment of substantial provisions of the LPC, which has an impact on merger control regime, was the abolition of the 35% threshold for the existence of dominant position.

In the new LPC the test of dominant position in assessing a merger has been preserved by virtue of which the CPC shall authorize a merger provided that it does not lead to the creation or strengthening of a dominant position, as a result of which effective competition in the relevant market might be significantly distorted. The law contains a provision according to which after the completion of the in-depth investigation the CPC may authorize a merger that leads to creating or strengthening of a dominant position but its overall positive effect outweighs the negative impact on competition in the relevant market.

Even though the possibility for imposing remedies (structural or behavioral) to the merging parties existed in the LPC of 1998 (amended in 2003), the new LPC of 2008 introduced more detailed provisions

in this respect, including the possibility for the parties to propose remedies to the CPC, which did not exist in the LPC of 1998.

With respect to procedure for assessment of mergers, the LPC clarifies that the first phase (so called preliminary investigation) shall be completed within 25 working days starting from the working day following the initiation of proceedings. Suspension of the time limits (“stop the clock”) is provided for where additional information is needed until it is furnished by the notifying parties.

The Law on Protection of Competition specifically provides for that the rules on merger control apply for those concentrations which have national dimension. The notified mergers are assessed therefore for their impact on the competition on the territory of Bulgaria.

As already mentioned under p.11, mergers with Community dimension, do not fall within the scope of the LPC, and the law refers for these mergers to Council Regulation (EC) No. 139/2004 and to the European Commission, which has the exclusive competence of assessing them.

In mergers, assessed under the national competition rules, but with multinational impact where CPC considers that sharing of confidential information between competition authorities might have been beneficial to a case, there is a possibility to use a confidentiality waiver – a declaration which is provided from notifying party where it agrees to reveal to third party some „commercial sensitive information”, which is part of the notification. In 2010 the CPC has adopted a template for confidentiality waiver, based on the ICN’s Model Waiver. Such a waiver has already been required for the purposes of successful cooperation with Romanian Competition Authority in relation with a merger investigation on a case ², referred for assessment to the Bulgarian Commission on Protection of Competition and to the Romanian Competition Council by the European Commission under the provisions of Council Regulation (EC) No. 139/2004.

²

COMP/M.5790 – LIDL/Plus Trei Romania/Plus Trei.

CHILE

1. Chile's merger control regime

1.1 Legal framework

Chilean Competition Act ("the Act")¹ does not address mergers or acquisitions directly. However, several sections of the Act provide the substantive basis for merger control by both the Fiscalía Nacional Económica ("FNE"²) and the Competition Tribunal ("TDLC"³) under two alternative procedures.

The first procedure is voluntary and non-adversarial⁴. There is no general pre-merger notification of the proposed merger to the FNE⁵. But either the merging parties or the FNE may request the TDLC to review the transaction. Mergers that may raise antitrust concerns are increasingly being voluntarily submitted to the TDLC by the parties involved⁶. In this case, the FNE's role is to submit a report with its opinion. The report is not binding for the TDLC, but is considered an important antecedent. The transaction can be cleared, blocked or subject to conditions for approval. The merger cannot be completed before the approval. The TDLC's final decision may be challenged before the Supreme Court. The Court generally acts with deference, mainly reviewing the measures and conditions imposed by the TDLC.

The preliminary review procedure has several advantages. If the transaction is approved or the merging parties comply with the conditions, there is no further liability with respect to the specific transaction. Also, after a non-adversarial proceeding has begun, the FNE or other third parties with legal standing to act in the case cannot initiate an adversarial procedure (e.g. seeking an injunction to suspend the transaction).

¹ Decree Law N° 211/1973.

² FNE stands for *Fiscalía Nacional Económica* (Competition Agency), an administrative and autonomous body in charge of competition law enforcement (investigation, and litigation) and competition advocacy. The FNE also acts as an independent technical body on competition law issues (drafting technical reports).

³ TDLC stands for *Tribunal de Defensa de la Libre Competencia*. TDLC is a judicial body with specific jurisdiction on competition law issues.

⁴ DL 211, articles 3, 18 N°2 and 31. The TDLC has issued instructions aimed at regulating the procedure in case of conflicting proceedings (adversarial and non-adversarial) regarding the same issue (*Auto Acordado N° 5/2004*) and about the information that parties must provide in these proceedings (*Auto Acordado N° 12/2009*).

⁵ Mandatory pre-merger notification to the competition institutions is required only for transactions involving television and radio. Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. Transactions in certain industries, such as media, banking, and electricity require approval by other governmental agencies. The TDLC has ordered mandatory pre-merger consultation for certain firms and markets, as remedies following its decisions about anticompetitive restraints (e.g. in the supermarket industry).

⁶ The voluntary procedure does not consider submission fee. Since 2004, the TDLC has decided 7 transactions voluntarily submitted.

The second procedure is adversarial: under Art. 3 of the Act, a merger or acquisition (pending or completed) may be considered an infringement if it prevents, restricts or hinders “free competition”⁷ or tends to produce such effects⁸.

Arguably, the adversarial procedure is less likely to be used in the future, after an amendment to the Act allowed the FNE to request the TDLC the review of future mergers⁹. This faculty, however, largely depends on the FNE’s available resources.

1.2 *FNE’s Guidelines for Horizontal Merger Review*

The FNE has provided guidance on merger analysis by issuing its *Internal Guidelines for the Analysis of Horizontal Concentration Operations* (2006) (“Merger Guidelines”)¹⁰. Although the Merger Guidelines is a non-binding document, the FNE conducts its analysis following the procedure established in them as much as possible.

The Merger Guidelines state that merger analysis aims at preventing increased concentration in the relevant market as result of the merger¹¹. Among the anticompetitive risks identified in the guidelines are unilateral behaviour by the merging company and post-merger coordination in the market. The Merger Guidelines balance these and other risks against pro-competitive efficiencies. In this sense, the substantive test is shaped as a risk-effect test similar to the Substantial Lessing of Competition (SLC) test rather than a structural test such as the dominance test.

The Merger Guidelines presume that if the market after the merger has an HHI lower than 1000 points, the merger is unlikely to entail potential anticompetitive effects. Markets with HHI between 1000 and 1800 points are considered moderately concentrated. Finally, post-merger HHI higher than 1800 points are regarded as potentially harmful and require further review. In this case, the FNE opens a formal investigation and may decide to initiate a review process before the TDLC if the parties to the transaction do not bring the operation to the TDLC for review¹².

Entry barriers and entry conditions receive an in-depth treatment in the Guidelines. Entry barriers are defined as “*an impediment to competitor’s entry or cost advantages that an incumbent has over a firm wishing to entry*”¹³. Legal barriers and sunk costs are addressed in detail. The analysis of entry conditions aims to assess the actual likelihood, timeliness and sufficiency of entry. This means that not only entry

⁷ “Free competition” is the wording used by Chilean law when referring to competition law.

⁸ Art. 3 of the Act: “*Whoever executes or enters into any act, agreement or convention, either individually or collectively, which hinders, restricts or impedes free competition, or which tends to produce such effects, shall be penalized with the measures indicated in Article 26 hereof, notwithstanding any preventive, corrective or restrictive measures that could be ordered in each case, with regard to said acts, agreements or conventions*”.

⁹ Before Act N° 20.361/2009, only the parties were able to request the review of future transactions. The FNE had only the power to request the review of completed transactions. The amendment aimed at broadening the FNE’s powers.

¹⁰ Available at http://www.fne.gob.cl/?content=guia_concentracion

¹¹ Merger Guidelines, p. 5.

¹² Merger Guidelines, pp. 14-15

¹³ Merger Guidelines p. 15.

barriers are assessed, but also any circumstance affecting entry conditions. For instance, the guidelines deal specifically with strategic behaviour¹⁴.

The Merger Guidelines also deal with failing firm situations and the analysis of overseas mergers with impact on the Chilean market. Regarding the latter, the Merger Guidelines give *prima facie* lenient treatment to mergers between undertakings located abroad that affect the ownership structure of subsidiary companies in Chile. However, the FNE considers the potential risks for competition arising from such transaction. This provision is the only specific reference to cross-border effects of mergers¹⁵ in Chilean legislation.

The Merger Guidelines represented an important first step in the standardization of competition rules for merger control to increase certainty and transparency. In the coming months the FNE aims to issue a new version, after a period of review initiated in 2009. The new draft may incorporate developments on cross-border mergers.

2. Merger cases with cross-border elements in Chile

The selection criterion of the following cases has been broad: all merger cases reviewed by the TDLC since 2004 where a relevant “cross-border element” is present have been included.

2.1 Cases reviewed by the TDLC

2.1.1 Telefónica Móviles takeover on BellSouth

In 2005, the TDLC reviewed a takeover by the Spanish company *Telefónica Móviles S.A.* (“TM”) of the Chilean companies *BellSouth Comunicaciones S.A.* and *BellSouth Inversiones S.A.* (the latter, the parent and controller company of *BellSouth Chile S.A.*, an actor in the international and domestic long-distance telecommunications industry). The acquisition was part of a broader purchase agreement between TM and the U.S. company *BellSouth Corporation* (“BS”) dated March 2004. Pursuant the agreement, BS agreed to sell to TM a number of business units operating in the telecommunication industry in several countries of Central and South America¹⁶.

The transnational dimension of the transaction was not considered in the market definition. The market was locally defined as *the analogue and digital mobile services supplied under radio electric spectrum concessions within Chilean geographic borders*¹⁷. International interconnection or roaming services, as a broader element for market definition, was discarded in the TDLC’s decision and considered not significant the calls traffic taken into account in the analysis

During the preparation of its report, the FNE requested the merging parties to inform on the stage of the merger control proceedings carried out in other jurisdictions, with the aim to avoid potential conflicts. Merging parties reported that in Chile the proceedings were more advanced and formal. In the TDLC’s decision none of the remedies imposed to the transaction was determined taking into account the eventual transnational dimension.

¹⁴ Merger Guidelines p. 18

¹⁵ A cross-border merger is “a merger between organizations in different countries” (Longman Business English Dictionary: http://lexicon.ft.com/Term?term=cross_border-merger)

¹⁶ By the transaction TM agreed to acquire from BS directly or indirectly 100% of BS subsidiaries in Argentina, Chile, Peru, Venezuela, Colombia, Ecuador, Uruguay, Guatemala, Nicaragua and Panama.

¹⁷ TDLC, Decision N° 2/2005, p.59

2.1.2 Acquisition of Iberoamerican Radio Chile by a Spanish media group

In 2007, the TDLC reviewed the acquisition of *Iberoamerican Radio Chile S.A.* by the Spanish media group Prisa (through its Chilean subsidiary *GLR Chile Ltda.*). Prisa was also acquiring shares in several other radio broadcasting companies. The seller was *Claxson Chile S.A.*

Competition authorities were involved in the case because a specific legal provision¹⁸ requires that changes in ownership or control of media businesses must be communicated to the TDLC within 30 days after agreement. In cases of media needing a “concession” to operate (i.e. a special permission from the authority), the legal provision ordered the parties to pre-notify the merger to the competition authorities and the TDLC to issue a report.¹⁹

The TDLC’s review and report was aimed at assessing the impact of the transaction in the “media” market (*mercado informativo*).²⁰ In the actual case, the discussion was centred on whether the provision mandated the TDLC to protect the “public interest” (i.e. pluralism in the media) as well as competition, or whether the test was based purely on competitive risk or effects. In this regard, the TDLC held:

“...[C]onsidering the aims of the law, the interest at stake is that the social, cultural and political content communicated through a mass media firm could be verified, compared or contrasted with other media. In this sense, the provision does not require to vary the analysis from the one performed regarding any other merger under the competition law provisions, however, it orders for the analysis to take into account the additional consideration of the effects a merger in the media industry can have with respect to pluralism in the media and freedom of speech” (Gr. 8°).

According to the TDLC, the legislator considered competition as merely *one* of the appropriate means to reach, indirectly, a reasonable degree of pluralism and information diversity (Gr. 9°, 80°).

The relevant product market was defined as “spaces in AM and FM radio stations for publicity dissemination” (Gr. 29°), and the relevant geographical market was defined as “all the national territory with some particular local considerations for certain zones” (Gr. 37°). The TDLC imposed remedies based on both competitive analysis (e.g., it reduced the length of non-compete covenants in order to increase market contestability (Gr. 66°)) and the protection of pluralism in media content (e.g., it ordered the divestiture of radio spectrum concessions in certain areas (Gr. 87°)).

An additional extra-competition argument was raised against the merger. According to independent radio broadcasters, the transaction violated a legal provision in media regulations²¹ that ordered the verification of “conditions of reciprocity” before the approval of acquisitions of radio-spectrum concessions by legal entities with more than 10% of foreign capital – i.e., the provision ordered to check whether in the country where the investor is based, Chilean investors have the same rights and duties as foreign persons have in Chile. The TDLC dismissed the argument on the grounds of lack of competence, and referred the point to the telecommunications regulator (the competent body on this issue) (Grs. 88° - 91°).

¹⁸ Art. 38 Act. N° 19.733 (“media law”).

¹⁹ This scheme was subsequently changed. Following a 2009 amendment to the media law, the FNE is the issuer of the report. If the report is not favorable, both the FNE’s report and the investigation files are referred to the TDLC for merger review.

²⁰ Following the 2009 amendment to the media law, the FNE’s assessment only concerns the effects on competition.

²¹ Art. 9 Act N° 19.733.

The TDLC's approved the merger with mitigating remedies. The dissenting vote used mainly "non-competition" arguments (i.e. pluralism and ownership reciprocity) to block the merger. The Supreme Court upheld the TDLC's decision, indicating:

"[T]he imposed remedies seem appropriate and sufficient in order to protect competition hence ensuring media pluralism and by this mean freedom of speech and information diversity" (Gr. 6°).

2.1.3 *ING AFP Santa María and Bansander Merger*

The merger between *ING AFP Santa María S.A.* and *Bansander AFP S.A.*, in 2007, was a consequence of a transnational agreement between the foreign companies *ING Insurance B.V.* ("ING"), from The Netherlands, and *Banco Santander Central Hispano S.A.* ("Santander"), from Spain. The parties agreed that Santander would sell to ING the entire capital of legal entities ING held in pension funds in Colombia, Uruguay, Mexico and Chile.

When the TDLC reviewed the transaction in 2008, regulations and the particularities of the private pension funds industry justified a very narrow and domestic definition of the market. Also, the frame agreement between the parent companies was only submitted to the TDLC a few days before the final hearing. Arguably for these reasons, no transnational consideration was part of the TDLC's reasoning.

2.2 *Pending cases*

The FNE is currently preparing reports on three mergers with significant cross-border elements. In two of them, the merging parties submitted a consultation to the TDLC for merger analysis under a non-adversarial procedure. Since the three cases have not yet been decided, only a general outline and some potential cross-border elements are described.

2.2.1 *Chilean Copec's acquisition of Colombian Terpel*

In June 2010, *Compañía de Petróleos de Chile Copec S.A.* ("Copec"), a leading Chilean gas distributor, notified the TDLC the acquisition of significant capital interests in the Colombian gas group *Organización Terpel S.A.* ("Terpel"). The transaction aimed at expanding the participation of the Chilean group in the Colombian market. According to Copec's submission, its rival in the Chilean gas distribution industry, Terpel Chile, subsidiary of Terpel, was not an essential part of the transaction.

From a structural point of view, the merger may be considered a cross-border merger. The merger would generate risks in the Chilean market. During certain period of time (i.e. the period in which Copec will indirectly have an interest in its rival in Chile) the transaction may be framed as a horizontal merger, which consequence would be to reduce the market structure from four to three players.

Copec proposed a structural remedy: the complete divestiture of assets in Terpel Chile. However, since the divestiture could take about two years, Copec also proposed a number of behavioural remedies ("Chinese walls") to regulate Terpel's corporate governance, prevent any influence of the Colombian parent company in Terpel Chile, and avoid any exchange of sensitive information between both firms.

If the remedies are accepted, monitoring them will represent a significant challenge for Chilean competition authorities, since most of the behavioural remedies must be abided by a Colombian legal entity. It is likely there will be a need for cooperation with the Colombian competition authorities for the implementation and monitoring of such remedies.

2.2.2 *Integration of Lan and Tam airlines*

In August 2010, the FNE launched an investigation on the merger between two airlines: the Chilean Lan and the Brazilian Tam. Pursuant the agreement, Lan acquires 100% of Tam's shares, whose shareholders receive shares in Lan in exchange. In order to comply with Brazilian regulations regarding caps to foreign capital in airlines ownership, Lan acquire only a 20% of voting rights in Tam, leaving the remaining 80% in hands of current Tam's controllers. Once the merger is completed Lan will become "Latam". Both Lan and Tam's controllers will have sits in Latam's board. A shareholder agreement between Latam and Tam's controllers will regulate the corporate governance of the merging entity.

Being both public companies, the parties had already reported the planned transaction to the securities regulators in Chile, Brazil and U.S. before the FNE launched its investigation. The parties also submitted the transaction for merger review to the Brazilian competition authorities in October 2010.

In its public statement for opening the investigation²², the FNE identified very high concentration levels in three air flight frequencies (which are the relevant market to consider in this industry): Santiago-Sao Paulo, Santiago-Rio de Janeiro and Santiago-Asunción. In the first two frequencies, Lan and Tam jointly serve over 90% of the traffic in passengers and freight.

This merger case is certainly a good case-study. Chilean and Brazilian authorities are facing a cross-border merger and undertaking parallel reviews regarding a unique transaction. In order to explore the possibility of coordination with the aim of implementing and monitoring potential remedies, the competition authorities of both countries have had informal exchanges under the frame of a bilateral cooperation agreement in force since 2008.

2.2.3 *Nestlé and Fonterra Joint Venture*

In November 2010 foreign groups Nestlé and Fonterra submitted to the TDLC a transaction aimed at implementing in Chile their 2002 "Alliance Agreement" (also known as "Dairy Partner America"), aimed at developing in America (excluding U.S. and Canada) an alliance for joint production and marketing of certain dairy products. The transaction consists of a Joint Venture implemented by the acquisition by Nestlé group of the 50% of one of Fonterra's subsidiaries, Soprole S.A., changing the name of the latter to Dairy Partner America Chile S.A.

According to the own submission of the merging entities, different markets in Chile may be affected by the transaction. Downstream, different dairy products were identified as separate markets. Parties argued that potential price increases on dairy products could be disciplined by imports. National industry exports (around 20% of the total product in the last 3 years) are also mentioned in the submission. However, so far competition authorities have not inquired into the potential risks for foreign markets. Improvements in consumer's health and increases in sales of dairy products of better quality are some of the benefits of the transaction claimed by the parties in addition to the synergies on productive efficiency.

Politicians and agricultural interest groups have raised concerns about the transaction's possible effects on the upstream market of primary product (particularly milk). The concerns include topics such as jobs cuts and sunk investments made by milk producers. In 2004 the TDLC issued a ruling in the milk market which the merging parties are now citing as an important protection of fair market conditions that complements the mitigation commitments they propose. The parties also suggest commitments regarding corporate governance and ring-fence conditions aimed at reducing the risks of coordination between parent companies in the markets involved. However, there are no explicit references to potential risks for

²²

Available at: <http://www.fne.gob.cl/?content=notes&db=jurispru&view=9a004077ac7ed70c8425733e005df334>

competition in the foreign markets of Chilean exports, nor to the risks of coordination of the foreign parent companies abroad that might influence the behaviour of the Alliance Agreement in Chile.

The parties highlighted the Alliance Agreement has already been implemented in several jurisdictions such as Argentina, Brazil, Colombia, Venezuela and Ecuador. They also adjoined to their submission the approvals by the European Union's and Brazil's competition authorities. The FNE may request information from these and other competition authorities.

3. Cooperation among competition authorities, jurisdictional issues and remedies

3.1 Cooperation

Chile has signed several free trade agreements (FTAs) as part of its general trade policy. However, the country is not part of any regional organization with jurisdiction on competition matters. FTAs contain provisions regarding competition laws and policy of each party and a general frame for cooperation between national authorities. Chile is associated to the regional organization Mercosur²³ under an Economic Complementation Agreement which also contains provisions aimed at developing cooperation between national competition authorities. The competition provisions of the FTAs are not subject to the dispute resolution mechanisms of the treaties.

The FNE has signed several cooperation agreements and memorandums of understanding with foreign competition authorities²⁴. The content of these documents reveal part of the efforts aimed at implementing the OECD and ICN recommendations for cooperation and coordination between authorities from different jurisdictions specially in merger review. These instruments have not been used in its whole dimension in merger analysis and it is hard to conclude that they have been used as an instrument to address cross-border issues that a merger under review may involve.

The FNE cannot report so far cases of conflict with foreign competition authorities regarding a merger review. Such a conflict would be solved by direct consultations between authorities. The fact that our legal framework and the assessments of the Chilean competition authorities do not consider other public interests different than competition in the markets -whether it comes from a domestic or foreign undertaking or interested party- should be considered by other jurisdictions to prevent any such conflict.

3.2 Jurisdictional issues

Chilean competition authorities may request information from outside their jurisdiction either through the merging parties or through cooperation with foreign competition authorities.

Actions or decisions of foreign competition authorities regarding cross-border mergers are certainly taken into account. However, their influence in national decisions may be limited, depending on the structure of the relevant market.

Institutional arrangements ensure very high degrees of autonomy and independency of both the FNE and the TDLC. Competition authorities focus their actions and decisions on concerns about competition in markets and try to avoid integrating in their assessment other public interest considerations.

²³ Integrated by Argentina, Brazil, Paraguay and Uruguay.

²⁴ These agreements are available at: <http://www.fne.gob.cl/?content=notes&db=actualidad&view=2c41b664d320a0eb8425733f0054c768>

3.3 Remedies

The FNE cannot yet report examples of merger remedies with transnational dimensions or aimed at mitigating cross-border issues. Considering the reported cases, however, the FNE needs to take into account international recommended practices. They suggest working closely with the corresponding foreign authority from an early stage of the case, in order to exchange preliminary opinions (especially when the insights of the foreign competition authority may be relevant in the implementation and monitoring of the remedies).

4. Concluding remarks

Chilean competition authorities have increased their involvement in reviewing transactions with cross-border elements in the last few years. It is likely that this trend will continue in the next years. The roundtable presents a great opportunity for the FNE to analyse the topic ahead of the next review of its Merger Guidelines.

CHINA ¹

ISSUES ON REMEDIES TO TRANSNATIONAL MERGERS WITHIN THE MERGER CONTROL REGIME OF AML IN CHINA

Since the Anti-Monopoly Law of the People's Republic of China (hereinafter referred to as "PRC AML") became effective on August 1, 2008, the concentrations including transnational mergers have been included in the scope of antitrust review,² and meanwhile the regime for the conditional clearance of certain concentrations has been established (hereinafter referred to as "merger remedies"),³ which should also be applied to the transnational mergers within the jurisdiction of China. The relevant issues including the classification of the merger remedies, the process of negotiation thereon as well as the supervision and implementation thereof will be further discussed in this Article.

1. The preliminary establishment of the system for merger remedies in China

It is stipulated in Article 29 of the PRC AML that, "to the concentrations that will not be prohibited, the anti-monopoly authorities under the State Council may decide to attach restrictive conditions that will reduce the negative effects of the concentration in terms of competition." This Article is the basic legal basis of the merger remedies in China, and an important basis, on which such remedy system should be established. On such a basis, the Ministry of Commerce of China (hereinafter referred to as "MOFCOM") as the authority responsible for the review of concentrations under the PRC AML, promulgated the Measures on the Review of Concentrations, in which the classification of remedies, the proposal of remedies, the amendment of remedies as well as the supervision of the implementation thereof are stipulated in general in Articles 11-15. Besides, in order to further the implementation of the decisions attached with restrictive conditions on the divestiture of assets or businesses, MOFCOM promulgated the Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators. The system for merger remedies is certainly in its infancy in China, and the development and consummation of the relevant legal systems will be based on the summarization of the practical experiences in the future.

2. The main content of the system for merger remedies in China

The system for merger remedies in China involves multiple issues including the definition and classification of remedies, the negotiation and determination on remedies and the implementation and supervision of remedies.

¹ The author of this article, Mr. Shufeng Cui, is an official from the Ministry of Commerce of the People's Republic of China.

² The "concentration of operators" as stipulated in the PRC AML includes the mergers of companies as well as the transactions through which the control or decisive influence on other companies can be obtained.

³ The "clearance of concentration with restrictive conditions" as stipulated in the PRC AML should be corresponding to the "merger remedies" as mentioned in the EU competition law and the antitrust law of the United States of America.

2.1 *The definition and classification of remedies*

As mentioned above, it is clearly stipulated in Article 29 of the *PRC AML* that the purpose of remedies for merger control is to reduce the negative effect of a concentration in terms of competition; and remedies have been further elaborated in Article 11 of the *Measures on the Review of Concentrations* as the restrictive conditions to adjust the schemes of the transaction of concentration in question. Meanwhile, it is stipulated in Article 11 (2) of the *Measures on the Review of Concentrations* that, depending on the detailed situations of the transactions of concentration, the restrictive conditions should be classified as follows: firstly, structural conditions such as the divestiture of part of the assets or businesses of the operators participating the concentration; secondly, behavioral conditions such as for the operators participating the concentration to open fundamental facilities such as networks or platforms, license key techniques (including patent, know how and other intellectual properties), terminate exclusive agreements, etc.; thirdly, comprehensive conditions including both structural conditions and behavioral conditions.

2.2 *The negotiation and determination on remedies*

According to the *Measures on the Review of Concentrations*, the suggestions on remedies for merger control should be proposed by the operators participating in the concentration. After such proposals have been made, both MOFCOM and the operators participating in the concentration may bring forward comments and suggestions on the revision of the restrictive conditions. Where MOFCOM and the operators participating in the concentration have reached an agreement on the content of the remedies, MOFCOM will clear the transaction of concentration on such basis and the content of the remedies will be included in the final clearance decision as restrictive conditions.

2.3 *The implementation and supervision of remedies*

It is provided in Article 15 of the *Measures on the Review of Concentrations* that MOFCOM should supervise and examine the behaviors of the operators participating the concentration to implement the restrictive conditions, and such operators should report to MOFCOM on the situation of implementation according to the designated timeframe. Where the operators participating in the concentration fail to fulfill their obligations according to the restrictive conditions, MOFCOM may order for correction, and where the operators participating in the concentration fail to correct the situation within the specified timeframe, MOFCOM may take actions according to the relevant stipulations of the AML. Considering the importance of the structural conditions mainly including the divestiture of assets or businesses (hereinafter referred to as “divestiture”), MOFCOM specifically promulgated the *Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators*, in which the procedural rules involved in all the steps of the divestiture as well as substantive rules such as the duties and responsibilities of the relevant parties have been provided in details.⁴

3. *The situation of the implementation of the system for merger remedies in China*

Since the AML became effective, MOFCOM has applied remedies in six transnational mergers so far, including: the acquisition of AB (ANHEUSER-BUSCH COMPANIES INC.) by INBEV N.V./S.A., the acquisition of Lucite International by the Japanese Mitsubishi kunstsilke Co, Ltd, the acquisition of the American Delphi Corporation by the American General Motors Co., the acquisition of the American Wyeth Co. by the American Pfizer Co., the acquisition between two Japanese companies Panasonic

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For the detailed content of the *Interim Regulations on the Implementation of the Divestiture of Assets or Businesses in Concentration of Operators*, please refer to the official website of MOFCOM at <http://fldj.mofcom.gov.cn/aarticle/c/201007/20100707012000.html?1134211981=3304667947>.

Co. Ltd and SANYO Electric Co., Ltd., and the acquisition of Alcon Co. by Novartis AG.⁵ Among the restrictive conditions attached to the decisions of the above six cases, there are structural conditions, behavioral conditions and comprehensive conditions. MOFCOM has supervised the behaviors of the relevant parties to implement the restrictive conditions according to law, through which the effectiveness of such implementation has been ensured.

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For the decision of the above mentioned cases, please refer to the official website of MOFCOM at <http://fldj.mofcom.gov.cn/static/ztxx/ztxx.html/1?1906094989=3304667947>.

COLOMBIA

1. Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

1.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

In Colombia, mergers and acquisitions are defined by law as "business integrations" which includes any act of concentration, merger or consolidation between two or more economic agents engaged in the same productive, distribution, supply or consumer activity. Any integration that exceeds a certain threshold must be notified to the authorities for a prior review.

After the Law 1340 of 2009, the “*Superintendencia de Industria y Comercio (hereinafter SIC)*” was established as the single competition authority for prior review of integrations in all sectors, except for mergers in the financial and aeronautical sectors, where SIC must provide a concept about the competition effects of the merger and may suggest remedies or conditions.

Since 2006, the SIC established that integrations between firms with combined annual operating revenues or total assets of more than 100.000 legal minimum monthly wages (US \$26 million) have to be notified to the SIC, in order to perform an analysis and decide whether to grant an authorization for the integration in case it does not reach concentration levels that would restrict competition in the markets. However, taking into account that markets are dynamic, the SIC updates such thresholds annually in order to have an objective and current criteria for reviewing business integrations that indeed deserve to be reported according with their impact on the national markets.

For that reason, with Resolution 69901 of 2009, the SIC established a new threshold for prior review of integrations during 2010, of f 150.000 legal minimum monthly wages (US \$ 42 million).

1.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

In Colombia, cross-border mergers are understood as integration processes in which a foreign undertaking, who operates directly or indirectly (through distributors) in Colombian territory, merges or acquires a Colombian company. It is also considered a cross-border merger when two firms that merge outside the country sell their products in the Colombian market, and have presence in Colombia (through subsidiaries or controlled companies). Therefore, if the SIC requires information from the parties involved in a concentration process, will obtain it from the Colombian controlled or subsidiaries companies, since they are located within the Colombian territory. Thus, no attempts to obtain information from parties located outside Colombia have been made, because the information has always been obtained from the location in Colombia of the parties.

1.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

All SIC's integration decisions are taken based on internal analyses and the decisions are reached independently. However, SIC does study extensively the decisions taken by foreign authorities regarding particular mergers, but views them as doctrinal developments that have no binding power.

Recently, regarding the merger between Coltabaco, a cigarette producer company owned by Phillip Morris International and Protabaco, a locally owned cigarette producer, SIC reviewed decisions undertaken by the EC commission regarding mergers of cigarette producers that could be somehow similar to the studied merger, as well as decisions taken by other Latin American authorities. Although the SIC's final decision took into account the different arguments presented in the reviewed decisions, it has also been conscious that the definitions of relevant markets and other consideration vary greatly among contexts. The SIC rejected the merger in the terms it was originally proposed, and after a special petition (allowed by administrative law), determined that the proposed merger could only proceed if very demanding conditions were met.

Moreover, private practitioners generally invoke decisions of foreign authorities that support the outcome that best suits the interests of the merging parties. In this sense, it has become a common practice to use comparative competition law as part of the arguments presented during merger and other competition law proceedings.

1.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

Political intervention is not possible at any merger control process in Colombia. The SIC is autonomous and bases its decisions only on economic and legal assessments made within the institution.

1.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

The SIC has proceeded under the understanding that, although some mergers may produce effects that can be undesirable from different perspectives, its sole concern has been maintaining competition in the relevant markets. Law 1340 of 2009 states in its article 3 that the administrative proceedings it undergoes have to be guided by consumer welfare, efficiency, and maintaining free market participation. These three purposes determine how competition analysis proceeds in merger review, as well as in monopolization, abuse of dominance and other restrictive practices that are considered illegal.

In the aforementioned proceeding of the merger between Coltabaco and Protabaco, the SIC studied the likely effects that the merger would have on the tobacco – growing community, since the merging parties were the only buyers of tobacco leaf in the country. This was not done because competition laws orders it to be so explicitly, but because it was realized that the eventual merger would produce undesirable effects in upstream and downstream markets, which also fell under the scope of the analysis. In particular, the study of the market of tobacco leaf was done in order to determine the effects of this merger on the welfare of tobacco growers.

1.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

It's been realized of lately that it is necessary to enhance SIC's capacity to deal with cross-border mergers. In this sense, it has become important to take into account the effects on competition of current negotiations of competition chapters in free-trade treaties with different countries and the project to implement a supranational regime within the Andean Community. For those reasons, efforts in this direction should be pursued by, for example developing, bilateral co-operation agreements with other competition authorities.

2. Remedies (types, consultation, monitoring and enforcement)

2.1 Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

The SIC, in order to offset any possible harmful effects on competition brought by a merger, conducts an economic analysis and if necessary imposes remedies or conditions (structural and behavioral) that must be fulfilled to authorize the transaction. These conditions may include transfer of assets, maintaining separate business units, providing competitors with open access to logistics and production facilities, terminating customer loyalty schemes, transferring technology, price and cost surveillance, maintenance of separate trademarks, and disclosure of commercial information.

There have been many cases in which the SIC has imposed conditions (structural and behavioral) in order to grant an authorization for a merger. For example, very recently, both structural and behavioral conditions took place in the merger between the two major tobacco companies in Colombia, Coltabaco (Philip Morris) and Protabaco. Here, the SIC imposed the condition of selling to a third party one of Protabaco's assets (the brand *Premier*) and behavioral obligations concerning mainly the relationship with the tobacco leaf growers. Other examples include the merger between the companies *Televisa* and *Editora Cinco*, where the parties were obliged to sell to a third party one of their assets, the magazine *"Tu hijo y tu"*, and the merger between two of the largest retailers chains (*Exito* and *Cafam*), where likewise, the parties had to sell seven outlets.

At this point, it is important to recall some of the merger decisions involving foreign undertakings that had the most significant impact in Colombian economy.

- In 2007, even though it was approved in the rest of the world, the SIC objected the merger between the two Colombian subsidiaries of *Linde AG* and *The Boc Group PLC* (*Aga Fano* and *Cryogas S.A.*), world leaders gas companies which turned into the *"The Linde Group"*.
- The SIC objected the sale of the *Fab* detergent owned by Colgate Palmolive to Procter and Gamble (P&G), because P&G owned already the *Ariel* detergent, one of the most powerful on the market, because of the risks it represented regarding unilateral effects
- The SIC approved the acquisition of Bavaria (Colombian company which controlled the beer business in Colombia, Peru, Ecuador and Panama), by the British-South African multinational SabMiller, which agreed to pay \$7.8bn for the whole Bavaria Group.

Data about mergers procedures in Colombia is presented in Table 1, which sets out the statistics of business integrations notified to the Superintendencia de Industria y Comercio between 1998 and 2010. It can be seen from this table that between 1998 and 2010 in only 29 cases the SIC imposed conditions in order to grant the authorization.

**Table 1. Business Integrations Notified to the Superintendencia de Industria y Comercio
between 1998 and 2010**

Decision	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Objected	----	----	----	----	1 ¹	----	3 ²	1 ³	1 ⁴	2 ⁵	----	----	1
Breach of a condition or obligations	----	----	2 ⁶	3 ⁷	9 ⁸	3 ⁹	2 ¹⁰	3 ¹¹	4 ¹²	2 ¹³	2 ¹⁴	----	1
Not objected	132	118	123	93	72	58	89	97	91	64	74	78	78
Jurisdiction of other Colombian authority	----	----	----	1	----	1	----	1	----	----	----	----	----
Filed	----	----	----	----	----	----	----	1	1	----	----	----	----
Not a merger	----	----	1	20	21	----	----	----	8	11	3	----	----
No duty to inform	----	----	----	3	1	----	1	----	----	1	2	----	----
Total number of notified cases	132	118	126	120	104	62	95	103	105	80	81	78	80

Table 1. SIC merger Information since 1998.

2.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.*

As stated before, the SIC can impose structural remedies. Historically, these have been the divestiture of important assets, ranging from brands to production facilities to third parties in order to carry through the proposed merger. The recent decision regarding the merger between Coltabaco and Protabaco is an example of such remedies.

2.3 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

Although the SIC tries not to negotiate its decisions with the merging parties, when imposing structural remedies there has always been certain reluctance regarding the adequate scope of the divested assets. As can be expected, the merging parties dislike these structural remedies because it implies a diminishment of their capital and is viewed as increasing the price of the merger itself. However, in the end, the SIC has prevailed and has been able to ensure that, if the merger is to take place, the divestiture of the assets considered necessary in order to guarantee that competition continues to take place has taken place.

2.4 *What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?*

In the event that an integration operation is approved under conditions, the SIC has the obligation to regularly monitor the compliance of such conditions. Any default will give rise to the sanctions provided by the law, including penalties and order to divest. However, no assistance with other countries has taken place.

2.5 *To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?*

Until now, there has not been any co-ordination with other national competition authorities on this specific matter.

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- ¹ (i) **ETERNIT – COLOMBIT** (By Decision number 14002 of 2002 the SIC prohibited the merger. It was confirmed by Decision number 28828 of 2002 and by Decision number 34712 of 2003, the SIC revoked and imposed conditions in order to grant the authorization).
- ² (i) **EXXON MOBIL – CARBOQUÍMICA** (By Decision number 4933 of 2004 the SIC prohibited the merger. (ii) **POSTOBÓN – QUÁKER** (By Decision number 16453 of 2004 the SIC prohibited the merger and by Decision number 27920 of 2004 it was confirmed). (iii) **PROCTER & GAMBLE – COLGATE** (By Decision number 28037 of 2004 the SIC prohibited the merger. It was confirmed by Decision number 29807 of 2004).
- ³ (i) **COCRETOS DE OCCIDENTE – HOLCIM** (By Decision number 35516 of 2005 the SIC prohibited the merger. It was confirmed by Decision number 14493 of 2006).
- ⁴ (i) **DUPONT DE COLOMBIA – PLASTILINE S.A.** (By Decision number 923 of 2006 the SIC prohibited the merger. By Decision number 14493 of 2006 it was confirmed).
- ⁵ (i) **CLOROX COMPANY – COLGATE PALMOLIVE** (By Decision number 24374 of 2007 the SIC prohibited the merger. (ii) **AGA-FANO – FÁBRICA NACIONAL DE OXIGNEO – CRYOGAS** (By Decision number 7805 of 2007 the SIC prohibited the merger and by Decision number 14811 of 2007 it was confirmed).
- ⁶ (i) **PELDAR – CONALVIDRIOS** (Decision number 99077445 of 2000). (ii) **BAVARIA – LEONA** (Decision number 0038295 0023 of 2000 and Decision number 25583 of 2003).
- ⁷ (i) **GUINNESS UDV – ATLAS COMERCIAL SEAGRAM** (Decision number 1046179 of 2001). (ii) **IBM- INFORMIX SOFTWARE** (Decision number 1043208 of 2001). (iii) **MÓNOMEROS – CARGILL** (By Decision number 43636 of 2001 the SIC prohibited the merger and by Decision number 13076 of 2002 the SIC revoked and imposed conditions in order to grant the authorization).
- ⁸ (i) **LADRILLERAS SANTA FE** (Decision number 2009661 of 2002). (ii) **HEWLETT PACKARD – COMPAQ** (Decision number 2015377 of 2002). (iii) **INDUSTRIAS ESTRA – CAJAS PLÁSTICAS** (Decision number 2022479 of 2002); (iv) **QUAKER – PROMASA** (Decision number 2049509 of 2002); (v) **AVIATUR S.A. – VIAJES DELTA** (Decision number 2064738 of 2002); (vi) **AVIATUR S.A. – KOREAN WORLD** (Decision number 2066483 of 2002); (vii) **PINTUCO – INDUSTRIAS PERMAPINT** (By Decision number 02002439-06 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 17723 of 2002 the SIC changed the conditions). (viii) **NOEL – SUIZO** (By decision number 1110475 of 2002 the SIC imposed conditions in order to grant the authorization and by decision number 19313 of 2002 the SIC changed the conditions). (ix) **ROBIN HOOD S.A - MEALS MERCADEO DE ALIMENTOS DE COLOMBIA S.A** (By decision number 2061593 of 2002 the SIC imposed conditions in order to grant the authorization).
- ⁹ (i) **COMCEL – OCCEL Y CELCARIBE** (Decision number 2114190 of 2003). (ii) **ETERNIT - COLOMBIA** (By Decision number 7390 of 2003 the SIC prohibited the merger and by Decision number 19110 of 2003 the SIC imposed conditions in order to grant the authorization. (iii) **DSM N.V. – ROCHE VITAMINAS** (By Decision number 22866 of 2003 the SIC imposed conditions in order to grant the authorization and by decision number 25550 of 2003 the SIC changed the conditions).
- ¹⁰ (i) **AMANCO (PAVCO) - AMERO (RALCO)** (By decision number 4861 of 2004 the SIC imposed conditions in order to grant the authorization and by decision number 5013 of 2004 changed the conditions). (ii) **CARVAJAL S.A - PROPAL S.A.** (By Decision number 25012 of 2004 the SIC imposed conditions in order to grant the authorization).

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- ¹¹ (i) **ROBIN HOOD – MEALS** (By decision number 5487 of 2005 the SIC imposed conditions in order to grant the authorization and by decision number 11665 of 2005 it was conformed). (ii) **VALORES SIMESA Y OTROS** (Decision number 29661 of 2005); y (iii) **TELEVISA – EDITORA CINCO** (Decision number 33268 of 2005).
- ¹² (i) **FENOCO S.A. VS CARBONES OFCARIBE S.A., CONSORCIO MINERO UNIDO S.A., CARBONES DE LOS ANDES S.A., COMPAÑÍA CARBONES OFCESAR S.A., DRUMMOND COAL MINING LLC., C.I. PRODECO S.A. - CARBONES DE THEJAGUA S.A.** (By decision Lumber 6027462 of 2006 the SIC imposed conditions in order to grant the authorization). (ii) **CEMENTOS OFCARIBE S.A., METROCONCRETO S.A., CONCRETOS DE OCCIDENTE S.A., AGRECÓN, LOGITRANS S.A. EMPRESAS INTEGRANTES OFGRUPO ARGOS - CEMENTOS ANDINO S.A. - CONCRECEM S.A.** (By decision number 13544 of 2006 the SIC imposed conditions in order to grant the authorization); (iii) **EXITO – CARULLA** (By decision number 34904 of 2006 the SIC imposed conditions in order to grant the authorization). (iv) **GRUPO GERDAU – ACERIAS PAZ OFRIÓ S.A.** (By decision number 5379 of 2006 the SIC prohibited the merger and by decision number 2489 of 2007 the SIC revoked and imposed conditions in order to grant the authorization).
- ¹³ (I) **MEXICHEM COLOMBIA S.A. - PAVCO S.A.** (By decision number 21345 of 2007 the SIC prohibited the merger and by decision number 29154 of 2007 the SIC revoked and imposed conditions in order to grant the authorization). (ii) **BAVARIA, LATIN DEVELOPMENT CORPORATION, CERVECERÍA UNIÓN, MALTERÍA TROPICAL, CERVECERÍA LEONA - GASEOSAS POSADA TOBÓN** (By decision number 9192 of 2007 the SIC imposed conditions in order to grant the authorization and by decision number 25489 of 2007 the SIC changed the conditions).
- ¹⁴ (I) **INDUSTRIAS ARFEL S.A. - ALUMINIO REYNOLDS SANTO DOMINGO S.A.** (By decision number 5886 of 2008 the SIC prohibited the merger and By decision number 19729 of 2008 the SIC revoked and imposed conditions in order to grant the authorization). (II) **MEXICHEM - PRODESAL** (By decision number 23541 of 2008 the SIC prohibited the merger and by decision number 34452 of 2008 the SIC revoked and imposed conditions in order to grant the authorization).
- ¹⁵ (I) **COLTABACO – PROTABACO** (By decision number 29937 of 2010 the SIC prohibited the merger and by decision number 54253 of 2010 imposed conditions in order to grant the authorization).
- ¹⁶ (I) **CAFAM – ÉXITO** (By decision number 38171 of 2010 the SIC imposed conditions in order to grant the authorization).

CROATIA

1. Introduction - Examples from the Croatian Competition Agency

A concept of a concentration in the newly reviewed Croatian Competition Law (2009), (hereinafter referred as the: Competition Act; CA), is defined in a way that a concentration between undertakings shall be deemed to arise where a change of control occurred, on a lasting basis, and if it results from: (1) a merger association of two or more independent undertakings or parts thereof; or (2) acquiring control or decisive influence of one or more undertakings over one or more other undertakings, or of one or more undertakings or a part of an undertaking, or parts of other undertakings, in particular by: (i) an acquisition of the majority of shares or share capital, or (ii) obtaining the majority of voting rights, or (iii) in any other way in compliance with the provisions of the Company Law of the Republic of Croatia and other legal prescriptions.¹

The Law also establishes that a concentration of undertakings which would significantly impede effective competition in the market, in particular where such a concentration creates or strengthens a dominant position of the undertakings parties to the concentration shall be deemed incompatible with competition rules and therefore prohibited².

2. Rules applicable to merger control

An acquisition of control occurs through transfer of rights, based on contracts between undertakings, or by other means, by which one or more undertakings, either separately or jointly, taking into consideration all legal and factual circumstances, acquire the possibility to exercise decisive influence over one or more other undertakings on a lasting basis³. Furthermore, a concentration is constituted by a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity, but a creation of a joint venture by two or more independent undertakings performing on a lasting basis all the functions of an autonomous economic entity which leads to the coordination of the competitive behavior of undertakings that remain independent thereby significantly impeding competition shall not be considered as a concentration and shall therefore be assessed as a agreement among undertakings.⁴

A concentration shall not be deemed to arise in following cases: (1) when credit institutions or other financial institutions or investment funds or insurance companies, the normal activities of which include transactions and dealing in securities for their own account or for the account of others, hold on a temporary basis (not longer than 12 months) securities which they have acquired in an undertaking with a view to reselling them, provided that they do not exercise voting rights in respect of those securities with a view to determining the competitive behavior of that undertaking, whereas the 12 month period may be

¹ Author. Dr. Sc. Mirna Pavletic-Zupic, Member of the Croatian Competition Council. Art 15, Par. 1 of the Competition Act; CA.

² Art. 16 of the CA.

³ Art. 15, Par. 2 of the CA.

⁴ Art. 15, Par 3 and 6 of the CA.

extended in cases where such institutions or companies can show that the disposal was not reasonably possible within the period set; (2) when the acquisition of shares or interest results from internal structural changes in either the controlled or controlling undertaking (such as merger, acquisition, transfer of legal title etc.); and (3) when the control is acquired by an office-holder or administration officer – relating to bankruptcy, liquidation or winding up – according to the Bankruptcy Law and the Companies Act of the Republic of Croatia⁵.

3. The notion of obligatory notification

The Competition Law also prescribes the conditions that should be met in order to implement the rules for obligatory notification of a concentration, along with the turnover thresholds. Namely, in order to assess the compatibility of concentration, the parties to the concentration are obliged to notify any proposed concentration to the Competition Agency if the following criteria are cumulatively met:

- the total turnover (consolidated aggregate annual turnover) of all the undertakings - parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least HRK 1 billion in the financial year preceding the concentration and in compliance with financial statements, where at least one of the parties to the concentration has its seat and/or subsidiary in the Republic of Croatia, and
- the total turnover of each of at least two parties to the concentration realized in the national market of the Republic of Croatia, amounts to at least HRK 100,000,000 in the financial year preceding the concentration and in compliance with financial statements⁶.

In relation to the calculating of the parties' turnover it should be mentioned that in the cases where the concentration involves association or merger of a part or parts of one or more undertakings, irrespective of whether or not those parts are constituted as legal entities, the calculation of the shall only include the relevant turnover of the parts which are subject to the concentration.

However, two or more transactions which take place within a two-year-period shall be considered to constitute one concentration, arising on the day of the last transaction.⁷ Finally, the turnover for banks and other financial institutions, including insurance companies and re-insurance organizations as parties to concentrations, is calculated on the basis of the total turnover from their normal business operations in the financial year preceding the concentration, in a way that for the banks and other institutions which provide financial services, after deduction of direct taxes related to them, the sum of the following points of income shall be taken: (i) income from interest rates and similar income; (ii) income from securities (i.e. shares and other variable yield securities, interests in other economic entities, shares in affiliated economic entities); (iii) commissions receivable; (iv) net profit on financial operations; and (v) other operating income⁸.

⁵ Art. 15, Par 5. of the CA.

⁶ Art. 17, Par 1 of the CA; where the parties to the concentration are unable to deliver financial statements at the time of the notification of concentration, the last year for which the parties to the concentration have concluded their financial statements shall be taken as the relevant year in the assessment procedure; also the intra-group turnover realized by the sale of goods and/or services by undertakings within a group shall not be taken into account when calculating the total turnover referred to under the conditions prescribed in the Law.

⁷ Art. 17, Par. 4 and 5 of the CA.

⁸ Art. 18, Par. 1 and 2 of the CA; For insurance companies and companies that perform re-insurance activities, the value of gross premiums which includes amounts paid and received in relation to the insurance contracts issued by or on behalf of an insurance company, including also re-insurance premiums,

4. The criteria for pre-notification

The Law prescribes the obligation for the prior notification of concentration. Namely, any concentration between undertakings shall be pre-notified from the side of the parties to concentration, subject to the following criteria⁹: (i) in the case where control or decisive influence is acquired over a whole or parts of one or more undertakings by another undertaking, the prior notification of concentration shall be submitted by the controlling undertaking. In all other cases, all undertakings parties to the concentration shall agree on the submittal of one joint notification; and (ii) the prior notification of concentration shall be submitted to the Competition Agency for assessment before the implementation of the concentration in question, following the conclusion of the contract on the basis of which control or decisive influence has been acquired by the controlling undertaking, or following the publication of the invitation to tender¹⁰.

When notifying the concentration the parties shall provide to the Competition Agency the following documentation: (i) the original or a certified copy of the document, or a certified translation, showing the legal grounds for the concentration if the original official text is not originally written in Croatian; (ii) annual financial statements of the parties to the concentration for the financial year preceding the concentration; and (iii) other documents and data necessary for the evaluation of a merger in question¹¹.

The notifying party shall state in the notification if it intends to submit the request for appraisal of concentration to another competent authority in charge of assessment of concentrations outside the territory of the Republic of Croatia. If the notifying party has already submitted such a request, it shall provide the Agency with the decision of the relevant body, where the relevant decision has already been adopted.

The Law also allows for the submission of a short-form notification of the concentration, which is used for the purpose of notifying concentrations under a simplified procedure treatment.

Such a short-form notification and the so called simplified procedure may be used where, in particular, one of the following conditions apply: (i) none of the parties to the concentration is engaged in business activities in the same relevant product and geographic market (no horizontal overlap), or in a

after the deduction of taxes and parafiscal contributions charged by reference to amounts of individual premiums or in relation to total premium volume.

⁹ Art. 19 of the CA.

¹⁰ Namely, by way of derogation from this rule, the parties to the concentration may submit the prior notification of concentration to the Competition Agency even before the conclusion of the contract or publication of the invitation to tender, if they, *bona fide*, provide evidence of the proposed conclusion of the contract or announce the invitation to tender; furthermore, the implementation of a notified concentration shall be permitted only after the expiry of the time period of 30 days, namely after the receipt of the final decision of the Competition Agency on compatibility or conditional compatibility of concentration in question. Finally, the Competition Agency can in particularly justified cases, upon the request of a party to the concentration, permit the implementation of particular actions relating to the implementation of the notified concentration before the expiry of the time prescribed period of time, and in deciding on such, the Competition Agency would ordinarily take into account all circumstances of the relevant case, particularly the nature and gravity of the damages which might be posed on the parties to the concentration or on third parties, and the effects of the implementation of the concentration concerned on competition.

¹¹ Art. 20 of the CA; Upon the request of the parties to the concentration, the Competition Agency may in particularly justified cases revoke the obligation as referred above, where it finds that the information in question is not necessary for the assessment of the concentration concerned.

market which is upstream or downstream of a market in which another party to the concentration is engaged (no vertical relationship); (ii) two or more of the parties to the concentration are engaged in business activities in the same relevant product and geographic market (horizontal relationship), provided that their combined market share is less than 15 %, and/or when one or more of the parties to the concentration are engaged in business activities in a relevant product market which is upstream or downstream of a product market in which any party to the concentration is engaged (vertical relationship), provided that none of their individual or combined market shares at either level is 25 % or more; and (iii) a party to the concentration is to acquire sole control of an undertaking over which it already has joint control; or in the case where two or more undertakings acquire control over a joint venture, where the joint venture has no, or negligible, actual or foreseen activities within the Republic of Croatia¹².

5. The assessment of compatibility of mergers

In relation to the assessment of compatibility of a concentration, the Competition Agency would initiate a proceeding immediately upon the receipt of the complete documentation necessary for the notification, and in a course of a proceeding it should always take into account the effects on competition and possible limitations on market access, particularly where the proposed concentration creates or strengthens a dominant position of the undertakings concerned¹³.

In conducting the proceeding on the assessment of a merger, the Agency can ask for any data and documents which it might find necessary for the establishment of the facts in the case, and the notifying party or the undertakings which are parties to the concentration may submit to the Agency any data and documents which they find relevant for the assessment of the concentration concerned because the burden of proof in terms of positive effects of the concentration lies on the undertakings concerned.

Then, following the receipt of a complete notification of concentration, the Agency would publish on its web site a request for information aimed at all interested parties who may respond to this request in writing, giving their opinions and submitting the data at their disposal relating to the concentration

¹² Art. 20, Par. 4 and 5 of the CA; By way of derogation from obligations stated afore, the Competition Agency may require a full notification of a concentration to be made, in cases where it finds that there are substantial indications of significant impediment of effective competition by the concentration concerned and where consequently, no simplified procedure treatment is applicable; furthermore, the day on which the Competition Agency has received all the data and documents requested, shall be considered as the date of the receipt of the complete notification of a concentration, and the Competition Agency shall issue a receipt thereon to the notifying party.

¹³ Art. 21. of the CA; In the course of assessment of a concentration the Agency shall in particular define as follows: (1) the structure of the relevant market, actual and potential future competitors in the relevant market within the territory of the Republic of Croatia or outside this territory, supply and demand structure in the relevant market and its trends, costs, risks, economic, legal and other barriers to entry to or withdrawal from the market; (2) the position in the market and the market share, economic and financial power of the undertakings in the relevant market, the level of competitiveness of the undertakings and possible changes in the business operations of the parties to the concentration and alternative sources of supply for the buyers resulting from the implementation of the concentration concerned; and (3) the effects of the concentration on other undertakings, and especially relating to the consumer benefit, such as: decrease in prices of goods and/or services, shorter distribution courses, lowering of transportation, distribution and other costs, specialization in production, technological innovation and other benefits directly deriving from the implementation of the concentration in question.

concerned which would then provide the Agency with better understanding of the players and the relevant markets concerned¹⁴.

6. Decisions from the side of the Croatian Competition Agency

In relation to the ways of possible decisions which the Competition Agency is going to take after the proceeding, and within three months following the adoption of a procedural order on initiation of the proceedings, the Law distinguishes three categories of possible decisions: (1) a decision by which the concentration concerned is rendered compatible; or (2) a decision by which the concentration concerned is declared conditionally compatible, provided that certain measures are observed and conditions met, within the time limits set by the Agency; (3) or by which the concentration concerned is assessed incompatible and therefore prohibited¹⁵.

¹⁴

Art. 21, Par. 6 and 7 of the CA; The request for information particularly contains the following data: (i) business activities performed by the parties to the concentration in the territory of the Republic of Croatia; (ii) the markets in the Republic of Croatia that may be affected through the implementation of the concentration concerned; (iii) a request containing the invitation to all undertakings who operate in affected markets, undertakings who perform their activities on other markets in which the proposed concentration may have effects on competition (upstream, downstream, neighboring markets), associations of undertakings, associations of employers, consumers associations and other parties who are not parties to the proceedings or competing undertakings of the parties to the concentration, but who may be reasonably assumed to have knowledge on the relevant markets concerned, to submit their comments, standpoints and opinions on possible significant effects which the concentration in question may produce on their operation as well as possible appreciable effects of the concentration concerned on effective competition in the markets concerned, and (iv) the deadline for submittal of the relevant comments which may not be shorter than 8 or longer than 15 days; furthermore, should in the course of the assessment of a concentration, the Agency receive one or more new notifications of concentration where control or decisive influence is acquired by one and the same undertaking who submitted the original notification of a concentration, than the Agency may decide to conduct a joint assessment proceedings and take one decision if it finds it reasonable and efficient; in this case the time limit for the assessment of a concentration shall begin to run when the notifying party is issued the receipt confirming the complete notification of concentration which was last notified to the Agency.

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Art. 22, Par. 7 of the CA; Where the Agency, on the basis of valid data and documents submitted together with the notification of a concentration, or on the basis of other available information and findings, establishes beyond dispute that it is reasonable to suppose that the implementation of the proposed concentration is not prohibited and unless it takes a procedural order on the initiation of the assessment proceedings within 30 days following the receipt of the complete notification of concentration, it can issue a special notice where would be confirmed that the subjected merger is deemed to be compatible with the market. Otherwise, where the Agency, based on the evidence submitted together with the notification of a proposed concentration, or on the basis of other available information and findings finds that the implementation of the concentration concerned could significantly impede effective competition in the relevant market, in particular as a result of the creation or strengthening of a dominant position of the undertakings concerned, it shall take a procedural order on the initiation of the proceedings for the assessment of compatibility of the concentration concerned. Finally, if in the course of the assessment proceedings the Agency finds that the concentration in question may be declared compatible only after necessary obligations and conditions are fulfilled, it shall without delay inform the notifying party thereof, and the notifying party shall than in the time period which may not exceed 30 days from the day of the receipt of this notice propose adequate commitments (whether behavioral and/or structural measures) and other conditions in order to remove the negative effects of the concentration concerned. It is important to mention that the commitments may be proposed by the notifying party as early as in the prior notification of the concentration concerned, whereas the Agency may accept the measures – conditions, obligations and deadlines, proposed by the parties to the concentration, in their entirety or parts thereof, if it establishes that the measures concerned are adequate to restore efficient competition, however, in the event that the

However, the Agency may, ex officio or upon request of a party to the concentration, withdraw the decision on concentration in the following cases: (1) if the decision has been made on the basis of incorrect or false information that has been essential for the decision making; and/or (2) if any of the parties to the concentration have not fulfilled the conditions and obligations determined by the decision of the Agency.

Such decision on the basis of which the declaring the concentration was declared as conditionally compatible if being revoked, shall render the concentration incompatible and therefore prohibited within the meaning of the Law, and parallel set the conditions and obligations and deadlines to restore effective competition and impose the fine prescribed for the committed infringements¹⁶.

As well, the Agency could, ex officio, or upon request of a party to the concentration, amend its decision where the parties to the concentration cannot fulfill any of the proposed conditions or observe the set deadlines, owing to unpredictable circumstances beyond their control.

Such an amended decision of the Agency may contain new obligations, conditions and deadlines for their implementation aimed at restoring effective competition. In other cases, the concentration could also be suspended. Namely, the Agency would, ex officio, by means of a separate decision, propose all necessary measures, whether behavioral or structural, aimed at restoring efficient competition in the relevant market, and set the deadlines for their adoption in the following cases: (i) where the concentration concerned has been implemented contrary to the decision of the Agency by which the concentration has been assessed as incompatible and therefore prohibited; (ii) or where the concentration concerned has been implemented without the obligatory prior notification of concentration based on the Law.

Following this, on the basis of a decision referred above, the Agency may, in particular: (1) order for the shares or interest acquired to be transferred or divested; (2) prohibit or restrict the exercise of voting rights related to the shares or interest in the undertakings parties to the concentration, and order the joint venture or any other form of control by which a prohibited concentration has been put into effect to be removed, whereas the decision may also contain the imposition of a fine prescribed for the committed infringements¹⁷.

7. CCA's experience; Merger between *Merck & Co. (USA)* and *Sanofi – Aventis (France)*

The most recent case which was subject for the review from the side of the Croatian Competition Agency was the merger involving the entrepreneurs Merck & Co., Inc, One Merck Drive, Whitehouse Station, New Jersey, USA and Sanofi – Aventis S.A., 174 Avenue de France, Paris, France, which was brought on the 46 session of the Croatian Competition Council held on 15 July 2010.

Agency does not accept or just partly accepts the said remedies proposed by the parties to the concentration, it can define and impose other behavioral and/or structural measures, conditions, obligations and deadlines for the restoration of effective competition in the market. The parties to the concentration may, as a rule, pursue the activities relating to the implementation of the concentration concerned as of the day of the receipt of the decision by the Agency declaring the concentration conditionally compatible; in the event that the parties to the concentration fail to comply with the conditions and obligations specified by the decision of the Agency within the prescribed time limits, the Agency would, taking into account the reasons for non-compliance regarding the conditions and obligations concerned, withdraw or amend the decision on the basis of which it rendered the concentration conditionally compatible with the market, whereas the time period established by the Law shall not run from the day of the receipt of the notice, to the day of the receipt of the proposed commitments in the Agency.

¹⁶ Art. 23 of the CA.

¹⁷ Art. 24 of the CA.

The merger was in a form of a joint venture, which was established outside the territory of the Republic of Croatia, but the merger was reviewed because of its possible effects on the Croatian Market. The said concentration was cleared to be compatible with the Croatian market and no measures were imposed.

CZECH REPUBLIC

This contribution deals with some of the issues related to the treatment of cross-border concentrations of undertakings. In the general part, a description of the Czech merger control regime is provided. In the following part, specific issues are discussed.

1. General points

In the Czech Republic, merger control regime is set out in the Act No. 143/2001 Coll., on the Protection of Competition and on Amendment to Certain Acts, as amended (hereinafter referred to as “the Competition Act”).

In order to qualify as a concentration of undertakings notifiable to the Czech Competition Authority, a transaction must take the form of:

- a merger of one or more undertakings previously independently operating in the market, or
- an acquisition of an enterprise of another undertaking or a part thereof on the basis of a contract, auction or by other means, or
- obtaining the possibility to control an undertaking by another undertaking, or
- a creation of joint venture performing on a lasting basis all the functions of an autonomous economic entity.

In contrast, a concentration of undertakings does not occur in the following two situations:

- a qualified stake held by a bank in a legal entity by virtue of payment of the issue price of shares by a set-off of the bank’s receivables from such legal entity, where such qualified stake is held for the duration of the rescue operation or financial restructuring of such legal entity for a maximum of one year;
- delegation of certain powers of the statutory bodies of undertakings to persons engaged in activities pursuant to special legal regulations, e.g. a liquidator or an insolvency trustee.

A concentration of undertakings must be notified to the Czech Competition Authority (and is subject to approval by the Czech Competition Authority), if

- the total net turnover of all undertakings concerned achieved in the last accounting period in the market of the Czech Republic exceeds CZK 1.5 billion and each of at least two of the undertakings concerned achieved in the market of the Czech Republic in the last accounting period a net turnover exceeding CZK 250 million, or
- the net turnover achieved in the last accounting period in the market of the Czech Republic

- in the case of a merger at least by one of the parties to the merger,
- in the case of an acquisition of an enterprise by the acquired enterprise or a substantial part thereof,
- in the case of an acquisition of control by the acquired undertaking, or
- in the case of a creation of joint venture by at least one of the undertakings establishing a joint venture

is higher than CZK 1 500 000 000 and at the same time the worldwide net turnover achieved in the last accounting period by another undertaking concerned exceeds CZK 1 500 000 000.

1.1 Who must notify

A concentration which is in the form of a merger must be notified jointly by all the parties to the merger. In case of acquisition of an enterprise and acquisition of control, it is the acquiring undertaking which must notify. A joint notification by the undertakings establishing a joint venture is required where a concentration takes the form of creation of a joint venture.

1.2 Suspension of implementation

It is important to note that a concentration of undertakings must not be implemented before the approval by the Czech Competition Authority.

1.3 Notification of a concentration of undertakings

A concentration notification must contain substantiation, documents certifying the facts decisive for the concentration and the requisites set out in the implementing legal regulation (the Decree of the Czech Competition Authority No. 252/2009 Coll., stipulating details of a concentration notification). The requirements of a concentration notification are:

- duly and completely filled Form for the approval of a concentration;
- receipt of administrative fee payment (a concentration notification is subject to an administrative fee that amounts to CZK 100 000);
- written authorizations granted to the representatives of all notifying parties, if the parties are represented in the concentration approval proceeding,
- extracts from the Commercial Register or other similar register, concerning all the undertakings concerned;
- documents establishing the concentration or documents certifying the existence of the concentration;
- annual reports including the audit of yearly financial statements for the last finished accounting period of all the undertakings concerned;
- consolidated financial statements for the last finished accounting period of all the undertakings concerned;

- the scheme and method of turnover calculation, the amount of which substantiates the submission of a concentration notification; and
- analyses, reports, studies, surveys, and any comparable documents prepared for any member(s) of the board of directors, or the supervisory board, or the other person(s) exercising similar functions (or to whom such functions have been delegated or entrusted), or the shareholders' meeting, for the purpose of assessing or analysing the concentration with respect to competitive conditions, undertakings (actual and potential), the rationale of the concentration, potential for sales growth or expansion into other product or geographic markets, and/or general market conditions.

1.4 *Deadlines - procedure*

The Czech Competition Authority has to decide upon a concentration of undertakings within 30 days from the initiation of proceedings if the concentration does not result in a substantial distortion of competition (approval of a concentration of undertakings in the first phase). In the first phase, however, a concentration may also be cleared subject to the commitments proposed by the notifying parties if the concentration raises competition concerns. If a concentration raises serious concerns as to a significant impediment to competition, the Czech Competition usually launches second phase in-depth investigation. In such a case the Czech Competition Authority must adopt a decision within 5 months from the initiation of proceedings.

The above deadlines are suspended if the Czech Competition Authority asks the notifying parties to provide additional information necessary for the assessment of the concentration of undertakings.

1.5 *Simplified procedure*

The notifying undertakings may enjoy benefits of a simplified procedure (short form requiring less information than full form; deadline of 20 days for the Czech Competition Authority to decide upon a case) if:

- none of the undertakings involved is operating in the same relevant market, or their combined share in such a market is below 15%, and at the same time none of the undertakings concerned is operating in the market vertically connected to the relevant market in which another undertaking operates, or their share in every such market is below 25%, or
- the undertaking acquires exclusive control over the joint venture in which it has participated in joint control so far.

1.6 *Substantive test*

Substantive test is used to assess concentrations of undertakings (a significant impediment to competition test) - covers both non-coordinated and coordinated effects that may stem from a concentration.

In our jurisdiction, there are no special rules which would apply to cross-border concentrations of undertakings.

2. Specific questions

2.1 *Cooperation among competition authorities*

In our jurisdiction, a model waiver of confidentiality has been introduced. If such a waiver is granted by the undertakings, the Czech Competition Authority may exchange confidential information relating to the particular case of a concentration with other competition authorities (note that only non-confidential information may be exchanged without a waiver).

In cases where we asked merging undertakings for a waiver, which was later granted, we discussed with the competition authorities of Slovakia and Austria whether the particular concentrations were also notifiable in these two jurisdictions, as well as the issue of the relevant market definition. Given the fact that none of these concentrations raised competition concerns in any of these jurisdictions, there was no need for a detailed exchange of information.

When assessing individual cases of cross-border concentrations of undertakings that fall within the jurisdiction of the Czech Republic, the Czech Competition Authority pursues only the primary goal of its powers in the field of merger control, which is the protection of effective competition on relevant markets. Competition rules of the Czech Republic are silent on the issue whether the Czech Competition Authority may take into consideration foreign interests when assessing a cross-border concentration of undertakings. So far, in our decision-making practice there has not been a case that would require dealing with this issue.

2.1.1 *International cooperation*

The Czech Competition Authority is involved in activities and discussions within the ICN and is, to a large extent, familiar with principles and recommendations set out in its key documents in the field of merger control. Moreover, many of these principles, recommendations and procedures are used by the Czech Competition Authority when assessing concentrations of undertakings.

2.1.2 *Regional cooperation*

The Czech Competition Authority is also a part of regional cooperation within the area of mergers. To illustrate this, the participation of the Czech Competition Authority in the initiative presented at the Marchfeld Competition Forum could be mentioned. This initiative, aiming to strengthen regional cooperation and coordination between European countries (with a focus on Central and Eastern Europe) has resulted in creating a database for cross-border merger cases focusing on mergers notifiable in countries of Central and Eastern Europe (e.g. Czech Republic, Slovakia, Latvia or Bulgaria, but also in Austria and Switzerland).

2.2 *Jurisdictional issues (notification, information exchange, enforcement, extra-territoriality)*

2.2.1 *Suitability of notification turnover thresholds*

We believe that the current notification turnover thresholds set out in the Competition Act are capable of capturing a huge majority of concentrations of undertakings that could have an impact on relevant markets within the territory of the Czech Republic. To this end, a local nexus has been introduced in 2004 in the Competition Act meaning that as from 2004 only transactions where the parties achieve substantial turnover in the Czech Republic are subject to approval by the Czech Competition Authority.

2.2.2 *Relying on actions and decisions taken by foreign competition authorities*

It has to be pointed out that if a merger meets notification criteria set out in the Competition Act, it must be notified to the Czech Competition Authority, which has no other option than investigate the merger and adopt a decision on the merger.

2.3 *Remedies (types, consultation, monitoring, enforcement)*

In the past, the Czech Competition Authority cooperated with other competition authorities in one case of concentration of undertakings that had raised serious competition concerns which needed to be solved by remedies.

It is the merger case of *Zentiva/Slovakofarma* which took place in the pharmaceutical industry; the Czech Competition Authority and the Slovak Competition Authority contacted each other to discuss on an informal level the relevant market definition, possible impact of this concentration on their respective jurisdictions as well as the issue of suitable remedies to remove the identified competition concerns.

EUROPEAN UNION

1. Merger control in the European Union

1.1 *Cross-jurisdictional cooperation within the European Union*

Merger control in the European Union (EU) is based on a sophisticated system for inter-jurisdictional co-operation. On the one hand, EU Member States have national legislation for merger control and on the other hand there is a supra-national system for mergers affecting more than one Member State.¹ Since the first Merger Regulation was adopted in 1989, EU merger control has evolved into a system which combines a clear and foreseeable allocation of jurisdiction while allowing sufficient flexibility for efficient work sharing between the supra-national level and national jurisdictions.²

The key to make such an intricate system work is deciding which jurisdiction should apply to mergers scrutinised in the EU. The primary guiding principle of the EU system is the "one-stop-shop", i.e. each merger should be handled exclusively by one jurisdiction. The allocation of jurisdiction is determined in the Merger Regulation. Mergers with "EU dimension" are examined at supra-national level by the European Commission (the Commission). Mergers that do not have EU dimension are examined by one or several of the national competition authorities (NCAs) within the EU, provided that these mergers are of a sufficient size to fall under national merger rules.

Mergers with EU dimension must be notified to the Commission beforehand. Whether or not a particular merger has EU dimension is regulated in the Merger Regulation.³

The Merger Regulation's main jurisdictional test stipulates that a merger has EU dimension where:

- the combined worldwide turnover of all the undertakings concerned exceeds EUR 5,000 million and
- the aggregate turnover of each of at least two of the of the undertakings concerned exceeds EUR 250 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.⁴

The main test has three components, each of them designed to target as precisely as possible mergers where the Commission is best-placed to scrutinise a merger. The first threshold should ensure that only mergers of a sufficient size fall under the Merger Regulation. The second threshold aims to avoid that

¹ Council Regulation (EC) No 139/2004 (the Merger Regulation). The Merger Regulation applies to "concentrations". For the purposes of this paper the term "merger" is used.

² The most important review of the EU merger rules resulted in the adoption of the 2004 Merger Regulation, which replaced Council Regulation (EEC) No 4064/89.

³ Article 1(1), paragraphs 2 and 3 of the Merger Regulation.

⁴ Article (1)(1), paragraph 2.

mergers involving small target companies fall within the scope of the Merger Regulation. The so-called "two-thirds rule" works as a corrective mechanism ensuring that a merger having its nexus in one Member State falls within the scope of that Member State's merger rules. In such cases it is presumed that the NCA in the Member State concerned is best-placed to deal with the merger.

One problem identified during reviews of the Merger Regulation is multiple filings in different jurisdictions. Certain mergers not sufficiently large to fall under the Merger Regulation but large enough to be caught by national jurisdictions may have to be notified to a number of NCAs. Multiple filings increase the regulatory burden of the merging parties and make the process less transparent, less predictable and more time-consuming.

To reduce the number of multiple filings under national jurisdictions, the Merger Regulation includes a subsidiary jurisdictional test. Mergers which do not meet the thresholds of the main test may still have EU dimension where:

- the combined worldwide turnover of all the undertakings concerned exceeds EUR 2,000 million;
- the combined turnover of all the undertakings concerned exceeds EUR 100 million in each of at least three Member States;
- the combined turnover of each of at least two of the undertakings concerned exceeds EUR 25 million in each of the same three Member States, and
- the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million, unless
- each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State.⁵

It should be noted that under the EU system, the notification thresholds in the Merger Regulation do not only determine whether a merger is caught by the merger rules as such but also whether a merger will be examined at the supra-national EU level or at national Member State level. The Merger Regulation is therefore a principal instrument for allocation of jurisdiction.

In addition to the "one-stop-shop" principle, allocation of jurisdiction is based on the "best-placed" principle, i.e. a merger should be allocated to the jurisdiction best-placed to handle the case. Even under the assumption that the turnover thresholds enumerated above are set at an appropriate level, it must be recognised that allocation of jurisdiction based on the merging parties' turnover does not always capture transactions with cross border impact and "EU relevance". To increase the flexibility of the system, to take full advantage of the "one stop shop" and to increase the possibilities to allocate a merger to the best-placed jurisdiction(s), the Merger Regulation contains rules for referral of cases to and from the Commission. Such referrals can take place either prior to the notification of a merger (pre-notification referrals) or after (post-notification referrals). For transparency reasons and to create consensus about possible referrals, the EU merger rules include an obligation for the Commission and the NCAs to consult each other. Experience so far indicates that in the vast majority of cases the Commission and the NCAs reach agreement when referrals are appropriate.

⁵ Article 1(1) paragraph 3 of the Merger Regulation.

1.1.1 *Pre-notification referral at the request of the notifying parties*

Prior to formal notification, the notifying parties may request that the examination of a planned merger should be referred from the Commission to a Member State or from a Member State to the Commission.

By means of a reasoned submission, the notifying parties may inform the Commission that a merger may significantly affect competition in a market within a Member State which presents all the characteristics of a distinct market should be examined – in whole or in part – by that Member State. The Member State referred to in the submission must express its agreement or disagreement with taking over the case within 15 working days.⁶ If the Member State in question agrees to take over the case and the Commission agrees with the notifying parties' view about the existence of a distinct national market, the Commission may refer the case to that Member State. The Commission must decide whether or not to refer the case within 25 working days.⁷

The notifying parties may inform the Commission by means of a reasoned submission that a planned merger - which does not have a EU dimension and which is capable of being reviewed under national law in at least three Member States - should be examined by the Commission. If at least one of the Member States competent to examine the merger disagrees with the proposed referral, the case may not be referred.⁸

1.1.2 *Post-notification referral at the request of the Commission or Member States*

Planned mergers may be referred from the Commission to the Member State concerned after the formal notification has been filed with the Commission. A Member State may inform the Commission within 15 working days⁹ that:

- a merger threatens to significantly affect competition in a market within that Member State, which presents all the characteristics of a distinct market, or;
- a merger affects competition in a market within that Member State, which presents all the characteristics of a distinct market and which does not constitute a substantial part of the internal market.¹⁰

If the Commission considers that there is such a distinct market and that such a threat exists, it Commission shall either:

- deal with the case itself; or
- refer the whole or part of the case to the NCA so that it may be examined under national competition law.¹¹

⁶ Reasoned submissions must be forwarded to the NCAs "without delay".

⁷ Article 4(4) of the Merger Regulation.

⁸ Article 4(5) of the Merger Regulation.

⁹ All merger notifications filed with the Commission are directly forwarded to the NCAs.

¹⁰ Article 9(2) of the Merger Regulation.

¹¹ Article 9(3) of the Merger Regulation.

The Commission must decide whether to refer or not refer a case within 35 working days of notification and within 65 days of notification if the Commission has initiated proceedings to go into "second phase" of its investigation. Once a case is referred to the NCA, it shall decide on the case without undue delay and the NCA must inform the notifying parties of the result of its preliminary investigation.¹²

Moreover, one or more Member States may request the Commission to examine a merger that does not have EU dimension, provided that the merger affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or Member States making the request. The request must be done within 15 working days after notification. Any Member State may join the initial request within 15 working days of being informed of the initial request. The Commission must decide whether or not to take over the case within 25 working days.¹³

In a report to the Council in 2009, the Commission concluded that the 2004 Merger Regulation contributes to more efficient merger control within the EU.¹⁴ While there are possible areas for improvements, the system of "work sharing" between the national authorities and the Commission works well. According to the report, the turnover thresholds are in most cases effective in distinguishing between cases of EU relevance from those with a primarily national focus. The application of the two-thirds rule, has also achieved this objective in the majority of cases. The system for referrals allows the Commission and the NCAs to re-allocate cases in a more efficient manner for the benefit of the authorities and for businesses.

The referral system is beneficial also for businesses because it allows them to take full advantage of the "one-stop-shop" assessment and ensures that their cases are handled by the best-placed authority. The "one-stop-shop" assessment contributes to reducing firms' regulatory burden.

Finally, it should be noted that the Commission and NCAs cooperate within the confines of the European Competition Network (ECN). The ECN is a forum for discussion and cooperation between the Commission and the NCAs. The purpose of the ECN is to facilitate an efficient division of work and an effective and consistent application of the EU competition rules.¹⁵ For merger cases there are no formal ECN rules for consultation and cooperation, as opposed to anti-trust cases under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Nevertheless, the ECN provides a forum for the Commission and the NCAs to meet and exchange information on a more informal basis also relating to merger issues.

1.2 Cooperation between the European Union and extra-European jurisdictions

The ongoing globalisation of the world economy and the ensuing increase in the number of mergers having an impact on competition in several of the world's main markets makes it increasingly important for competition authorities to coordinate merger cases investigated in parallel across jurisdictions. The Commission cooperates with a number of competition authorities outside the EU. To this end, the

¹² Article 9(4) of the Merger Regulation.

¹³ Article 22 of the Merger Regulation.

¹⁴ Communication from the Commission to the Council – Report on the functioning of Regulation No 139/2004, 18.06.2009. When preparing the report, the Commission asked stakeholders to submit their views about the Merger Regulation. Businesses, business associations, law firms, lawyer's associations and representatives of academia submitted their views. NCAs were consulted and provided detailed input for the report.

¹⁵ "Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities" available at http://ec.europa.eu/competition/ecn/joint_statement_en.pdf.

Commission has entered into bilateral agreements and Memorandums of Understanding for cooperation in competition cases with a number of jurisdictions such as Brazil, Canada, China, Japan, South Korea and the United States. While such codifications of cooperation facilitates provides a framework for cooperation, the absence of such arrangements does not prevent the Commission from cooperating with other jurisdictions in merger cases. In the past, the Commission has cooperated with a large number of competition authorities in ongoing merger investigations.

While competition authorities can always discuss parallel merger investigations in more general terms, confidentiality issues may sometimes make the exchange of case-specific information more difficult. However, in most cases cooperation between competition authorities simultaneously examining proposed mergers is in the notifying parties' interest because it may avoid delays and divergent outcomes. To allow competition authorities to exchange confidential information related to their respective merger reviews, the notifying parties therefore often agree to waive their confidentiality rights in affected jurisdictions.

Cooperation between competition authorities in ongoing merger investigations is mutually beneficial because it allows them to test e.g. market definitions, theories of harm and the feasibility of remedies with their peers in other agencies. Such an exchange of views may be useful not only between mature competition authorities but also between mature authorities and less experienced authorities from jurisdictions with recently adopted merger control regimes. Cooperation facilitates knowledge transfer allowing the less experienced authority to benefit from the mature authority's knowledge and experience of conducting merger investigations.

A crucial aspect of proposed mergers being examined by several jurisdictions is the timing of the merger reviews. While it may not be possible – due to divergent rules and notification requirements – to completely synchronise the investigations in different jurisdictions, merger investigations should nevertheless be carried out simultaneously to the extent possible. Experience shows that time-lags – for instance cases where one jurisdiction clears a merger while another has hardly started its review – may have unfortunate effects making the authority still investigating the case susceptible to interference and undue pressure to come to the same conclusion as the authority that already finished its investigation. For this purpose, the Commission regularly advises the merging parties to time their notifications in different jurisdictions with the aim of having decisions adopted as closely as possible to each other time wise.

The Commission cooperates most frequently with the federal competition authorities of the United States (the Federal Trade Commission and the Department of Justice). To facilitate this cooperation, an EU-US Merger Working Group published the document "Best Practices on Cooperation in Merger Investigations" in 2002. In the document best practices were established concerning *inter alia* coordination on timing, collection and evaluation of evidence and remedies.

The EU-US experience shows that despite divergent legal frameworks (substantially as well as procedurally), "hands on" cooperation and exchange of views between investigative teams is very fruitful, in particular as regards market definition and - in later stages of investigations - remedy design. Coordination in the latter respect is becoming increasingly important as firms internationalise and production facilities cater to demand across the world. For example, the sale of a production facility in the EU to remedy a competitive concern in the EU may have repercussions also in the US and vice versa.

In 2010, the Commission cooperated with competition authorities outside the EU in a number of merger cases. Notable examples are Microsoft's acquisition of Yahoo's search business (cooperation with the United States), Stanley Works' acquisition of Black & Decker (in this case the Commission liaised with competition authorities in four jurisdictions, namely Canada, Chile, Mexico and the United States). Cooperation with the Competition Bureau of Canada took place in the Teva/Ratiopharm merger and the

Commission coordinated its review of Nokia Siemens Networks' acquisition of Motorola's mobile network business with the authorities in Switzerland and the United States.

2. Implications for developing and emerging economies

The EU system for cross-jurisdictional cooperation in merger control may serve as an example for other regions in the world considering setting up supra-national merger control regimes. However, it should be noted that the EU system does not exist in isolation but goes hand in hand with far-reaching economic integration, in particular the rules underpinning the EU internal market. Moreover, the EU has a longstanding supra-national judiciary to settle merger cases. It ought to also be remembered that the Member States negotiated for almost 20 years before the first Merger Regulation was adopted in 1989. In subsequent years the EU merger regime has been revised and fine-tuned (in particular as regards jurisdictional and cooperation issues as described above).

The "one-stop-shop" is primordial to any supra-national system for merger review. It is also important that the parameters defining whether or not a merger is subject to *ex ante* regulatory review are based on objective, transparent and foreseeable criteria.

Setting appropriate notification thresholds is a difficult exercise.¹⁶ In merger regimes with supra-national and national reviews such as the EU, the thresholds ought to be designed in a manner which allocates mergers to the jurisdiction where the nexus of the transaction is situated. In a "single-jurisdiction" setting, notification thresholds should ideally be set in such a manner that all mergers with potentially adverse effects on competition must be notified to the regulator while all "harmless" mergers fall outside the scope of the merger rules. Designing such a perfect system is impossible in practice. For practical reasons, notification thresholds only serve as a rather crude proxy for identifying potentially harmful mergers and making them subject to merger review. Setting notification thresholds also has strong resource implications. If notification thresholds are set at a sufficiently low level, all anti-competitive mergers would be "caught" by the merger rules but the competition authority would risk being overwhelmed with harmless merger notifications which must be processed as well. Investigating and clearing large numbers of mergers having no adverse effect on competition is extremely resource-consuming. These activities may prevent the regulator from allocating sufficient resources to anti-trust enforcement. Threshold design is therefore a difficult balancing act where the lawmaker aims to "catch" as many potentially anti-competitive mergers as possible while not overburdening the regulator with notifications of mergers which do not affect competition.

Basing the obligation to notify a merger on the merging parties' market shares in markets affected by the transaction is a possible alternative to notification based on turnover. At first sight, using the merging parties' market shares seems like an attractive proposition since this measure would allow the regulator to easily identify mergers leading to problematic market shares which merit closer scrutiny.

However, a notification system based on market shares is problematic in practice because the obligation to notify would not be based on objective and verifiable criteria. The definition of the relevant market (on which market shares are calculated) is not always a straightforward exercise. In many industries defining the relevant market - in particular the relevant product market - involves complex economic analysis. In most cases, alternative market definitions are (more or less) feasible and may be subject to discussion. Leaving it to the merging parties to define the relevant markets (and thus the market shares) gives the parties an opportunity to circumvent regulatory review by defining artificially wide markets where market shares would seem unproblematic. Due to the ambiguities of market definition also merging

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The International Competition Network (ICN) has published a report that discusses "threshold design" in detail. "Setting Notification Thresholds for Merger Review", Report to the 2008 ICN Annual Conference by the ICN Merger Working Group, Notification and Procedures Subgroup.

parties that wish to fulfil their regulatory obligations find it difficult to determine whether their merger should be notified or not. Using market shares as notification thresholds therefore leads to uncertainty whether or not a proposed merger is subject to merger review and may lead to protracted discussions between the regulator and the merging parties. Merger notification based on market shares is therefore somewhat arbitrary, is likely to be resource-consuming and risks leading to delays.

Basing the obligation to notify on the merging parties' annual turnover is admittedly a rather blunt instrument for measuring the potential impact of a proposed merger. The main advantage of this approach is the fact that the thresholds are based on verifiable and objective data (audited accounts), which reduces the likelihood of disputes whether or not a merger is subject to merger review. The logic behind this type of notification threshold is the presumption that mergers involving larger companies are more likely to have an impact on competition in affected markets and therefore also more likely to adversely affect competition. While this is far from true in all cases, it nevertheless serves as a useful "rule of thumb" allowing the regulator to target mergers appropriate for review.

Which type of turnover to be included in the thresholds must be specified in detail. While the Commission has opted to use worldwide turnover for its first threshold (the combined turnover of all companies concerned), smaller jurisdictions may possibly consider whether it would be more appropriate to use national turnover for this threshold because it may allow "catching" to a greater degree those transactions that have their nexus in the country in question.

Turnover threshold levels should not only be determined in relation to the size of a country's economy, the sectors with particular preponderance in that economy and the size of its firms, but also in relation to how large proportion of planned mergers the lawmaker wishes to be "caught" by the merger rules. Setting the turnover thresholds too low means that the competition authority must examine a large number of mergers with minimal impact on competition. Setting the turnover thresholds too high would mean that some mergers that have an adverse impact on competition risk "slipping through the net".

One way of alleviating this dilemma – i.e. setting the turnover thresholds low enough to "catch" most potentially problematic mergers while avoiding to spend a disproportionate amount of resources on processing non-problematic mergers – is to introduce a simplified notification procedure for mergers that are above the merger thresholds but unlikely to cause competitive problems. Under the EU system, mergers fulfilling certain additional criteria may benefit from a simplified notification procedure.¹⁷ In such cases, the Commission's investigation is very limited and the Commission publishes a "short form" decision of less than one page.

When establishing a new competition regime it may be advisable to err on the low side as regards turnover threshold values. Although this approach may increase firms' regulatory burden, it is certain that

¹⁷ Merging parties may submit a short form notification in the following cases: (i.) for joint ventures (JVs) where the turnover of the JV and/or the turnover of the contributed activities are less than EUR 100 million in the European Economic Area (EEA) and the total value of the assets transferred to the JV is less than EUR 100 million in the EEA.; (ii.) when none of the merging parties are engaged in the same relevant markets (no horizontal overlap) or engaged in markets upstream or downstream from markets where another merging party is active (no vertical relationship); (iii.) when the merging parties are engaged in the same relevant market but their combined market share is less than 15% and/or the merging parties are engaged in markets upstream or downstream of each other but none of their individual or combined market shares at either level are 25% or more and (iv.) when a party acquires sole control over a company over which it already has joint control. Anticipating the potential arbitrariness of market share thresholds discussed above, the Regulation states that the Commission may require a full form notification *inter alia* in cases where it is difficult to define the relevant markets (e.g. in emerging markets or markets where there is no established case practice). [Annex II to Commission Regulation (EC) No 802/2004 of 21 April 2004, OJ L 133, 30.4.2004, p.1.]

the competition authority will be able to review most potentially anticompetitive mergers. Once the competition authority gains experience and is able to find the right policy balance, the turnover thresholds may be adjusted upwards to a more appropriate level, thereby reducing regulatory costs. For political reasons, it may also be easier for stakeholders to accept reducing the scope of the regulation by increasing the thresholds rather than lowering them.

FINLAND

1. General points

The Finnish Competition Authority (FCA) is responsible for competition law enforcement in Finland. The FCA investigates competition restraints and controls mergers.¹ The other main bodies responsible for competition law enforcement are the Market Court and the Supreme Administrative Court.

The Competition Act entered into force in September 1992 and has subsequently been amended. Merger control provisions were included in the Competition Act in 1998. Finland is currently in the process of amending the Competition Act. In 2007, the Ministry of Employment and the Economy appointed a working group to assess the need to amend the Competition Act. In 2009, the group submitted its report proposing new competition legislation. The Government Bill was brought before the Parliament in 2010. If the law proposal is approved, the legislation will become effective in 2011.

The above-mentioned proposals also foresee some changes in merger control. One proposal includes a change from the currently used dominance test to the SIEC test. Accordingly, intervening in a merger would no longer require the establishment or strengthening of dominance. A merger could be prohibited or the FCA could attach conditions on its implementation if it significantly impedes effective competition in Finland. Applying the same test as the European Commission would facilitate case allocation and cooperation among the authorities. Further proposals include the elimination of the deadline set for compulsory notifications and the possibility to extend processing time limits.

A concentration shall be notified to the FCA if the combined aggregate worldwide turnover of the parties exceeds EUR 350 million and the turnover of a minimum of two parties derived from Finland exceeds EUR 20 million. Notification is mandatory and shall be made by using a Notification Form.² Information required in the Notification Form is similar to that requested by the European Commission in the Form CO. The FCA will accept the simplified notification when companies, to which turnover derives from Finland, set up a joint venture or obtain joint control in a company which has no connection to the Finnish markets. The FCA does not impose fees for filing of notifications.

The concentration shall not be implemented prior to the FCA's decision in the matter. The primary method to eliminate any harmful effects of a merger is to impose conditions upon it. If harmful effects cannot be addressed by conditions, the FCA shall make a proposal to the Market Court to prohibit the merger.

¹ Information about the FCA and its activities is available on the FCA's web pages at www.kilpailuvirasto.fi/english. The web pages contain, for example, the English press releases of all the major cases of international interest, an English version of the FCA's Yearbook and the brochure entitled "Efficiency through Competition", which also provides information about the FCA's tasks and activities.

² Decision by the Ministry of Trade and Industry (currently Ministry of Employment and Industry) on the Obligation to Notify a Concentration.

The provisions on merger control in the Competition Act as well as the procedures of the FCA are applied in a uniform and objective manner, regardless of the nationality of the parties to the merger. The same standards apply to both Finnish and foreign undertakings.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

There have not been any instances of conflict.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

The FCA has a cooperation agreement with the Russian Federal Antimonopoly Service (FAS). The concrete form of the cooperation is the reciprocal visit of officers.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

The Competition Act is silent about foreign interests. Informal contacts, however, are common between the competition authorities and ensure non-conflicting outcomes and consistent remedies.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?*

The FCA is actively involved in the work and deliberation of international organisations. The FCA participates in the work of the OECD Competition Committee and its subcommittees Working Party 2 and Working Party 3. The FCA also participates in the work of the ICN and its various working groups, such as Merger Working Group.

With regard to the implementation of recommendations by these organisations, the ICN Recommended Practices for Merger Notification and Review Procedures led to the reassessment of the nexus when the Competition Act was amended in 2004. The work products of the OECD and ICN are also used by case handlers in the course of merger investigation and in legislative procedure as background information.

The FCA is also actively involved in the European Competition Authorities (ECA) network. The cooperation in the ECA e.g. consists of the exchange of information and the experience between the competition authorities. When an agency part of the network receives a notification of a merger which exceeds the notification threshold in several ECA countries, it conveys the information on the merger and the contact information of the relevant case-handler(s) to the other members. The case-handlers in the different countries may then exchange non-confidential information on the case with each other. The exchange of confidential information is only possible if the national and EU-provisions allow it.

The FCA also receives information about mergers which exceed notification thresholds in other jurisdictions in the Notification Form.

2.1.5 Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

The FCA does not belong to any regional organisation in the field of competition law. The FCA actively participates in cooperation between other Nordic competition authorities. The cooperation includes an annual meeting. Finland, however, is not a party to the Nordic cooperation agreement between Denmark, Iceland, Norway and Sweden which allows the exchange of confidential information between the respective competition authorities.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

The FCA considers that the current notification thresholds are appropriate to catch mergers which have an impact in Finland. In addition to the thresholds that concern the combined aggregate worldwide turnover, the turnover of a minimum of two of the parties derived from Finland must exceed EUR 20 million.

2.2.2 Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

The FCA has requested information from parties involved in cross-border mergers who are located outside Finland. The FCA has not encountered any major problems in obtaining the information. Foreign parties to a merger usually use a legal representative who is established in Finland and through whom the requests for information are in practice submitted.

The case-handlers of the FCA also regularly exchange views on pending merger cases with other competition authorities reviewing the same merger. The exchanged views consist of the views on market definition and general views of the market positions of the merging parties. In general, without permission from the parties, the FCA can only exchange non-confidential information. This concerns the exchange of information between the FCA and the EU Member States' competition authorities as well as between the FCA and other competition authorities. The confidential information between the Commission and the EU Member States' national authorities will be exchanged according to Council Regulation No 139/2004.

In one case, the FCA and another national competition authority exchanged Notification Forms. Before the exchange, all confidential information was deleted from the Notification Forms. The exchange provided both authorities e.g. with information about the scope of the markets subject to notification obligations.

- 2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

The FCA exchanges information about the current phase of the proceedings and the planned next steps with other competition authorities. The FCA is thus aware of actions taken by other competition authorities. The exchange of information may also concern the public versions of the draft remedies which the competition authority will market test. The FCA considers that these contacts have been sufficient to ensure non-conflicting outcomes and consistent remedies.

The FCA may also verify the parties' claims about the competitive conditions with another competition authority who investigates the same merger. In one case, discussions with another competition authority revealed that the parties' claims about the similarities of the competitive conditions in different geographic markets were not accurate. The fact that the competitive conditions were different affected the design of remedies in Finland.

- 2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

Political intervention is not possible in the area of merger control. This concerns both national and cross-border mergers.

- 2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

The Competition Act does not provide for non-competition considerations.

- 2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

The FCA considers that cross-border mergers do not provide any challenges that are unique to the Finnish merger control. The potential challenges of cross-border mergers, i.e. the timing of notifications and avoiding conflicting outcomes and inconsistent remedies, are common to all jurisdictions.

2.3 Remedies (types, consultation, monitoring and enforcement)

- 2.3.1 *Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.*

The FCA has imposed remedies on cross-border mergers. The types of remedies are similar in national and cross-border mergers and have consisted, for example, of divestments and supply or sales terms.

- 2.3.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.*

The FCA favours structural remedies. However, in some cases the FCA has also applied behavioural remedies. Behavioural remedies have concerned, for example, sales terms.

In 2008, the FCA conditionally approved a transaction in which the television company owned by the Swedish Bonnier media group acquired control in C More Group AB, a company that offers pay TV channels under the Canal+ brand. The competition concerns related to the pay TV services market. The remedies e.g. consisted of the removal of restrictions on the separate sales of certain channels and the commitment to sell certain broadcasting rights to competitors. The aim of the remedies was to secure a versatile consumer supply and the possibilities of other companies to pose a competitive constraint on the merged entity.

The FCA has also applied behavioural remedies in two earlier cross-border mergers as follows.

In 1999, the FCA conditionally approved a transaction in which the Danish Danisco A/S acquired majority control in Cultor. Cultor is Finland's and Danisco Denmark's and Sweden's sole sugar producer. Although Danisco had not previously operated in the Finnish sugar market, it was Cultor's significant potential competitor. The merger would have strengthened the monopoly in the Finnish sugar market. The remedies related to the non-competition clauses between Cultor and Lännen Tehtaat, which the companies had set while combining their sugar production in 1990. Danisco committed to remove the provisions, which prevented Lännen Tehtaat from purchasing sugar from other parties than Cultor. The aim of the remedies was to increase potential import competition.

In 1999, the FCA conditionally approved a transaction where the American York International Corporation acquired the stock capital of the Danish Sabroe A/S. The merger would have strengthened Sabroe's leading position in the industrial refrigeration market. As a result of the merger, the three commonest ammonia compression brands would have been owned by the merged entity. York committed to use its control in Sabroe Finland e.g. to elicit Sabroe Finland to sell products of the York Group to all third contractors operating in Finland on non-discriminating terms. The aim of the remedies was to secure the availability of the commonest ammonia compressors in Finland and their spare parts to third contractors.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

The FCA has encountered some difficulties in the implementation of remedies in cross-border mergers. In one case where a subsequent merger occurred, the acquiring company in the second merger found that due to certain changes in the distribution channels the conditions imposed on the previous owner were no longer valid and refused to implement them accordingly. The case is pending at the FCA.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

The FCA usually applies a trustee to monitor the implementation of remedies. The appointment of trustee has not required assistance from other competition authorities.

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

The FCA has discussed, for example, the types of appropriate remedies with other competition authorities. The discussions have concerned remedies proposed to the FCA and/or remedies proposed to other competition authorities. So far, the FCA has not designed any common remedy package with other competition authorities.

In one case, the notifying party sent a remedy proposal already sent to the FCA to another competition authority who was reviewing the same merger. The competition authorities discussed the remedies but as the other agency did not impose remedies there was no need to design a common remedy package.

In one case, the remedies proposed to another competition authority provided the FCA with further assurance that the merger would not result in competition concerns. The merger, which was approved by the FCA without conditions, was subject to conditions in another jurisdiction. The FCA approved the merger mainly due to the fact that the relevant geographic markets were wider than national, thus enabling the FCA to conclude that high market shares in Finland did not reflect the market position of the merged entity in the wider geographic markets.

JAPAN

1. Focus of the regulations against business combinations in Japan

The Antimonopoly Act (hereinafter referred to as the “AMA”) prohibits business combinations such as shareholdings, interlocking officers, mergers, splits, joint share transfers, acceptance of assignment of business, etc., if the effects of such business combinations may be substantially to restrain competition in any particular field of trade.

1.1 Notification system and its thresholds

The AMA prescribes a prior notification system against business combinations such as share acquisitions and mergers, etc. Accordingly, the AMA sets the thresholds for notification such as follows: share acquisitions should be notified when the total amount of domestic sales of the share acquiring company as coupled with the domestic sales of companies, etc., other than the said company in a combined group of companies to which the acquiring company belongs exceeds 20 billion JPY in case of the total amount of domestic sales of a share issuing company and its subsidiaries exceeds 5 billion JPY. (See ICN Merger Template¹ 4-A for details).

No filing fee is charged for the notification.

1.2 Substantive test

As the “substantive test” for merger review, any business combinations such as mergers, shareholdings, or other transactions are prohibited if “the effect may be substantially to restrain competition in a particular field of trade.” [Article 10, 13, 14, 15, 15-2, 15-3 and 16 of the AMA]

The Japan Fair Trade Commission (JFTC) has published the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination²” (hereinafter referred to as the “Merger Guidelines”). The Merger Guidelines prescribe, upon determination of any particular field of trade, as follows: “determined, in principle, in terms of substitutability for users” and “when necessary, substitutability for suppliers is also considered.” In addition, when it comes to the interpretation of the geographical range of the scope of a particular field of trade, the Merger Guidelines also prescribe as follows: “If users inside and outside a territory usually purchase a certain product irrespective of whether the geographic location of suppliers is inside or outside the territory...In this situation, the geographic range (of the scope of a particular field of trade) is defined as crossing national borders³.”

¹ http://www.jftc.go.jp/e-page/internationalrelations/icn-materials/ICN_Merger_Template_Japan_2010.pdf

² <http://www.jftc.go.jp/e-page/legislation/ama/RevisedMergerGuidelines.pdf>

³ An example of the case where a geographic range of a particular field of trade was defined as crossing national borders is “Establishment of joint venture for iron ore production by BHP Billiton and Rio Tinto.” (A summary of this case is explained in our contribution).

When it comes to the interpretation of “the effect may be substantially to restrain competition,” the Merger Guidelines prescribe as follows: “if the market structure is altered in a non-competitive way by the business combination, and if conditions are likely to emerge that would allow the company a certain latitude to manipulate price, quality, volume, and other conditions by acting unilaterally or coordinately with other companies.”

2. Review of notification system for business combination to ensure international consistency

Before the amendments to the AMA in 2009 (effective in January 2010), unlike merger regulations in major foreign countries, share acquisitions were only notified ex-post in Japan. This had impeded international cooperation, due to the differences in timing for notification between Japan and other countries, although cooperation in merger investigations and, as a result, coordination on potential competitive concerns among several competition authorities should bring merits for both competition authorities and the companies subject to the review on business combination, with the developments of globalization of the economy and the increase of the cases where several competition authorities investigate the same business combination simultaneously. Also, there existed the risk that the JFTC would impose some sort of cease and desist orders against the parties after other competition authorities had completed the examination of the business combination. For these reasons, a prior notification system similar to those for other business combinations such as mergers, etc., was introduced regarding share acquisitions through the amendments to the AMA in 2009.

In addition, since the notification thresholds for foreign companies were different from those applied to domestic companies in the system before the amendment of the AMA in 2009, there were some cases where the business combinations concerning foreign companies were not subject to notification, etc., although they should have been notified in light of their effects on the market in Japan. To address this problem, the same notification thresholds as applied to domestic companies have been applied to foreign companies since the amendments to the AMA in 2009.

Note: Other than the revisions described above, revisions, including simplification of percentage thresholds regarding voting rights with regard to acquisitions of shares, a raise in the amount of notification thresholds, etc., were also implemented pursuant to the amendments.

3. Cooperation in merger reviews with foreign competition authorities

3.1 Cooperation agreements or the like in the area of competition law

With regard to cooperation agreements related to the competition law, Japan has concluded bilateral agreements, such as the “Agreement between the Government of Japan and the Government of the United States of America concerning cooperation on anti-competitive activities (effective in 1999),” “Agreement between the Government of Japan and the Government of the European Community concerning cooperation on anti-competitive activities (effective in 2003)” and “Agreement between the Government of Japan and the Government of Canada concerning cooperation on anti-competitive activities (effective in 2005).” In addition, among the bilateral economic partnership agreements already signed and in force in Japan, the agreements with Singapore, Mexico, Malaysia, the Philippines, Chile, Thailand, Indonesia, Vietnam, and Switzerland contain chapters prescribing cooperation in the area of competition law. In these antimonopoly cooperation agreements and the chapters regarding competition in the economic partnership agreements, notification, cooperation in enforcement, coordination in enforcement, request of enforcement activity, consideration of important interests for the government of the other country, and so on are prescribed as their specific contents of cooperation applied to cases including business combinations. The JFTC, the competition authority in Japan, has actively engaged in cooperation with foreign competition authorities with regard to business combination cases across borders, based on the antimonopoly

cooperation agreements and the chapters regarding competition in the economic partnership agreements with the above-mentioned countries and based on the 1995 Council Recommendation of the OECD with the OECD member countries.

3.2 *Examples of cooperation with foreign competition authorities in merger review*

The chart below shows the recent cases in which the JFTC conducted reviews on business combinations in cooperation with the other competition authorities.

Year	Case	Cooperating agencies	Results of reviews
2005	Share Acquisition of Guidant Corporation by Johnson & Johnson ⁴	US Federal Trade Commission European Commission	Accepted on the condition of transfer of business
2009	Share Acquisition of Sanyo Electric Co., Ltd., by Panasonic Corporation.	US Federal Trade Commission European Commission	Accepted on the condition of transfer of business
2010	Share Acquisition of Varian, Inc., by Agilent Technologies, Inc. ⁵	US Federal Trade Commission	Accepted on the condition of transfer of business
2010	Joint venture establishment between BHP Billiton and Rio Tinto for producing iron ore ⁶	Australian Competition and Consumer Commission European Commission German Federal Cartel Office Korea Fair Trade Commission	The parties announced they would abandon the plan of the joint venture

The outline of the share acquisition of Varian, Inc., by Agilent Technologies and the outline of the establishment of a joint venture for producing iron ore by BHP Billiton and Rio Tinto are explained as follows.

3.2.1 *Share acquisition of Varian, Inc., by Agilent Technologies*

Pursuant to the amendments to the AMA in 2009, a prior-notification system similar to that for other business combinations such as mergers, etc., was introduced regarding share acquisitions and the same notification thresholds as applied to domestic companies in Japan were to be applied to foreign companies. Against this background, this case is where a prior notification regarding a share acquisition was submitted to the JFTC based on the amended AMA and where the JFTC carried out a review of the business combination by exchanging information with the US Federal Trade Commission (USFTC).

- Outline of the case

In this case, Agilent Technologies, Inc., which manufactures and distributes analytical instruments, etc.⁷, planned to acquire 100% ownership of Varian, Inc., which also operates a similar business. Both companies have their HQs in the US, operating sales of analytical instruments all over the world, and they also sell their products in Japan through their Japanese affiliates, etc.

⁴ <http://www.jftc.go.jp/e-page/pressreleases/2005/Dec/051209.pdf>

⁵ <http://www.jftc.go.jp/e-page/pressreleases/2010/June/100609.pdf>

⁶ <http://www.jftc.go.jp/e-page/pressreleases/2010/October/101018rev.pdf>

⁷ Analytical instruments are the machines, apparatuses, or devices which qualitatively and quantitatively measure various factors of substance such as composition, nature, structure, state, etc., mainly used in industries such as oil, gas, pharmaceutical, food, semi-conductor, environment, etc.

- Conclusion of the JFTC

The JFTC analyzed the effects of the share acquisition on the analytical instruments market in Japan by investigating actual statuses of distribution, new entries, competing goods, trade with users for 3 competitive products such as Micro/Portable GC⁸, etc., because the share acquisition might have a significant impact on the competition of these products. This case was also subject to similar investigations by other competition authorities such as the USFTC and the European Commission (EC).

Regarding the particular fields of trade which the JFTC mainly investigated, concerns of serious harm to the competition, etc., were raised during the reviews by the USFTC and the EC. In response, the companies to the business combination proposed a remedy to the USFTC and the EC where they would transfer the business for these products to a third party which was expected to be a competitor to the concerned companies after the transfer. This remedy was also proposed to the JFTC and the JFTC concluded, based on the proposed remedy, that the share acquisition in this case would not substantially restrain competition.

3.2.2 *Establishment of a joint venture for iron ore production by BHP Billiton and Rio Tinto*

The JFTC, upon receiving a request for prior consultation from BHP Billiton and Rio Tinto (“the parties”), which operate businesses involving mining and sales of iron ore etc., on January 20, 2010, had undertaken a review of the proposed joint venture between the parties for iron ore production in west Australia.

In reviewing the business combination case, the JFTC received the submission of materials, etc., from the parties and conducted questionnaire surveys, etc., for overseas competitors to the parties in question and for domestic and overseas users (steel manufacturers) or the like. In addition to the JFTC, the Australian Competition and Consumer Commission, the European Commission, the German Federal Cartel Office, and the Korea Fair Trade Commission conducted reviews on the case respectively. The JFTC proceeded with its prior consultation review by exchanging information with these competition authorities.

On September 27, 2010, the JFTC made a notice of its concerns to the parties by noting that the proposed joint venture would substantially restrain competition in the field of the production and sale of (lumps and fines of) iron ores in the worldwide seaborne market. Since BHP Billiton and Rio Tinto made a press release on October 18, 2010, indicating they would abandon the proposed joint venture, the JFTC closed its prior consultation review on the proposed joint venture on the same day.

⁸ GC refers to gas chromatograph, which is a device that separates volatile specimens into individual components for analyzing the existence of specific substances.

KOREA

1. Overview of merger control regime

The Monopoly Regulation and Fair Trade Act (MRFTA), Korea's competition law, provides in Article 7 (1) that anyone shall not conduct a merger that substantially lessen competition in a particular business area. Also, Article 12 of the MRFTA stipulates that a merger transaction where turnover or total asset of merging firms falls under certain criteria should be notified to the Korea Fair Trade Commission. In the case where a company that is required to make notification does not notify, fails to notify within the designated time or makes a false notification, it shall face administrative fines under Article 69-2 of the MRFTA. And there is no need to pay notification fee when making notification.

When one of the merging firms has total asset or turnover of KRW 200 billion (about \$200 million) or more and the other company's total asset or turnover is KRW 20 billion (about \$20 million) or more, the acquiring company is required to notify the KFTC of the transaction. When both of the merging firms are based in foreign countries, notification on the transaction is required to be made only when each company's turnover in the Korean market is KRW 20 billion (\$ 20 million) or more.

Merger notification can be made either before or after a merger deal depending on the size of merging companies. If one of the merging firms is classified into a large company, i.e. a company having total asset or turnover of KRW 2 trillion (about \$2 billion), the merging parties are subject to pre-merger notification and shall not complete the deal before the KFTC's review is finished. When neither of the merging firms is a large company, the merger can be notified after the transaction is completed.

2. Cooperation with other competition authorities

The KFTC signed MOU (Memorandum of Understanding) for cooperation in competition law enforcement with other competition authorities like Australian Competition and Consumer Commission (2002), Mexico's Federal Competition Commission (2004) and Canadian Competition Bureau (2006). Recently, the Korean government signed an agreement with the European Community concerning cooperation on anticompetitive activities (2009).

However, there have not been many cases so far where the KFTC sought cooperation based on those bilateral agreements in the review process of a cross-border merger. But it has actively notified other competition authorities on its merger enforcement based on the agreements. The cooperation agreements commit the signatories to give notice to each other when they prolong a review period or produce an Examination Report on a merger that is relevant to their counterparts' jurisdiction. Accordingly, when a foreign company is under a merger review by the KFTC or a Korean company's merger goes through a review by a foreign authority, and the transaction raises anticompetitive concerns, the authority reviewing the transaction informs the other on the fact. Such cooperation based on the bilateral agreements was shown when the KFTC handled a merger between Rio Tinto and BHP Billiton which intended to establish joint venture for co-production of iron ore in the Western Australia. The KFTC gave notice to competition

authorities of Australia and EU immediately after delivering the merging firms an Examination Report¹ which concluded that the proposed deal would cause anticompetitive effect.

Competition agencies give notice on their merger enforcement even where there is no bilateral agreement in place. Particularly, OECD member countries have been actively giving such enforcement notice following the 1995 OECD recommendation². Competition authorities of the U.S. and EU inform other OECD member countries in many cases when their law enforcement including merger review targets companies within the jurisdiction of those countries. In line with this, the KFTC also has received notice from them. For example, when the EU DG Comp announced its initiation of in-depth review on acquisition of Aker Yards by STX, a Korean shipbuilding company in December 2007, the KFTC received notification by the EU DG Comp at the same time.

When it comes to a merger case which is under concurrent review by several competition authorities, the KFTC has rarely engaged in substantial cooperation with its foreign counterparts in the manner of, for example, exchanging opinions on potential anticompetitive effect of the deal. Exceptionally for the Rio Tinto-BHP Billiton joint venture, however, it actively shared information and opinions throughout the review process through e-mails and face-to-face meetings with other competition authorities including the Japan Fair Trade Commission (JFTC) and the EU DG Comp.

The KFTC actively participates in discussion on merger regulations of international organizations like OECD and ICN with strong commitment to following best practices or recommendations developed as a result of the discussion. For instance, the KFTC introduced local nexus thresholds in 2003 based on the ICN Recommended Practices for Merger Notification Procedures³, under which a merger between foreign companies was required to be notified when each company's turnover in the Korean market was KRW 3 billion (\$3 million) or more. The threshold was revised upward to KRW 20 billion (\$20 million) or more to satisfy materiality requirement imposed by the ICN Recommended Practices. In 2009, it once again tried to harmonize its merger control regime with the ICN recommended practices by abolishing pre-merger notification time limit⁴. As a result, pre-merger notification, which had to be made within 30 days after the date of contract, can now be made at any time before the deal is completed.

3. Experience of reviewing cross-border mergers

Since 2004, the KFTC has been reviewing at least 50 mergers between foreign companies every year. In several cases, the KFTC imposed administrative fines on foreign companies for failing to meet the notification requirements. However there have been just a few cases where it has imposed remedies for cross-border mergers on the grounds of potential anticompetitive effect. Here are two merger transactions of foreign companies on which the KFTC practically imposed remedies.

¹ According to the Regulation on Operation of KFTC Meetings and Case-handling Procedures, an Examiner produces an Examination Report based on results of an investigation into a case. Once the Examination Report is submitted to the Committee, the commissioners make a final decision through deliberation.

² Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, as revised July 1995

³ Section I-B of the ICN Recommended Practices for Merger Notification Procedures states that "merger notification thresholds should incorporate appropriate standards of materiality as to the level of "local nexus" required for merger notification."

⁴ ICN Recommended Practices for Merger Notification Procedures Section III-B states that "jurisdictions should not impose deadlines for pre-merger notification."

In 2007, the KFTC conducted a review on Owens Corning's acquisition of Saint-Gobain Vetrotex glass fiber reinforcements business (the U.S and French companies, respectively) and ordered the target company to divest its Korean production facilities of glass fiber reinforcements⁵. As in this case, where production facility operates within the jurisdiction of a competition agency and the relevant geographic market is clearly defined to include the domestic market, there is little need to cooperate or coordinate review results with other competition authorities in the course of the review process. As both of the merging parties had production facilities in the Korean market, the KFTC was able to receive necessary documents or secure compliance with the imposed remedies without any particular difficulties.

But the BHP Billiton-Rio Tinto merger case reviewed by the KFTC in 2010 was different. The two companies entered in to an agreement to set up a joint venture to combine their Western Australian iron ore operations. The problem here was that neither of the merging firms had a sales branch or assets in Korea. In this situation, even if the KFTC decides that the concerned transaction would cause anticompetitive effect, it would not be easy to draw up effective remedies or ensure implementation of the imposed remedies. To resolve this problem, the KFTC engaged in close coordination with competition authorities in other jurisdictions like Japan and EU which shared similar interests. The KFTC actively exchanged opinions with them through e-mails and, when necessary, face-to-face meetings. During the process, the KFTC realized that other competition officials had similar views on the proposed transaction. Based on the strong cooperation with its counterparts, the KFTC produced an Examination Report which concluded that the proposed joint venture would significantly lessen competition in the global market for seaborne iron ore, and served it to the merging parties on October 1, 2010⁶. The merger review was closed as the two companies decided to terminate their joint venture agreement on October 18 based on the consideration that the transaction would not get approvals from competition authorities around the world including the KFTC.

When reviewing an M&A of foreign companies which have no sales office in the domestic market, obtaining documents from merging firms or collecting opinions of interested parties is often found to be difficult. In the review on the BHP Billiton-Rio Tinto merger, the KFTC experienced such difficulties in several occasions, but the review proceeded without serious disruption as a whole, since the companies hired a Korean law firm as their legal representative and offered full cooperation by submitting necessary documents throughout the process. The KFTC requested other iron ore suppliers and buyers to present opinions on the proposed joint venture, considering that the deal would have far-reaching impact on the global market. As the request was based entirely on voluntary cooperation of those companies, collecting their opinions was not an easy task. Many of the companies responded to the request and sent opinions, but, for some, it took a very long time to present opinions, and some did not even respond at all.

4. Challenges for developing and emerging economies

The KFTC has 30-year-history of M&A enforcement, but it was not until the late 1990s that it started to control anticompetitive M&As actively. In particular, it has been just a few years since it conducted review on M&As of foreign companies in earnest which affect the domestic market. The KFTC will strengthen enforcement capacity for cross-border M&As which have impact on domestic market, and ensure effectiveness of law enforcement by increasing the number of staffs with enhanced M&A enforcement skills and expanding cooperation with foreign competition agencies down the road.

⁵ However, in 2008, as the merging firm failed to divest the production facility, the KFTC imposed behavioral remedies instead.

⁶ The JFTC expressed concerns on potential anticompetitive effect and requested the merging companies to submit plans to address potential anti-competitiveness at a similar time to the KFTC. And after the mid October, it was known through media coverage that the EC DG Comp was preparing a Statement of Objection for the transaction.

Review of global M&A cases requires more resources than domestic cases. The KFTC has yet to secure abundant M&A enforcement experience and human resources specialized in international M&A cases. It is believed that most developing countries and young authorities are currently experiencing or will encounter such problems down the road. It is highly likely, therefore, that these countries cannot adequately control international M&As that adversely affect the domestic markets. As for now, only a few large jurisdictions like U.S. or EU have full control over large scale international M&As. However, because such large competition authorities tend to impose remedies focused on anticompetitive effect on their own domestic markets, adverse impact developing countries might suffer is not adequately controlled.

Nevertheless, each authority's separate effort to strengthen its own cross-border merger control cannot be a good solution. Such way is also unrealistic in that it takes a very long time for all the young authorities to individually enhance their capacity to the level required for international M&A enforcement. If all the competition authorities try to control international M&As, it could create a problem of excessive enforcement. In this sense, a better solution would be encouraging competition authorities of developing economies to actively participate in international organizations including the GFC and the ICN so that they can improve their enforcement capacity based on technical support provided by advanced authorities.

LITHUANIA

1. General points

The first legislation establishing merger control in Lithuania was the 1992 Law on Competition. By the amendment of 15 of April 2004, which entered into force on 1 May 2004, the Law on Competition has brought the merger regime, found in section III (Articles 10 to 15), closer to the EC model. A more detailed regulation of concentrations is provided in Resolution No.45 of 27 April 2000 of the Competition Council on the approval of the procedure for submission and examination of notification on concentration and of calculation of aggregate turnover (the Merger Regulation).

The authority responsible both for implementing the Law on Competition and for overall competition policy is the Competition Council (the Council). The Council undertakes control of concentrations, conducts investigations into concentration cases and can prohibit or permit concentrations. The Council's resolutions in merger cases may be challenged before the Vilnius Regional Administrative Court.

Under the provisions of the Law on Competition, the Council must be informed of the intended market concentration and its permission must be obtained when the combined aggregate turnover of the undertakings concerned is more than 30 million litas in the last financial year prior to concentration, and the aggregate turnover of each of at least two undertakings concerned is more than 5 million litas in the last financial year prior to concentration.

The Council has the right control concentrations that fall below the above – indicated turnover thresholds. The Council may, within 12 months after implementation of a concentration, request merging parties to file a notification if it is likely that a concentration falling below the jurisdictional thresholds will create or strengthen a dominant position, or result in a significant impediment to competition in the relevant market. This alternative was designed to address competition concerns in 'small markets', where turnover figures of firms with significant market power are below the level that would allow the competition authority to claim control over concentrations under the thresholds mentioned above. The Council uses this right on average for one to two cases per year.

Article 2(2) of the Law on Competition expressly states that the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

All concentrations of undertakings exceeding the turnover thresholds defined above must be notified to and receive approval from the Council. The law on Competition requires that concentrations falling within the turnover thresholds be notified to the Council prior to their implementation and following the presentation of an offer to conclude an agreement or acquire shares or assets; authorization to conclude an agreement; conclusion of an agreement; or the acquisition of ownership rights or to dispose of certain assets.

A concentration subject to notification cannot be implemented before it is cleared by the Council. Any implementing transactions and actions performed by the undertakings and controlling persons that are constituted as implementing the concentration are considered to be invalid with no legal force and effect. At the request of the undertakings participating in concentration or of the controlling person, the Council may permit individual actions of concentration until the adoption of a final decision, taking into account the consequences of suspension of concentration to the persons concerned, as well as a foreseeable influence on competition. Such permission may be subject to certain conditions and obligations.

The Council has four months in total to examine the notification of concentration submitted in accordance with the established requirements. If the commitments are offered the examination period may be extended for one month at the request of the notifying parties. The time limit begins on the next day after receipt of a notification that complies with these requirements. Article 11 of the Law on Competition provides general filing requirements, while the Merger Regulation establishes detailed rules for filing according to a standard notification form. Besides the formal requirements set down in the law (such as registration information of the undertakings participating in the concentration; a description of the method of concentration and a description of transaction; an information about associated undertakings; a description of activities of each of the undertakings participating in the concentration and evaluation of their market share in a relevant market), the standard notification form requires more detailed and sophisticated analysis of the relevant markets that might be affected as a result of concentrations performed. On the other hand, by agreement with the Council, it is possible to reduce the scope of the notification in most transactions that create no significant competition issues. Although the Law on Competition establishes two phases of examination of the concentration, which may take up four month (or five month on the request of merging parties), the Council usually clears most mergers within one month.

The Law on Competition requires payment of a filing fee. The Government has set the filing fee at 4,600 litas.

Having completed its examination of a notification, the Council will make one of the following decisions:

- to permit the concentration as indicated in the notification;
- to permit the concentration by establishing conditions and obligations regarding the concentration on the undertakings or controlling persons participating in the concentration to prevent the creation or strengthening of a dominant position; or
- to refuse to grant permission to effect the concentration by imposing obligations for the undertakings or controlling persons concerned to undertake actions to restore the previous situation or remove the consequences of the concentration.

The Lithuanian substantive test for clearance prohibits any concentrations that create or strengthen a dominant position; or result in a significant impediment of competition in the relevant market. As to the dominant criterion, Lithuanian competition rules define ‘dominant position’ as a position of one or more undertakings in the relevant market in which the undertaking does not directly face competition, or that enables the undertaking to exercise a unilateral decisive influence in the relevant market by effectively restricting competition. The Law on Competition contains a presumption of market domination based upon high market share. Thus, unless proved otherwise, an undertaking with a market share of not less than 40 per cent (for retail trade market - 30 per cent) shall be considered to have a dominant position in the relevant market. Moreover, unless proved otherwise, each of a group of three, or a smaller number of undertakings with largest share of the relevant market, jointly holding 70 per cent or more of the relevant market (for retail trade market – 55 per cent), shall be considered to enjoy a (collective) dominant position. The Guidelines on the Establishment of a Dominant Position provide an open-ended list of concerns that may

be addressed by the competition authority. Pursuant to Guidelines, the Council is supposed to assess sole and collective market dominance (the latter implies assessment of coordinated effects) and unilateral effects. Analysis of these competition-related concerns is described in greater detail. Besides, the Guidelines contain a general statement allowing the Council to take into account any other factor that may be relevant in assessing the probability of a significant impediment to competition, such as the possibility to invoke conglomerate effects or vertical foreclosure. In practice, the Council usually invokes the market dominance test. Thus, this test might be regarded as the centre of gravity of the Council's analysis. In cases of vertical concentrations, the Council also used to assess possible foreclosure of upstream or downstream markets.

2. Specific questions

2.1 *Co-operation among competition authorities (international, regional and bilateral)*

There are two bilateral agreements:

- Agreement between the Competition Council of the Republic of Lithuania and the Agency of the Republic of Kazakhstan for Competition Protection (Antimonopoly Agency) concerning cooperation in the area of competition policy and law (dated 02-08-2010);
- Agreement on co-operation between State Competition and Consumer Protection Office of the Lithuanian Republic and Antimonopoly Committee of Ukraine (dated 18-02-1997).

It should be noted that these agreements haven't been used in practice in any cross-border merger case.

There are no specific statutory provisions on the cooperation of the Council with other competition authorities. Outside the remit of national competition rules, the Council's cooperation with other competition authorities is defined by EC law, including the EC Merger regulation and the Commission Notice on case referral in respect of concentration. Besides, the Council is involved in participating in EU Ad Hoc Merger Working Group. The basic document for enforcing cooperation among the national competition authorities of the EU and the EEA in the review of mergers which are notified to more than one authority ('Draft/ Best practices on cooperation in merger review') is now under consideration.

The Council most intensively cooperates with the European Commission and national competition authorities within the European Competition Network and ECA (European Competition Authorities). The Council participates in cross-border mergers information exchange process. This information is very useful for possibility to use provided information to contact the case-handlers directly responsible for the case. All participants of ECA are provided with key information: the date of received notification and provisional deadline for decision; the parties involved in anticipated transaction; the relevant economic sectors/ markets; the other member States concerned.

The Council also actively participates in developing competition policy in international forums, such as OECD and ICN (International Competition Network). The Council participates in OECD Competition Committee, Working Party No.2 'Competition and Regulation' and Working Party No. 3 'Co-operation and Enforcement' as an observer since 2001. The Council participates in the activity of ICN since 2002 and respectively in ICN Merger Working Group. The main activities in this area are participation in Merger Workshops, and submission of responses to the ICN Questionnaires and ICN Merger Templates & Related Materials.

A number of significant changes to better align the Concentration control with the best practices are implemented:

- Increased flexibility in timing of notification by removing the former deadline for notification of one week after the conclusion of a binding agreement and by introducing the possibility of notification before conclusion of a binding agreement;
- Increased flexibility of investigatory timeframe by providing, at the parties request, an additional month triggered on the submission of a remedy offer;
- Enhancement of the substantive test of dominance by the application of test of significant impediment of competition;
- Inclusion of the consideration of efficiencies in merger review analysis;
- Publication of the Procedure for the Submission and Examination of Notification on Concentration and of Calculation of Aggregate Turnover;
- Publication of The Guidelines on the Establishment of a Dominant position with the latest amendments on the notion of joint dominance and significant impediment of competition in concentration cases.

2.2 *Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)*

As mentioned above, the Law on Competition shall also apply to the activities of undertakings registered beyond the territory of Lithuania if such activities restrict competition in the internal market of Lithuania. Accordingly, Lithuanian merger control rules apply to all concentrations that fall within the turnover criteria described above, irrespective of where a concentration takes place and whether the parties concerned have any subsidiaries or activities in Lithuania. Notably, however, if a party to a concentration is an undertaking of a foreign country, its aggregate turnover is calculated as the sum of income received from the sale of its products in the Lithuanian market.

It was one case in banks merger in question which could possibly in some extent rely on the actions and decisions taken by foreign competition authorities.

In 2001, the Council received a request from Estonian bank *AS Hansapank* to permit the acquisition of more than 90 percent of the shares of the stock company *Lietuvos taupomasis bankas* (Lithuanian Savings Bank) which was owned by the state and offered for privatization. This was a horizontal concentration in the market of financial services but by itself it did not threaten to create a dominant position. However, almost at the same time when the Council was reviewing the merger the announcement was made by *Forenings Sparbanken AS (Swedbank)* and *Skandinaviska Enskilda Banken AB (SEB)* about their intention to merger. *Swedbank* was a strategic shareholder of *AS Hansapank* and *SEB* was a strategic shareholder of *Vilniaus bankas*. The sum of market shares of the two largest Lithuanian banks exceeded 40 percent market share's threshold for several key financial services. Thus, it was very likely that the latter merger of Swedish banks would have created a dominant position in Lithuania. Nevertheless, the intended merger of Swedish banks was not even notified to the EU Commission at that time. Therefore, the Council only communicated its view to the relevant parties and governmental institutions in Lithuania that the only possible solution if both mergers took place would have been divestiture of one of the banks in Lithuania, but before the beginning of implementation of the merger of Swedish banks there was no ground to block the acquisition of *Lietuvos taupomasis bankas* by *AS Hansapank*. The Council also contacted the European Commission and the Swedish Competition Authority.

Later the Council received a letter from the *SEB* and *Swedbank* confirming that the merging parties agreed with the divestiture of one of the banks in Lithuania in case their merger was allowed to proceed. However, having received the statement of objections from the European Commission the *SEB* and *Swedbank* abandoned their intentions to merge.

2.3 Remedies (types, monitoring and enforcement)

The Council may permit concentration by establishing conditions and obligations relating to the concentration for the undertakings or controlling persons participating in the concentration to prevent the creation or strengthening of a dominant position. Such conditions and obligations may be both of a behavioural and structural nature. The most common structural remedy imposed by the Council is the divestiture of an undertaking. However, in practice, the Council has also imposed behavioural remedies such as, a requirement of transparent pricing and arm's length dealing with related undertakings, a prohibition on applying discriminatory prices and imposing exclusive purchase obligations, as well as requirement to provide the possibility of unilateral termination of a contract.

The Council applied both structural and behavioural remedies to resolve competition-related concerns resulting from foreign-to-foreign mergers. However, the remedies were imposed only in situations where merging non-Lithuanian companies had significant presence on Lithuanian markets through their local subsidiaries or related companies. In practice, under the common legal power to use obligations and conditions the Council can use the trustee institution (both divestiture and monitoring) in more complicated cases where it is required to ensure compliance with obligations. As a rule, the parties involved in concentration are obliged to provide regular information on adequate compliance with obligations and conditions.

As practice shows, the risk of a foreign-to-foreign merger being blocked is rather low, but it can be expected that if question of dominance or significant restrict of competition arose, the Council might make clearance subject to either behavioural or structural remedies, including a 'hold separate arrangement'. There are provided below two instances of foreign-to- foreign mergers with applied structural and behavioural remedies.

2.3.1 A merger of breweries

In 2000, *Carlsberg A/S* and *Orkla ASA* announced their plans to create *Carlsberg Breweries A/S*. The new company was supposed to be owned 60 percent by *Carlsberg A/S* and 40 percent by *Orkla ASA*. Despite the fact that foreign companies were involved in this merger it did threaten competition in Lithuania. All three largest Lithuanian breweries (*Kalnapilis*, *Utenos alus* and *Svyturys*) were directly or indirectly controlled by the merging foreign companies. The sum of pre-merger market shares of the aforementioned Lithuanian breweries was approximately 60 percent, however, they had more than 90 percent in the premium beer segment. The Council came to the conclusion that intended concentration would have strengthened a dominant position in the relevant market (*Kalnapilis* and *Utenos alus* were already controlled by the same parent company) and therefore would have significantly restricted competition. The Council informed representatives of the merging parties and started negotiations concerning adequate remedies. Since all three Lithuanian breweries directly affected by the merger were approximately of equal size, the Council insisted that the only adequate remedy was to sell one of the breweries in a time period prescribed by the Council. Thus, the final decision contained the following conditions and obligations. First at all, *Carlsberg A/S* (parent company of *Svyturys*) and/or *BBH* (parent company of *Utenos alus* and *Kalnapilis*) were obliged to sell an unspecified brewery (either *Svyturys* or *Kalnapilis* or *Utenos alus*) within prescribed time limit. Secondly, until the divestiture *Carlsberg A/S* was obligated to maintain viability of the aforementioned breweries. Later the Council approved *Kalnapilis* to be sold and *BBH* proposed the candidature of divestiture trustee. Besides aforementioned, the final decision contained described procedure of providing regular trustee's reports and information to Council on compliance with obligations. And finally, *Kalnapilis* was sold and a buyer *Danish Brewery Group* was approved.

2.3.2 A merger in telecommunications and information technologies services

In 2005, the Council examined the notification of acquiring a 100 per cent shareholding of *Microlink AS* by one of the largest Estonian telecommunications and information technologies service provider *Elion Ettevõtte AS*. *Microlink AS* was Internet and data transmission services provider in Lithuania, Latvia and Estonia. Upon the implementation of the transaction in Lithuania *AB Lietuvos telekomas* was supposed to acquire subsidiaries of *Microlink AS* operating in Lithuania. *AB Lietuvos telekomas* and *Elion Ettevõtte AS* were controlled by the *TeliaSonera AB*. The Council assessed the concentration deal under consideration as vertical and horizontal in the retail Lithuanian market of broadband access. At that time *AB Lietuvos telekomas* was a sole wholesale broadband access provider in Lithuania, operating a well-developed fixed telecommunications line network and the infrastructure; furthermore, the company held a dominant position in the leased lines market, and, in addition to quite a number of other advantages was in the process developing alternative internet access and data transmission technologies. The Council concluded that following the concentration through the acquisition of its competitor *AB Lietuvos telekomas* would strengthen its market position. Although *UAB MicroLink Lietuva*'s market share was insignificant, it was nevertheless one of the major Internet and data transmission services provider in Lithuania. Due to the concentration transaction *AB Lietuvos telekomas* would strengthen its position in the market and in connection with other related undertakings could restrict competition in the relevant Lithuanian retail market for broadband access. Meanwhile its competitors managing networks of much lower penetration rate had less possibility to increase their market shares. Thus, the Council authorized *Elion Ettevõtte AS* to implement concentration with following conditions and obligations. First at all, *AB Lietuvos telekomas* was obliged to sell *UAB MicroLink Lietuva* within an established time limit. Secondly, until the divestiture *AB Lietuvos telekomas* was obliged to maintain viability of the acquired entity, accordingly maintain its competitiveness, trade marks and other acquired rights related with the image of the entity. Besides aforementioned, the Council imposed an obligation to ensure the continuity of the contracts concluded with the business partners and customers, *AB Lietuvos telekomas* was obliged to ensure non-discriminating terms in the provision of the broadband access to all recipients of the service. The decision also contained prescribed procedure for providing regular information of *AB Lietuvos telekomas* to the Council on compliance with obligations. The latter company was disposed of prior to the established term and later in 2006 *UAB MicroLink Lietuva* offered to the market a fixed telecommunications service 'Metro Tel' thus entering into competition with *TEO LT*, *AB* (former *AB Lietuvos telekomas*).

During the investigation procedure, the Council communicated to the Latvian Competition Council and the Estonian Competition Authority. As Internet and broadband access markets were defined as national markets, so it wasn't the possible referral case to the European Commission. The situation in Lithuanian market slightly differed from the certain situation in Latvia and Estonia, as *UAB MicroLink Lietuva* didn't own the network for providing Internet and data transmission services. It used network based on leased lines from *AB Lietuvos telekomas*, besides the leasehold time was coming to an end. However, *Microlink AS* entities in Latvia and Estonia owned networks for providing aforementioned services. Therefore, the Latvian Competition Council and the Estonian Competition Authority adopted decisions contained the obligation to divestiture the part of business asset (network). Notably, that the first decision was made by the Latvian Competition Council, the second – by the Lithuanian Competition Council, and the latest – by the Estonian Competition Authority.

MEXICO

1. General points: Merger control regime

1.1 *Please provide a brief overview of your merger control regime*

1.1.1 *Legal powers*

The Federal Law of Economic Competition (FLEC) was enacted in 1993. Since then, there has been a fully-functioning merger control regime.

The FLEC defines concentrations as the merger, acquisition of control, or any other action whereby an economic agent acquires assets, stock holding, equity interests, trusts, or assets in general from other economic agent.

The Mexican Federal Competition Commission (hereinafter Commission or CFC for its acronym in Spanish) has the power to challenge and impose fines on any transaction whose aim or effect is to reduce, lessen or prevent competition and free market access of products and services that are equal, similar or substantially related.

1.1.2 *Substantive test used*

Article 17 of the FLEC states that the CFC may consider the following criteria for challenging a concentration: i) that the transaction grants or may grant to the merging parties unilateral power to set prices or restraint supply in the relevant market and competitors are not able to counteract this power; ii) that the transaction has the purpose of unduly displace competitors or impede entry to the relevant market; and iii) that the new agent obtains or strengthens its power to incur in monopolistic practices.

Article 18 of the FLEC defines the elements that are necessary to decide if the merger may be challenged or sanctioned. First, the article establishes the basis of an analysis following the principles of a dominance test. The analysis begins with the definition of the relevant market, according to a procedure that is defined in the FLEC and its Regulations. Second, the Commission identifies the economic agents that participate in the market, defines their market shares, analyzes their market power and estimates the degree of concentration. To do this, the Commission uses the Herfindahl-Hirschman Index (HHI), and the Dominance Index (DI). The use of concentration indexes is regulated by a ruling by the Commission's Plenum.¹

¹ The ruling is called "Resolución por la que se da a conocer el método para el cálculo de los índices para determinar el grado de concentración que exista en el mercado relevante y los criterios para su aplicación" and was published in the Official Gazette (Diario Oficial de la Federación) on July 24th, 1998. The dominance index, used as a complement of the HHI, has the characteristic that it diminishes when the merging parties are minor competitors in the market so that presumably competition is enhanced by a "new stronger" agent. An increase in the ID does not imply the achievement of dominant position by the merging parties; in any case, the level and its change are taken as a presumption of the "new" agent to achieve or strengthen market power. The concentration indexes only use market share information and for this reason, are at most considered auxiliary elements for the analysis of market power. To determine if an economic

In addition, article 18 defines other elements that open the possibility of an analysis similar to the Substantial Lessening of Competition Test (SLC). Particularly, this article considers the examination of the effects of the concentration on other related markets, as well as efficiency arguments presented by the parties that are involved in the transaction.

In the evaluation of efficiencies, article 16 of the FLEC's Regulations considers that a concentration can improve efficiency in the market and can have a positive impact in the process of competition and free market access if the parties show that there are permanent benefits for consumers that exceed the anti-competitive effects of the concentration. The kind of efficiencies that could be accepted in an efficiency defense is related to permanent cost reductions, technology transfers, improvement of infrastructure and distribution networks.

In addition to article 18, the Plenum's ruling that defines the methodology to estimate concentration indexes stipulates that even in the case that indexes are below the risk thresholds, the Commission may conclude that a transaction could reduce, damage or impede competition and free market access, when: i) the involved parties have participated in previous transactions in the same relevant market; ii) the parties are related with another agent and from this relationship the parties can obtain a privileged access to any essential input or advantages in distribution, marketing or advertising in the relevant market; iii) the parties can obtain market power in related markets; or iv) any other element that could represent or lead the parties to obtain market power that is not reflected in the market shares before the transaction occurs.

1.1.3 Mandatory regime

When the monetary thresholds established in the FLEC are met, it is compulsory to notify mergers and acquisitions prior to their completion.

Since January 1st 2011, the notification fee will be eliminated.

There are not special requirements for merger notification. The parties have to submit information on the parties involved in the concentration; documents which certify the representative's legal capacity; the companies' constitutional documents; financial statements; description of capital stock structure of the economic agents participating, both before and after the concentration; description of the transaction, its objectives, kind of transaction and non-compete clauses; mention if the economic agents involved in the transaction participate in other firms that produce or sell similar or substantially related goods to those supplied by the parties; description of the goods and services supplied by the parties, and information about their use in the relevant market; information about market shares of the parties and their competitors in the relevant markets; information about placement of factories and distribution centers owned by the parties; and another elements that could be helpful for the analysis of the transaction.

1.1.4 Monetary thresholds

The FLEC establishes that the following concentrations have to be notified to the CFC:

agent has market power or could obtain market power as a result of a merger or acquisition, the Commission has to take into consideration barriers to entry, the power and presence of competitors, access to inputs, the recent behavior of economic agents involved in the transaction, access to imports, the capacity to fix prices unilaterally without the competitors being able to actually or potentially counteract that capacity, the cost for the consumers to access to another suppliers, and other elements.

- When the transaction or series of transactions giving rise to the concentration, regardless of the place where they take place, have a value in Mexico, directly or indirectly, exceeding the equivalent of 18 million times the general minimum wage (MW) for the Federal District;
- When the transaction or series of transactions giving rise to the concentration involve the accumulation of 35 per cent or more of the assets or shares of stock of an economic agent, whose assets or annual sales in Mexico exceed the equivalent to 18 million times the MW; or
- When the transaction or series of transactions giving rise to the concentration involve the accumulation in Mexico of assets or capital stock in excess of the equivalent to 8.4 million times the MW and two or more economic agents take part in the concentration whose assets or volume of annual sales, jointly or individually, exceed an amount equivalent to 48 million times the MW.

It is not necessary that control is acquired over the Mexican economic agent. A notification could be triggered if the thresholds are met even if the transaction involves only the acquisition of non-voting shares.

1.1.5 Exemptions or special provisions for cross-border mergers

The FLEC states that whenever the acquired party in a merger has interests (assets, stock or sales) in Mexico, the transaction has to be notified – this obligation stands even if the acquirer has no prior interests in Mexico.

The analysis carried out by the Commission in the case of cross-border mergers is not different from that when the parties are national companies.

2. Specific questions

2.1 Co-operation among competition authorities (international, regional and bilateral)

2.1.1 Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

No, there has not been such a case in México. Most instances related to cross-border mergers focused on: i) the exchange of information; and ii) the request by other authorities to sign waivers from companies situated in México which may have interests in their jurisdictions.

2.1.2 Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

Yes, currently the Mexican Government and the CFC have signed agreements with other agencies and governments (jurisdictions) in the field of competition policy enforcement and advocacy. Particularly, in merger cases the agreements require the authorities to notify each other whenever there is a transaction in which the economic agents involved are established and/or located in the territories of the corresponding authorities.

The agreements which have been signed by the Mexican Government or the CFC are the following:

- Agreement between the government of the United States of America and the government of the United Mexican States regarding the application of their competition laws.

- Agreement between the government of the Canada and the government of the United Mexican States regarding the application of their competition laws.
- Arrangement between the Fair Trade commission of the Republic of Korea and the Federal Competition Commission of the United Mexican States regarding the application of their competition laws.
- Agreement between the Federal Competition Commission of the United Mexican States and the Federal Antimonopoly Service of the Russian Federation on Cooperation in the Field of Competition Policy.
- Implementing Agreement between the government of Japan and the Government of the United Mexican States Pursuant to article 132 of the Agreement between Japan and the United Mexican States for the Strengthening of the Economic Partnership.
- Annex XV of the Free Trade Agreement between the European Union and Mexico.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

Most of the agreements signed by the Mexican government and the CFC relating to the enforcement of competition law are non-binding in nature; however, the Commission has always been willing to comply with the commitments contemplated in the agreements regarding cross-border mergers and acquisitions

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organizations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?*

The CFC has been a very active participant in the OECD and ICN in the area of merger control. As a member of the OECD, the Commission has taken part in a number of roundtables where merger control has been addressed. As part of the Global Forum on Competition in January 22, 2009, the CFC answered a Questionnaire on the Challenges Facing Young Competition Authorities and participated in the related discussion. During this Forum the CFC explained merger control rules in Mexico, as stated in the Federal Law of Economic Competition. The CFC also wrote about the challenges it faces while implementing the merger control regime, such as streamlining the analysis so that human resources can concentrate on the handling of complicated cases.

Regarding its participation in the ICN, the CFC has been actively involved in the development of the Merger Working Group products (such as Recommended Practices; Guidelines Workbook; Handbooks; Reports and Templates). In addition to this, these products have served as useful guidance and international benchmark to reform the FLEC. For example, in 2006 the FLEC was amended to allow the CFC to impose structural remedies and to strength and simplify procedures related to the presentation of efficiency gains arguments. Currently, the Mexican Congress analyzes a second generation of reforms to ease the enforcement of the merger control regime. Among other things, the reform proposal contemplates exempting from the obligation to notify certain type of mergers that clearly pose no risk to competition.

2.1.5 *Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger*

operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

The provisions included in the FLEC and its regulations do not belong or are subordinated in any way to a regional regime or an international organization.

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 *If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?*

To determine if a merger needs to be notified, the FLEC considers the use of monetary thresholds. These were updated in 2006, when the FLEC was reformed. At that time the thresholds were increased more than 50% on average, in order to improve the agency's capability to analyze mergers that have a significant impact in Mexico. In the reform package currently under discussion, changes to the notification thresholds are not contemplated.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

The FLEC considers that the merger has to be notified by the different parties involved in the transaction (buyer, seller and the target). The parties are obligated to provide the information that is considered necessary by the CFC to carry out the analysis, even if one of the parties is placed in other country. If the parties do not provide the requested information, the Commission can close the file, without issuing a decision. Normally, the CFC does not have major difficulties in obtaining the information and so far it has not asked official help from other competition authorities.

2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

In cross-border mergers it is important for the Commission to take into consideration the analysis of other agencies, particularly those of Canada and the USA - Mexico's commercial partners in NAFTA -. The CFC verifies if conditions imposed in other jurisdictions could affect the degree of concentration in Mexican markets or affect supply conditions.

In some merger cases that are cleared with remedies in other jurisdictions, it is often not necessary to impose remedies in Mexico, because the action taken by other agencies is normally enough to solve the competition concerns in Mexico.

2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

The Law employs technical elements to define relevant markets and to assess the competitive effects of mergers. The decisions are made by a collegiate body and it is not necessary to obtain the approval of other agencies or ministries. The executive power is not allowed to modify or to block a Commission's decision, in any kind of merger.

2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

The objective of the FLEC is the protection of competition and free entry into the markets as a means to improve efficiency and to create better conditions for consumers. The FLEC does not consider public interest objectives, such as the protection of employment or protection of national companies.

2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

The Commission has not identified any particular aspect in which it is necessary to work in order to improve enforcement actions in the case of cross-border mergers.

The Commission has a good relationship with agencies of Canada and USA, Mexico's main trade partners.

For the CFC, it is important to maintain cooperation with these countries because many of cross-border mergers that affect Mexico's economy involve companies placed in Canada or USA.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 *Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.*

The CFC has imposed remedies on cross-border mergers only in cases in which the markets have a national dimension, so the remedies have only affected Mexican markets.

Typical cases are those involving pharmaceuticals, in which is possible to divest assets on a national basis.

2.3.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioral remedies be applied? Please provide examples where appropriate.*

According to the FLEC, it is possible to impose remedies that may alleviate competitive effects of mergers, when remedies are justified in magnitude and are focused on concerns in the relevant markets that could be affected by the merger.

The FLEC does not limit the kind of remedies that could be imposed, so the Commission can adopt behavioral or structural remedies.

According to its experience, the Commission prefers the use of structural remedies, because they are more effective and simpler to enforce.

The Commission employs behavioral remedies only when it is not possible to impose structural remedies or as a complement of the latter. In the adoption of this kind of remedies, the Commission analyses their effectiveness to protect competition and the cost of implementation.

2.3.3 Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

Once a merger is approved, the parties may have incentives to avoid the adoption of remedies. Thus, the CFC has decided not to approve certain mergers until the parties have fulfilled a program of remedies. If the parties demonstrate that they have satisfied the program, then the Commission approves the merger.

There are some cases in which it is not possible to proceed as mentioned above. For example, in cross-border mergers the Commission has considered that is not necessary to affect the closing of the merger in other jurisdictions. Because of that, sometimes the CFC approves the merger conditioned to a strict program to fulfill the remedies. The Commission is empowered to reverse an approval when the parties do not satisfy the program.

In Mexico, the rules of the game in place do not provide much flexibility for negotiating remedies. Particularly, the review period is relatively short and the procedure does not consider the possibility to stop it in order to open a period to discuss remedies with the parties.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

In general, the parties have to accept the remedies imposed by the agency and have to present a program that considers actions, dates and reports.

Because the imposed remedies are normally focused on the attention of competition concerns that arise in Mexican markets, the Commission rarely informs others agencies or requests their assistance.

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

The Commission has discussed remedies with other national agencies within the framework of existing cooperation agreements. For this, it has been necessary to exchange information on the basis of confidentiality and the consent of the parties.

The discussions have focused on informing the other national authority about the possibility of a remedy that could have cross-border effects. There are no experiences of discussions to impose joint or coordinated remedies.

MONGOLIA

MERGER AND ACQUISITION CONTROL IN MONGOLIA

Unlike contractual restraints of competition where the participating enterprises remain legally independent, concentrations or mergers between enterprises are characterized by the fact that, through the acquisition of shares or assets, formerly independent firms are either merged into one single enterprise or at least capital links are created.

The restraints of competition that are associated with mergers are particularly obvious and by no means hypothetical when all competitors in a particular market merge and thereby obtain a monopoly position. Thus concentration may restrain competition as much as cartelization. Therefore, the most recent proposals for changes in large economies have focussed more on merger control issues. Smaller economies, like Mongolia, do not engage in significant merger control.

The Law of Mongolia on Competition, which was approved by Parliament on July 2010, aims at protecting competition in the commodity markets of Mongolia and requires business entities which want to merge or acquire a significant part of another competitor to notify their intention.

According to the Article 8 of the law, dominant entities shall submit an application to the Authority for Fair Competition and Consumer Protection of Mongolia (AFCCP) if they intend to restructure through a merger and acquisition, to purchase more than 20 percent of common shares or more that fifteen percent of preferred shares of a competitor.

The AFCCP shall review the application and issue of an assessment within 30 days from receiving it. This period could be extended up to 30 days. The AFCCP can reject authorisation where it considers that there are circumstances which restrict competition. The Government of Mongolia shall adopt a detailed regulation on the AFCCP assessment when a dominant business specified in Article 8 of the Law on Competition reorganizes through a merger and acquisition with other legal entities, purchases the shares of competitors selling the same type of goods and products or merges with other entities.

Recently, the AFCCP has drafted this regulation and sent it to other government bodies for comments. According to this draft regulation, the application shall classify and review the forms of the reorganization through merger and the purchase of shares and shall assign them to 3 merger types:

1. The horizontal merger and purchase of shares;
2. The vertical merger;
3. The conglomerate merger;

The types of reorganization through a merger of legal entities and the purchase of shares shall be determined as follows:

- The type where the legal entity dominant on the market purchases more than twenty percent of common shares or more than fifteen percent of preferred shares of a competitor selling the same goods and products shall be an horizontal merger;
- The type where the dominant legal entity reorganizes through a merger with other entities or merges with related entities shall be determined on the basis of the review of the application and documents submitted from the legal entity.
- There shall be an inquiry on whether the applicant legal entities have previously breached the Law on Competition. The repeated breach of such law by any one of the applicant legal entities shall be grounds for refusing the reorganization through a merger with other entities and the purchase of shares.
- Where the dominant legal entity reorganizes through a merger with other entities and purchases shares, the Agency for Fair Competition and Consumer Protection shall investigate whether competition will be restricted in the relevant market and shall issue a decision:
 - Issuing a relevant assessment by determining the market share of the relevant legal entities, market concentration and market capacity as specified in the regulation on determining natural monopolies and dominant business entities reorganizing through a merger with other entities;
 - Determining whether the merger of the dominant legal entity with other entities aims at pushing other competing business entities out of the market and has the potential of impeding new entry to the market;
 - Determining whether there is a potential of engaging in the monopolizing activity by illegally using the dominant position on the market as specified in Article 7.1 of the Law on Competition;
 - Determining whether there is a potential for engaging in activities that restrict the economic interests of other competing business entities and those of consumers;
 - Determining whether the benefit to the national economy exceeds the damage caused to competition.

In addition, exemptions could apply if it is determined that the benefit to the national economy exceeds the damage to be caused to competition.

A prohibition decision shall be the ground to refuse the state registration of the legal entity at the General State Registration Agency and to trade at the “Mongolian Stock Exchange” (JSC).

The main change in merger control is that the AFCCP will regulate only dominant business entities through merger and acquisition. (AFCCP had to regulate all business entities).

CONSEIL DE LA CONCURRENCE DU MAROC ¹

La globalisation des échanges a généré une multiplication des fusions et ententes sur le plan transnational. Il en est résulté une vigilance accrue et un renforcement des contrôles nationaux. La problématique est encore plus délicate pour les pays en développement. La volonté de préserver la concurrentiabilité des tissus économiques nationaux et la protection contre les effets des concentrations transfrontalières a d'ailleurs été encouragée par les conseils prodigués par les instances économiques et financières internationales. Certains ont même vu dans ces processus la possibilité de récolter des flux financiers.

Il faut cependant préciser que le constat de ces contrôles reste relativement limité du fait qu'au moment où l'économie se mondialise, ces derniers reposent fondamentalement sur des droits nationaux avec leurs particularités et au mieux avec une coopération bilatérale ou internationale. On reste donc loin de la mise en œuvre d'un droit de la concurrence mondialisé.

La problématique est encore plus épineuse pour les pays en développement qui sont confrontés non seulement à des difficultés objectives de lutte contre les pratiques anticoncurrentielles et de contrôle des concentrations, mais également à l'impératif de mettre à niveau leurs économies en vue d'affronter les processus concurrentiels internes et internationaux.

Essayons donc d'examiner successivement les difficultés des systèmes de contrôle fondés sur des droits nationaux avant de nous pencher sur l'indispensable mise en œuvre d'un droit mondialisé de la concurrence et l'impératif d'une mise à niveau des économies concernées.

1. Les difficultés des systèmes de contrôle fondés sur des droits nationaux

Précisons d'abord que la majorité des pays dispose actuellement d'un droit et des institutions de régulation de la concurrence et de contrôle des concentrations. La tâche est déjà énorme sur le plan interne. Elle se complique sérieusement lorsqu'on passe à la sphère internationale, particulièrement en ce qui concerne les fusions-acquisitions transfrontalières. La problématique est évidemment encore plus épineuse pour les pays en développement ou en transition.

La difficulté essentielle réside dans le fait que les différents codes nationaux peuvent entrer en conflit surtout en raison du principe juridique de l'effet qui signifie que le droit national est applicable dès qu'une opération produit un effet sur les échanges du pays concerné.

Une telle situation génère des solutions difficilement conciliables pour le même cas. N'a-t-on pas vu des cas d'abus de position dominante traités différemment par différentes législations ?

Bien sûr, on a parfois essayé d'atténuer les effets des solutions unilatérales par la prise en considération, dans les décisions nationales, des intérêts des entreprises des autres États comme on a multiplié les accords bilatéraux, mais une telle situation reste préjudiciable pour certains États, particulièrement pour les pays en développement. Non seulement ces pays se trouvent dans la nécessité de

¹ Contribution soumise par M. Abdelali Benamour, Président du Conseil de la concurrence du Maroc.

mettre à niveau leur tissu économique afin d'appréhender correctement la problématique de la concurrence interne et internationale, mais ils doivent en plus affronter des cas de concentrations transfrontalières extrêmement compliqués. A titre d'exemple, durant cette année, le Conseil de la Concurrence du Maroc a eu à traiter du cas de concentration des filiales marocaines de « Kraft Foods Inc » et « Cadbury PLC ». Évidemment, nous avons examiné ce cas comme on l'aurait fait pour n'importe quelles entreprises marocaines. Il faut cependant préciser qu'on aurait voulu avoir des informations sur la fusion à l'échelon internationale et sur les entreprises concernées pour mieux cerner la problématique ; mais maîtriser ce processus s'est avéré très compliqué.

Bref, le fait d'appréhender les questions de concentrations transnationales par les droits nationaux s'avère très délicat, particulièrement pour les pays en développement ou en transition. Aussi a-t-on réfléchi à la difficile mise en œuvre d'un droit mondialisé de la Concurrence.

2. L'indispensable réflexion sur un droit de la concurrence mondialisé

Face aux insuffisances des solutions unilatérales et des accords bilatéraux, il est apparu évident que dans le cadre d'une économie globalisée, il faille réfléchir à un droit transnational de la concurrence. Des recommandations ont été faites dans ce sens aussi bien dans le cadre de l'OCDE dès 1967 que par la CNUCED et enfin au niveau des longues négociations qui ont abouti à la mise sur pied de l'OMC en 1995 et qui ont continué jusqu'à la conférence de Cancun en Septembre 2003 et bien au delà.

Force est de constater que tous les efforts destinés à faire émerger un droit mondialisé de la concurrence ont échoué. Précisons à ce sujet que le Professeur Wolfgang Fikentsher de l'Université de Munich a présenté en 1995 une sorte de code mondial du commerce, appelé code de Munich, constituant une synthèse entre les dimensions commerciale et concurrentielle des échanges avec la mise en œuvre d'une autorité antitrust instaurée au sein de l'OMC. Le projet n'a pas été adopté. Les pays développés craignent les règles contraignantes et la cession de leurs compétences en la matière alors que les pays en développement restent attachés aux spécificités des transitions économiques.

En fait, il semble que les pays les plus perdants en la matière soient ces derniers, particulièrement en ce qui concerne les effets des cartels et des fusions-acquisitions transnationales dont ils maîtrisent difficilement les rouages. Le meilleur positionnement pour eux consisterait peut-être à réclamer la mise en œuvre d'un droit mondialisé de la concurrence qui couvrirait bien entendu un certain nombre d'exemptions économiques et sociales durant la phase de la transition. Ce droit mettrait en évidence les interactions du libre commerce et de la concurrence en veillant à ce que les barrières étatiques aux échanges ne soient pas relayées par des barrières privées dues aux grandes unités qui émergeraient des cartels ou des fusions.

Globalement, les pays en développement pourraient réclamer une approche « développement » à mettre en symbiose avec un droit mondialisé de la concurrence. Ceci suppose, outre les exceptions signalées précédemment, que les pays en question mènent un processus de mise à niveau de leurs économies avec un certain appui international.

3. L'impératif de la mise à niveau des économies en développement dans un cadre mondialisé

Lorsqu'on se penche sur l'histoire économique des nations, on pourrait mettre en évidence trois étapes importantes.

La première étape, peut être la plus longue, était celle d'un monde dominé par l'idée de modernité reposant sur la raison du siècle des lumières avec comme orientations essentielles, la révolution scientifique ; l'État-nation laïc et démocratique ; le libéralisme ou l'économie de marché ; enfin la prise en charge par l'État régulateur des débordements du marché ainsi que de la solidarité qui était traditionnellement celle des régions, du sang ou des confessions. Moralité, qui dit élargissement du marché

des sphères disloquées du moyen âge vers celles de l'État-nation, dit prise en charge par ce dernier des solidarités et des débordements que peut générer le libre marché.

La deuxième étape est celle des regroupements régionaux comme celui qui s'est opéré dans le cadre de l'Union Européenne. On franchit une nouvelle étape dans l'organisation et l'élargissement des espaces de la citoyenneté dont celui du marché. Dès lors, la sphère concurrentielle s'élargit, ce qui nécessite un effort solidaire de mise à niveau des régions les moins favorisées par une action institutionnalisée afin de permettre à tout le monde d'affronter le libre jeu de marché et la concurrence. C'est ce qu'on a largement observé, particulièrement au profit de l'Espagne, du Portugal, de la Grèce, de l'Italie et dans d'autres circonstances.

La troisième étape qui a été en fait presque concomitante avec la précédente, mais qui s'est bien développée par la suite, est celle de la mondialisation. Le marché s'élargit encore plus, mais contrairement aux deux autres situations où le processus d'élargissement s'est accompagné par une régulation et une solidarité organisée destinée à mettre à niveau les structures les plus fragiles, on n'a rien prévu jusqu'à présent au niveau supranational, au profit de la mise à niveau des pays en développement. Toutes les tentatives dans ce sens semblent avoir échoué.

En conclusion, Il semble donc nécessaire, pour les pays en transition, de se positionner peut-être en faveur d'une sorte de Code de Munich remanié de façon à permettre à l'institution supranationale qui en découle, de veiller à l'application du libre commerce et de la libre concurrence, mais de prévoir également des exceptions transitionnelles ainsi que des moyens d'aide à la mise à niveau.

ANNEXE*

La libération des échanges de tout type d'entraves étatiques doit être prolongée et garantie par un contrôle des opérateurs afin d'éviter que ceux-ci ne reconstituent artificiellement les barrières à l'entrée au marché : c'est ce qu'on appelle communément le contrôle des opérations de concentration.

En effet, il est admis que certaines concentrations peuvent bénéficier à l'économie dans la mesure où elles permettraient un rendement accru et mettre à la disposition des consommateurs des produits de meilleure qualité et à des prix plus bas. D'autres, par contre, peuvent occasionner la réduction de la concurrence sur tel ou tel marché en créant ou en renforçant un opérateur dominant, le conduisant à pratiquer des prix plus élevés avec des choix réduits ou à moins d'innovation.

La loi marocaine 06-99 sur la liberté des prix et de la concurrence est venue pallier ce genre de situations. Elle requiert l'obligation de notifier certaines concentrations économiques aux autorités de la concurrence. Elle définit d'une manière explicite les critères de notification des projets de concentration, le test d'évaluation et d'appréciation, la procédure de notification ainsi que le régime de sanctions à appliquer au cas où les règles de contrôle ne sont pas respectées.

Toutefois, il y a lieu de signaler que le contrôle des concentrations sous le régime de la loi marocaine actuelle n'est pas très développé au Maroc ; le Conseil de la Concurrence n'a eu à examiner qu'un seul cas depuis sa réactivation en 2009.

1. Aperçu sur le régime du contrôle des concentrations au Maroc

1.1 Définition de la concentration

Aux termes des dispositions de l'article 11 de la loi 06-99, est considéré comme concentration, tout acte, quelque soit sa forme, qui porte sur :

- le transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d'une entreprise ;
- ou encore tout acte qui a pour objet ou pour effet de permettre à une entreprise ou un groupe d'entreprise, d'exercer directement ou indirectement sur une ou plusieurs entreprises une influence déterminante.

Ce faisant, la loi marocaine concerne non seulement les fusions et acquisitions comme mode de formation des concentrations, mais aussi les prises de contrôle.

A ce sujet, la prise de contrôle est considérée comme une concentration lorsqu'elle permet d'exercer une influence déterminante sur l'activité de l'entreprise à acquérir, c'est le cas où l'acquéreur peut peser sur les décisions stratégiques ou influencer sur la composition des organes décisionnels de cette entreprise.

* Contribution soumise par M. Khalid El Bouayachi, Rapporteur Général et Directeur des Instructions du Conseil de la Concurrence du Maroc.

1.2 Le seuil de notification : plus de 40% des parts de marché

L'article 10 alinéa 2, de la loi 06-99 soumet chaque projet de concentration, tel que défini ci-dessus, à un contrôle administratif par les autorités de la concurrence¹. Ce contrôle doit intervenir lorsque les parts de marché réalisées par les entreprises qui font partie de l'acte ou qui en sont l'objet, durant l'année civile précédente, représentent plus de 40% des ventes, achats ou autres transactions, sur un marché national de biens, produits et/ou services de même nature ou substituables ou sur une partie substantielle de celui-ci. Font partie de la concentration, du reste, non seulement des entreprises qui sont engagées dans l'opération, mais aussi toutes les entreprises qui sont économiquement liées à une entreprise impliquée ou concernée² par cette opération.

Les entreprises concernées doivent indiquer, pour toute opération de concentration, les parts de marché détenues sur le marché national dans la mesure où celles-ci atteignent directement pour les entreprises concernées, 40% sur le territoire marocain ou sur une partie substantielle de celui-ci, en précisant la base de calcul ou l'estimation de ces parts. Enfin il y a lieu de souligner que selon les termes de l'article 12 de la loi ci-dessus mentionnée, les opérations soumises au contrôle des concentrations doivent être notifiées aux autorités de la concurrence préalablement à leur réalisation.

2. Méthodologie poursuivie par l'autorité de la concurrence marocaine en matière de contrôle des concentrations

Le contrôle d'une opération de concentration vise essentiellement à s'assurer que celle-ci ne porte pas atteinte au libre jeu de la concurrence en créant ou en renforçant une position dominante. Pour répondre à cette préoccupation, le contrôle des concentrations se déroule en trois étapes successives et liées entre elles : il s'agit de la définition du marché pertinent suivie du calcul des parts de marché pour aboutir à une appréciation des effets concurrentiels de la concentration sur le marché en question.

2.1 Définition du marché pertinent

La définition du marché est un facteur essentiel dans l'application des règles du droit de la concurrence en matière de concentration. Manifestement, cette définition joue un rôle clé dans la mesure où le contrôle de l'opération de concentration ne s'applique, aux termes de l'article 10 de la loi 06-99, que pour certaines opérations qui réalisent des parts de marché supérieures aux seuils de 40 %.

Ainsi, l'objectif de la définition du marché de référence est de permettre à l'autorité de concurrence de préciser le cadre qui détermine les limites dans lesquelles la pression de la concurrence s'exerce et de mesurer le pouvoir économique des entreprises concernées vis-à-vis de leur homologue et des consommateurs. Il est par conséquent nécessaire de définir le marché pertinent aussi bien en termes de

¹ Dans le schéma institutionnel actuel retenu par la loi marocaine, les autorités de la concurrence sont constituées par le Premier Ministre ou l'autorité déléguée par lui à cet effet à savoir le Ministère délégué auprès du Premier Ministre chargé des affaires économiques et générales qui dispose d'un pouvoir décisionnel dans le contrôle des concentrations et le Conseil de la Concurrence qui ne dispose que d'un pouvoir consultatif en la matière.

² Sont considérées comme entreprises économiquement liées à une entreprise concernée par une opération de concentration et jugées comme une entreprise unique : (i) les entreprises dépendantes et/ou dominantes ainsi que les entreprises affiliées à un groupe de sociétés ; (ii) les entreprises contrôlées par l'entreprise concernée seule ou avec d'autres entreprises, et vice versa, les entreprises en mesure d'exercer une influence déterminante sur l'entreprise concernée.

produits qu'en termes géographiques³ pour déterminer si l'entreprise se trouve sous la pression suffisante d'une concurrence effective.

2.2 *Le calcul des parts de marché*

Pour ce qui est du calcul des parts de marché, la méthode adoptée par l'autorité de la concurrence peut être basé sur un volume ou une valeur : sur des marchés de marchandises, par exemple où la variation des prix est limitée, il n'y a pas de différence entre les parts de marché calculées sur la base des prix et celle calculées sur la base des volumes. Cependant si les produits en question sont différenciés et portent par exemple une marque, les parts des marchés basées sur la valeur peuvent diverger considérablement des parts des marchés basées sur le volume. Les parts calculées sur la base des valeurs sont généralement considérées comme les plus précises.

2.3 *Appréciation des effets concurrentiels d'une concentration*

Dès qu'elle définit le marché pertinent et calcule la part de marché résultant de l'opération de la concentration et que le seuil défini par la loi est atteint ou dépassé, l'autorité de la concurrence doit procéder à un examen concurrentiel, notamment pour constater si la concentration est de nature à créer ou renforcer une position dominante⁴ des entreprises concernées.

Elle doit tenir compte de la position sur le marché des entreprises concernées et de leur puissance économique et financière, des possibilités de choix des fournisseurs et des utilisateurs, de leur accès aux sources d'approvisionnement ou aux débouchés, de l'existence en droit ou en fait de barrières à l'entrée, de l'évolution de l'offre et de la demande des produits et services concernés, des intérêts des consommateurs ainsi que de l'évolution du progrès technique et économique.

2.4 *Délai et procédures de réalisation des contrôles de concentration*

En application des dispositions de l'article 12 de la loi 06-99, le Premier Ministre et son Ministre Délégué chargé des affaires économiques et générales ainsi que le Conseil de la Concurrence disposent d'un délai total de 6 mois pour autoriser ou non une concentration. En termes de phases, ce délai est ainsi précisé:

- Phase I (maximum 2 mois après la réception de la notification complète)

Après avoir reçu une notification complète de l'opération de concentration, le Premier Ministre renvoie le dossier à son Ministre délégué chargé des affaires économiques et générales⁵ pour étude et avis. La Direction de la Concurrence et des Prix relevant de ce département ministériel examine dans un délai de deux mois si la concentration est de nature à porter atteinte à la concurrence notamment et si elle est susceptible de créer ou de renforcer une position dominante

³ Le marché pertinent de produits comprend tous les produits et/ou services considérés comme interchangeables ou substituables en raison de leurs caractéristiques, de leur prix et de l'usage auquel ils sont destinés. Quand au marché pertinent géographique, il comprend le territoire sur lequel les entreprises concernées sont engagées dans l'offre et la demande des produits et/ou services où les conditions de concurrence sont suffisamment homogènes.

⁴ Une position dominante est une position de force économique permet qui à l'entreprise qui en bénéficie d'empêcher le maintien d'une concurrence effective sur le marché en cause, en lui conférant le pouvoir se comporter de manière indépendant de ses concurrents et des consommateurs.

⁵ Ce département ministériel a reçu une délégation expresse de pouvoirs du Premier Ministre à l'effet de contrôler les opérations de concentration.

sur un marché. Elle prépare un dossier dans lequel ses conclusions serviront au Premier Ministre pour prendre une décision motivée afin de :

- autoriser la concentration sans engagements ou ;
- autoriser la concentration avec des engagements ou encore ;
- demander l’avis du Conseil de la Concurrence.

Le silence gardé par le Premier Ministre pendant deux mois vaut acceptation tacite du projet de concentration ainsi que des engagements qui y sont attachés le cas échéant.

- Phase II (maximum 6 mois après la réception d’une notification complète, délai de la phase I compris)

Dans le cas où le projet de concentration a été jugé de nature à porter atteinte à la concurrence en créant ou en renforçant une position dominante, il est soumis par le Premier Ministre au Conseil de la Concurrence pour avis. Dans ce cas, le délai d’examen est porté alors à 6 mois à compter de la date de la réception complète de la notification chez le Premier Ministre.

Le Conseil procède alors à l’examen du projet de concentration en évaluant les effets concurrentiels du projet soumis. Indubitablement, il est tenu de porter son appréciation sur le fait que ce dernier apporterait une contribution suffisante au progrès économique du pays qui soit de nature à compenser les atteintes à la concurrence qui peuvent être occasionnées.

Dans son travail d’appréciation, le Conseil est appelé également à tenir compte de la compétitivité de l’entreprise en cause au regard de la concurrence internationale.

A l’issue de cet examen, le Conseil doit émettre un avis motivé dans un délai raisonnable n’excédant pas le délai légal défini par la loi. Et c’est seulement après avoir reçu l’avis du Conseil de la Concurrence que le Premier Ministre peut, par décision motivée :

- autoriser une concentration ou ;
- interdire un projet de concentration susceptible de créer ou de renforcer une position dominante sur le marché, ou encore
- demander des modifications ou compléments à l’opération notifiée, ou prendre toutes mesures propres à assurer ou à établir une concurrence suffisante. L’autorisation de l’opération de concentration peut être subordonnée à l’observation des prescriptions de nature à apporter au progrès économique du pays une contribution tangible pour compenser les atteintes à la concurrence.

2.5 Le rôle des tribunaux en matière de contrôle des concentrations

Chaque décision du Premier Ministre en matière de contrôle des concentrations est susceptible de faire l’objet d’un recours devant la juridiction administrative compétente. Le principal aspect sur lequel doit se prononcer le tribunal est de savoir si la décision du Premier Ministre est fondée que ce soit en interdisant ou en autorisant avec ou sans conditions cette concentration et par conséquent de savoir si la concentration peut créer ou renforcer une position dominante.

En effet, non seulement les décisions d'interdiction de concentration touchant directement aux intérêts des entreprises sont susceptibles d'être attaquées devant le juge administratif, mais aussi celles autorisant ce genre d'opération. Dans ce cas de figure, les concurrents et les autres tiers dont les intérêts légitimes sont lésés par ces décisions peuvent déposer plainte devant le tribunal compétent.

2.6 Régime des sanctions applicables au non respect des règles de contrôle des concentrations

Le Premier Ministre peut, par décision motivée et sur recommandation du Conseil de la Concurrence, ordonner des mesures conservatoires par injonction aux parties intéressées par la concentration, aux fins de revenir à l'état antérieur au cas où la concentration ne lui a pas été notifiée. En outre et à défaut de notification obligatoire et en cas de non respect des décisions sur les concentrations notifiées, le Premier Ministre peut après consultation du Conseil de la Concurrence, saisir le procureur du Roi près du tribunal du première instance compétent pour mener des poursuites judiciaires contre les contrevenants conformément aux dispositions de l'article 70 de la loi 06-99 qui prévoient, entre autres, des amendes pouvant atteindre 2 à 5% du chiffre d'affaires des entreprises concernées.

3. Analyse de l'expérience du Conseil de la Concurrence du Maroc en matière de contrôle des concentrations

En dépit du caractère récent de l'expérience du Conseil de la Concurrence marocain en matière de contrôle des concentrations, ce dernier a eu l'occasion, depuis sa réactivation fin 2008, d'examiner en 2010 un projet de concentration transfrontalière. Aussi est-il intéressant de faire une présentation succincte dudit projet tout en tirant les premières conclusions de cette expérience.

3.1 Présentation du cas de concentration transfrontalière

En février 2010 et conformément à la réglementation en vigueur au Maroc, le Premier Ministre a saisi, pour avis, le Conseil de la Concurrence du projet de concentration que lui a notifié la multinationale Kraft Foods Inc. qui comptait lancer une offre publique d'achat (OPA) sur l'ensemble des actions d'une autre multinationale, à savoir Cadbury PLC.

L'objectif de l'opération qui est en fait une prise de contrôle et non une fusion, avait une ampleur internationale dans la mesure où elle devait permettre à Kraft Foods Inc. de s'annexer de nouvelles activités (confiserie, chocolaterie, chewing-gum,...) géographiquement diversifiées à l'échelle mondiale. Les nouvelles activités se rapprochaient de ses activités de base dans l'industrie alimentaire (vente des boissons conditionnées et de produits alimentaires) en recherchant les effets de synergie au niveau du marketing et de la distribution notamment. Ces nouvelles activités étaient celles développées par Cadbury PLC.

Au niveau national, cette opération concernait les deux filiales des deux multinationales présentes sur le territoire marocain et qui étaient des sociétés de droit marocain, en plus d'une joint-venture que l'une d'elles avait constitué avec un groupe marocain.

L'examen du cas a permis au Conseil de confectionner et d'appliquer une méthodologie d'approche telle qu'expliquée dans le point 2 ci-dessus mentionné.

Ainsi l'avis émis par le Conseil et suivi par le Premier Ministre a estimé que l'opération projetée n'aboutira pas au renforcement d'une position dominante dans les marchés concernés⁶ par l'opération et

⁶ Après segmentation, les marchés concernés étaient ceux de la confiserie et celui de la biscuiterie.

que cette dernière pourrait avoir un effet bénéfique sur l'environnement concurrentiel des entreprises nationales, leur permettant d'élever leur niveau de compétitivité aux normes internationales.

3.2 *Principales conclusions de cette expérience*

- En l'absence de tout accord avec les autorités de la concurrence ayant déjà eu l'occasion de se prononcer sur cette concentration (Commission Européenne, FTC, autorité anglaise de la concurrence,...), le Conseil de la Concurrence a dû construire son appréciation sur ses propres analyses, à partir d'informations fournies par la partie concernée ou collectées par ses propres soins : il n'y a eu aucun échange avec ces autorités ;
- Le Conseil de la Concurrence ayant récemment obtenu le statut de participant désigné au Forum Mondial sur la Concurrence de l'OCDE et membre du réseau ICN n'a pas encore assez développé ses relations avec les autorités de la concurrence en matière de coopération bilatérale ou multilatérale sur les questions se rapportant aux concentrations ;
- Les deux multinationales concernées ont déjà obtenu des autorisations de la part de la Commission Européenne et des autorités roumaines de la concurrence, avec un engagement sur l'exclusion du marché du chocolat de l'opération. Cet engagement n'a pu être imposé au Maroc, eu égard à l'insignifiance du marché marocain de ce produit ;
- L'application du contrôle des concentrations est subordonné à un seuil en terme de parts de marché qui est calculé par rapport au territoire national marocain, dès qu'il y a effet sur ce dernier, nonobstant la nationalité des entreprises ou la localisation juridique de la concentration ;
- Dans son évaluation, le Conseil de la Concurrence n'a pris en considération que les effets de l'opération sur le marché national. Le test permettant de décider si l'opération peut être ou non autorisée a été examiné uniquement par rapport à ce marché, sachant que le marché géographique des multinationales concernées est mondial. Dans ce cas, il était difficile d'identifier les problèmes de concurrence et d'établir notamment le pouvoir de marché ou la domination de la nouvelle entité issue de l'opération ;
- Le contrôle des concentrations est une activité inhabituelle et délicate dans le sens où elle implique un jugement *ex ante* sur le futur par opposition au contrôle des ententes illicites qui s'appuie sur des appréciations *ex poste* ;
- La méthode d'appréciation appliquée au cas a intégré aussi bien le bilan concurrentiel que le bilan économique de l'opération.

COMPETITION COUNCIL OF MOROCCO¹

CROSS-BORDER MERGER CONTROL BY DEVELOPING COUNTRIES, OR THE VITAL LINK BETWEEN GLOBALISED LAW AND ECONOMIC UPGRADING

The globalisation of trade has triggered an increase in the number of cross-border mergers and agreements. This has resulted in heightened vigilance and a strengthening of national controls. The problems involved are even more delicate for developing countries. Moreover, the desire to preserve the competitiveness of national economic infrastructure and protect against the effects of cross-border concentration has been encouraged by the advice dispensed by international economic and financial institutions. For some, these processes have even been viewed as an opportunity to collect financial flows.

Nevertheless, it must be pointed out that the observation of such controls has remained relatively limited insofar as controls at a time when the economy is globalising are based fundamentally on national laws, with their own particularities, and at best on bilateral or international co-operation. The institution of globalised competition law thus remains a distant prospect.

The issues involved are even thornier for developing countries, which face not only objective difficulties in combating anti-competitive practices and merger control, but also the overriding need to upgrade their economies so as to cope with domestic and international competitive processes.

Let us therefore attempt to look in turn at the difficulties of control systems based on national law before turning to the vital implementation of globalised competition law and the necessity of upgrading the economies involved.

1. The difficulties of control systems based on national law

Let it be stipulated from the outset that a majority of countries currently have legislation and institutions for regulating competition and controlling concentration. The task is already vast domestically; it gets seriously more complicated when the focus becomes international, especially with regard to cross-border mergers and acquisitions. The problems are obviously thornier for developing countries or transitional economies.

The primary difficulty stems from the existence of potential conflicts between national codes, especially as a result of the legal principle of effectiveness, which means that national law shall apply as soon as an operation produces an effect on the trade of the country in question.

Such a situation generates multiple solutions for a given case, and these may be difficult to reconcile. Have there not been examples of abuse of dominant position cases being handled differently under the laws of different countries?

¹ Contribution submitted by Mr. Abdelali Benamour, Chair of the Competition Council of Morocco.

Of course, it has been attempted at times to mitigate the effects of unilateral solutions by having national decisions factor in the interests of businesses from other countries, just as bilateral agreements have become more numerous, but such a situation remains detrimental to certain countries, and particularly developing ones. Not only do these countries find themselves in the position of having to upgrade their entire economies in order to cope properly with the problems of domestic and international competition, but in addition they must deal with extremely complex cases of cross-border concentration. For example, in the course of this year, the Moroccan Competition Council had to address a merger case involving the Moroccan subsidiaries of Kraft Foods Inc. and Cadbury PLC. Obviously, we examined this case as we would have done for any Moroccan companies. It should be specified that we would have liked to have information about the merger on an international level, and about the businesses concerned, in order to get a better handle on the problem; it proved highly complicated to grasp this process fully.

In short, tackling cross-border concentration issues with domestic law proves highly delicate, especially for developing countries or transitional economies. As a result, thought has been given to the difficult process of instituting globalised competition law.

2. Indispensable consideration of globalised competition law

Given the inadequacies of unilateral solutions and bilateral agreements, it became obvious that a globalised economy demanded consideration of cross-border competition law. Recommendations along these lines had been made by the OECD back in 1967 and by UNCTAD, as well as in lengthy negotiations culminating in the establishment of the WTO in 1995 and continuing until the September 2003 Cancun conference and a long time thereafter.

It must be admitted that all efforts to bring about globalised competition law have failed. In 1995, Professor Wolfgang Fikentscher of the University of Munich presented a sort of world trade code known as the “Munich Code” consolidating the commercial and competition-related dimensions of trade with the institution of an anti-trust authority within the WTO. The plan was not adopted. Developed countries fear binding rules and the surrender of their powers in this area, whereas developing countries remain attached to the particularities of economic transitions.

As it happens, it would seem that the biggest losers here are the latter, especially with regard to the effects of cartels and cross-border mergers and acquisitions, the complexities of which they have a hard time grasping. For these countries, the optimum stance might be to call for implementation of globalised competition law, which would of course incorporate a number of economic and social exceptions during the transitional phase. Such law would highlight the interactions of free trade and competition while taking care not to let State-imposed trade barriers be replaced by private barriers erected by the large entities emerging from cartels or mergers.

Worldwide, developing countries could demand that a “development” approach could be used in symbiosis with globalised competition law. Apart from the exceptions cited earlier, this would assume that the countries in question carry out a process of upgrading their economies, with a certain degree of international support.

3. The need to upgrade developing economies within a globalised framework

Looking at the economic history of nations, three important steps can be highlighted.

The first, and perhaps longest, step was that of a world dominated by the idea of modernity grounded in the reason of the Age of Enlightenment, the essential orientations of which being: the scientific revolution; the secular and democratic nation-state; liberalism or the market economy; and lastly, a takeover by a regulating State of control over market excesses as well as of the solidarity that was

traditionally the province of regions, bloodlines or religious communities. The moral of the story is that when the market expands from fragmented mediaeval spheres to those of the nation-state, it is that nation-state which must cope with the solidarity and excesses that a free market can generate.

The second step is that of regional groupings such as the one formed by the European Union. This is a new step in the organisation and expansion of areas of citizenship, including that of the market. Consequently, the sphere of competition has widened, entailing a joint effort to raise the level of the most highly disadvantaged regions via an institutionalised action to allow everyone to cope with the workings of a free market and competition. Such an effort has been observed repeatedly, in particular for the benefit of Spain, Portugal, Greece and Italy, and in other circumstances.

The third step, which in fact began practically at the same time as the second, but which expanded considerably thereafter, was globalisation. The market widened even more, but in contrast to the two other situations in which the enlargement process was accompanied by regulation and organised solidarity to bolster the shakiest structures, to date nothing has been provided on a supranational level to assist developing countries. All attempts along these lines seem to have failed.

In conclusion, it would therefore seem necessary for transitional economies to position themselves in favour of some sort of Munich Code reworked so that the resultant supranational institution could monitor enforcement of free trade and free competition but also institute transitional exceptions and lend assistance in upgrading their economies.

ANNEX *

The unshackling of trade from all sorts of State-imposed barriers must be extended and guaranteed by control over operators so that these operators do not artificially reconstitute barriers to market entry: this is what is commonly known as concentration (or merger) control.

It is acknowledged that some instances of concentration may in fact benefit the economy by allowing greater output and giving consumers access to lower-priced and higher-quality products. Other instances, however, may reduce competition on a given market by creating or strengthening a dominant operator, prompting that operator to charge higher prices for less choice or less innovation.

Moroccan Act 06-99 on pricing freedom and competition was instituted to counter such situations. It requires that certain economic concentration operations be notified to the competition authorities. It stipulates explicitly the criteria for notifying proposed mergers, the evaluation test, the notification procedure and the penalties to be imposed if control rules are not complied with.

Nevertheless, it should be pointed out that concentration control under current domestic law is not very highly developed in Morocco; the Competition Council has examined only one case since its re-activation in 2009.

1. Overview of the Moroccan concentration control regime

1.1 Definition of concentration

Under Article 11 of Act 06-99, concentration is construed as any act, irrespective of its form, involving:

- Transfer of ownership or the right to use all or part of a firm's assets, rights and obligations;
- Any act, the purpose or effect of which is to enable a firm or group of firms to exert a decisive influence, directly or indirectly, over one or more other firms.

Even so, Moroccan law covers not only mergers and acquisitions as a means of concentration, but takeovers as well.

In this regard, a takeover is considered a concentration operation if it confirms a decisive influence over the activity of the firm to be acquired, as is the case when the acquiring party can sway strategic decisions or influence the composition of the firm's executive bodies.

* Contribution submitted by Mr. Khalid El Bouayachi, Rapporteur-General and Director of Investigations of the Competition Council of Morocco.

1.2 Notification threshold: market share of over 40%

Article 10, paragraph 2 of Act 06-99 makes any proposed concentration, as defined above, subject to administrative control by the competition authorities¹. This control model intervenes if the aggregate market share of the firms taking part in the act or constituting the purpose thereof, during the previous calendar year, accounted for more than 40% of the sales, purchases or other transactions on a national market for goods, products and/or services of the same type or substitutable for a substantial portion thereof. Moreover, concentration involves not only the firms engaged in the operation, but also all firms having economic ties to a firm involved in or concerned by the operation².

The firms involved must indicate, in respect of any concentration operations, any domestic market shares if the aggregate direct market shares for the firms concerned amount to 40% within Morocco or a substantial part thereof, specifying the basis for calculating or estimating those market shares. Lastly, it should be emphasised that under Article 12 of the aforementioned Act, operations subject to concentration control must be notified to the competition authorities before they are carried out.

2. Methodology used by the Moroccan competition authority in respect of concentration control

The essential purpose of controlling a concentration operation is to ensure that the operation does not impede competition by creating or strengthening a dominant position. To address this concern, concentration control takes place over three successive and interrelated steps: what these involve is ascertaining the relevant market; then computing market shares; and, lastly, assessing the competition-related effects of that concentration on the market in question.

2.1 Defining the relevant market

Defining the market is an essential factor in enforcing the rules of competition law regarding concentration. Clearly the definition plays a key role insofar as, under Article 10 of Act 06-99, control over a concentration operation shall be exercised only if the market shares involved exceed the 40% threshold.

Therefore, the objective of defining the reference market is to allow the competition authority to delineate the boundaries within which competitive pressures come to bear and to assess the economic power of the firms involved vis-à-vis their counterparts and consumers. Consequently, it is necessary to define the relevant market both in terms of products and geographically³ in order to ascertain if the firm is subject to sufficient effective competition.

¹ Under the institutional structure currently established by Moroccan law, the competition authorities are constituted by the Prime Minister or the Prime Minister's appointed delegate (in this case the Minister for Economic and General Affairs, who has decision-making power in concentration control), and the Competition Council, whose powers in this area are solely advisory.

² The following are considered to be firms with economic ties to a firm concerned by a concentration operation and deemed to be a single enterprise: (i) dependent and/or dominant enterprises, as well as enterprises affiliated to a group of companies; (ii) firms controlled by the firm in question alone or together with other firms, and conversely, firms in a position to exert a decisive influence over the firm in question.

³ The relevant product market comprises all products and/or services considered to be interchangeable or substitutable by virtue of their characteristics, price and intended use. For its part, the relevant geographic market comprises the areas in which the firms involved are engaged in supply and demand of the products and/or services, in which competitive conditions are sufficiently uniform.

2.2 *Computing market shares*

To compute market shares, the method adopted by the competition authority can be based on volume or value: on merchandise markets, for example, where price variations are limited, it makes no difference whether market shares are computed on the basis of prices or volumes. However, if the products in question are differentiated and are branded, for example, market shares based on value might diverge considerably from market shares based on volume. Market shares computed on the basis of value are generally considered more accurate.

2.3 *Assessing the competitive effects of a concentration*

As soon as it defines the relevant market and computes the market share resulting from the concentration operation, and if the legally stipulated threshold is attained or exceeded, the competition authority must conduct a competition analysis, in particular to ascertain whether the concentration is such as to be likely to create or strengthen a dominant position⁴ for the firms involved.

The analysis must factor in the market positions of the firms involved and their economic and financial power, options open to suppliers and users, their access to sources of supply or sales outlets, the existence of *de jure* or *de facto* barriers to entry, supply and demand trends for the products and services involved, consumers' interests and technical and economic progress.

2.4 *Timeframe and procedures for conducting concentration controls*

Pursuant to Article 12 of Act 06-99, the Prime Minister and his delegated Minister for Economic and General Affairs, along with the Competition Council, have a total of six months in which to authorise a concentration or not. This timeframe is divided into the following phases:

- Phase I (maximum: two months after receipt of complete notification)

After receiving complete notification of the concentration operation, the Prime Minister forwards the dossier to his delegated Minister for Economic and General Affairs⁵ for study and opinion. The Directorate for Competition and Prices, which is a part of that ministerial department, has two months in which to ascertain whether the concentration is likely to impede competition, and in particular whether it is likely to create or strengthen a dominant market position. The Directorate prepares a dossier in which its conclusions will help the Prime Minister take a reasoned decision to:

- Authorise the concentration unconditionally;
- Authorise the concentration subject to conditions; or,
- Request the opinion of the Competition Council.

A two-month silence on the Prime Minister's part is tantamount to tacit acceptance of the concentration proposal and of any conditions that may have been a part of it.

⁴ A dominant position is a position of economic strength allowing the firm in that position to thwart the preservation of effective competition in the market in question by wielding the power to behave independently of its competitors and consumers.

⁵ This ministerial department has been given express delegation of the Prime Minister's powers to control concentration operations.

- Phase II (maximum: six months after receipt of complete notification, including Phase I)

In the event a proposed concentration has been deemed likely to impede competition by creating or strengthening a dominant position, the Prime Minister submits the matter to the Competition Council for an opinion. In such cases, the deadline is extended to six months from the date on which complete notification is received by the Prime Minister.

The Council then proceeds to review the concentration proposal, assessing its competitive effects. Indubitably, it is required to express its opinion on whether the proposal's contribution to the country's economic progress would be sufficiently beneficial to offset any detrimental effects on competition.

In making its assessment, the Council must also factor in the competitiveness of the firm in question in relation to international competition.

After this review, the Council must issue a reasoned opinion within a reasonable amount of time not exceeding the deadline imposed by law. It is only after having received the opinion of the Competition Council that the Prime Minister may, by a reasoned decision:

- Authorise the concentration;
- Prohibit the concentration on the grounds that it would create or strengthen a dominant market position; or,
- Request changes or additions to the proposed operation, or take any measures needed to ensure or establish adequate competition. Authorisation of the concentration operation may be made conditional on compliance with directives that could result in a tangible contribution to the country's economic progress which could offset the detrimental effects on competition.

2.5 *The role of the courts in concentration control*

Each of the Prime Minister's decisions in the realm of concentration control may be appealed to the competent administrative jurisdiction. The main aspect on which the courts must rule is whether the Prime Minister's decision – whether to prohibit or allow the concentration, with or without conditions – is justified, and thus whether the concentration can create or strengthen a dominant position.

Indeed, decisions prohibiting concentrations that directly affect corporate interests are not the only ones open to challenge before an administrative court; decisions authorising such operations are contested as well. In such cases, competitors and other third parties whose legitimate interests are adversely affected by the decisions may file complaints with the competent court.

2.6 *Penalty regime applicable in the event of non-compliance with concentration control rules*

The Prime Minister may, by a reasoned decision and on recommendation of the Competition Council, issue an injunction to the parties involved in the concentration, imposing protective measures to revert to the previous state of affairs if he had been served no notice of the concentration. In addition, and in the event of failure to serve compulsory notification, or of non-compliance with decisions in respect of notified concentrations, the Prime Minister may, after consulting with the Competition Council, refer to the Crown Prosecutor of the competent court of first instance to initiate judicial proceedings against violators, pursuant to Article 70 of Act 06-99, which provides, *inter alia*, for fines of up to 2 to 5% of the turnover of the firms in question.

3. Analysis of the Moroccan Competition Council's experience of concentration control

Although the Moroccan Competition Council's experience of concentration control is only recent, it did have an opportunity since its re-activation in 2009 to review a proposed cross-border concentration operation in 2010. It would therefore be interesting to look briefly at that project and draw initial conclusions from the experience.

3.1 *Presentation of the cross-border concentration case*

In February 2010, and pursuant to regulations in force in Morocco, the Prime Minister petitioned the Competition Council for its opinion regarding a concentration proposal that had been notified to him by the multinational Kraft Foods Inc., which was intending to launch a takeover bid for all shares of another multinational, Cadbury PLC.

The purpose of the operation, which was in fact a takeover and not a merger, had international ramifications insofar as it would enable Kraft Foods Inc. to take on new lines of business (confectionery, chocolates, chewing gum, etc.) that were geographically diversified on a global scale. The new lines of business were a close match to its basic activities in the food industry (sale of prepared beverages and food products), the aim being to harness synergies, especially in marketing and distribution. The new activities had been developed by Cadbury PLC.

At the national level, the operation involved the two multinationals' two subsidiaries present in Morocco and incorporated under Moroccan law, along with a joint venture that one of the subsidiaries had set up with a Moroccan group.

Its review of the case enabled the Council to formulate and apply the methodology explained in Section 2 above.

The opinion issued by the Council and followed by the Prime Minister held that the planned operation would not lead to the strengthening of a dominant position in the markets concerned by the operation⁶ and that the operation could have a beneficial effect on the competitive environment of national firms, enabling them to raise their competitiveness to international standards.

3.2 *Main conclusions from this experience*

- In the absence of any agreement with competition authorities having already had a chance to speak out on this concentration (the European Commission, FTC, UK competition authorities, etc.), the Competition Council had to formulate its judgement on the basis of its own analyses, using input provided from the party in question or compiled by its own efforts. There was no contact with these authorities.
- The Competition Council, having recently become an official participant in the OECD Global Forum on Competition and a member of the International Competition Network (ICN), has not yet sufficiently developed its contacts with competition authorities in the realm of bilateral or multilateral co-operation on issues involving concentration.
- Both of the multinationals concerned have already received authorisations from the European Commission and the Romanian competition authorities, subject to a commitment to exclude the

⁶ After segmentation, the markets concerned were confectionery and biscuits.

chocolate market from the operation. This commitment could not be imposed in Morocco, given the insignificance of the Moroccan market for this product.

- Enforcement of concentration control is contingent on a market share threshold that is calculated over Moroccan national territory as soon as that territory is affected, irrespective of the nationality of the firms or the legal location of the concentration.
- In its assessment, the Competition Council took only the operation's domestic market effects into consideration. The test by which it decided whether the operation could or could not be authorised was examined solely with relation to that market, it being understood that the geographical market of the multinationals concerned was worldwide. In this case, it was difficult to identify competition problems, and in particular to establish the market power or domination of the new entity resulting from the operation.
- Concentration control is an unusual and delicate activity insofar as it entails an *ex ante* judgement about the future, as opposed to the control of illegal agreements, which relies on *ex post* assessments.
- The evaluation method used in this case incorporated both an assessment of competition and an assessment of the operation's economic consequences.

MINISTÈRE DES AFFAIRES ÉCONOMIQUES ET GÉNÉRALES (MAROC) *

1. Description générale du système de contrôle des concentrations dans notre pays :

Selon l'article 11 de la loi marocaine 06-99 sur la liberté des prix et sur la concurrence, sont considérées comme concentrations les opérations suivantes :

- Le transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d'une entreprise ; ou
- Tout acte qui a pour objet ou pour effet de permettre à une entreprise ou un groupe d'entreprises d'exercer, directement ou indirectement, sur une ou plusieurs autres entreprises une influence déterminante.

Une opération est soumise au contrôle des concentrations lorsque la part de marché réalisée par les entreprises parties à l'acte ou qui en sont l'objet, durant l'année civile précédente, est de plus de 40% conformément aux dispositions de l'article 10 alinéa 2 de la loi " *les entreprises qui sont parties à l'acte, ou qui en sont l'objet, ou qui leur sont économiquement liées ont réalisé ensemble, durant l'année civile précédente, plus de 40 % des ventes, achats ou autres transactions sur un marché national de biens, produits ou services de même nature ou substituables, sur une partie substantielle de celui-ci*".

Le franchissement de ce seuil de 40 % de parts de marché cumulé induit de plein droit l'obligation de notifier au Premier ministre tout projet de concentration tel que cela est défini à l'article 12 de la loi.

Le Ministère des Affaires Économiques et Générales, en particulier la Direction de la Concurrence et des Prix, examine le dossier et prépare un rapport pour le Premier Ministre. Dans un délai de deux mois, le Premier Ministre peut, par décision motivée soit :

- Autoriser la concentration,
- Autoriser la concentration avec des engagements,
- Demander l'avis du Conseil de la Concurrence.

Le silence gardé par le Premier Ministre pendant ces 2 mois vaut acceptation tacite du projet de concentration, ainsi que les engagements qui y sont joints le cas échéant.

Si la concentration est de nature à porter atteinte à la concurrence, notamment par la création ou le renforcement d'une position dominante, elle est soumise par le premier Ministre à l'avis du Conseil de la Concurrence. Ce dernier prépare son avis et le transmet au premier ministre.

Le délai maximum pour examiner l'opération de concentration est de 6 mois après la réception d'une notification complète.

Après avoir reçu l'avis du Conseil de la Concurrence, le Premier Ministre peut, par décision motivée soit :

- Autoriser une concentration ;
- Interdire un projet de concentration susceptible de créer ou de renforcer une position dominante sur le marché ;
- Modifier ou compléter l'opération notifiée ou prendre toute mesure propre à assurer ou à établir une concurrence suffisante. Une opération peut être subordonnée à l'observation des prescriptions de nature à apporter au progrès économique et social une contribution suffisante pour compenser les atteintes à la concurrence.

L'alinéa 5 de l'article 12 de la loi dispose expressément que "durant ce délai précité, les entreprises concernées ne peuvent mettre en œuvre leur projet".

Une nouvelle réforme de la loi est en cours. Elle concernera plusieurs volets, en particulier les opérations de concentration économique.

En effet, l'obligation de notification des entreprises parties à l'opération de concentration quand la part de marché dépasse les 40%, pose un problème au niveau de l'évaluation des parts de marchés des entreprises concernées en pourcentage aussi bien de la part des entreprises que de l'autorité de concurrence qui tend à adopter un seuil du montant du chiffre d'affaires en valeur absolue. D'autres modifications vont être apportées à la procédure relative aux opérations de concentration économique.

2. Les concentrations transfrontalières

A la lecture du premier article de la loi 06-99, on relève que le système de contrôle des concentrations exige la notification du projet dès lors qu'il y a un effet sur le marché domestique. La loi dispose ainsi que "la présente loi s'applique à toutes les personnes physiques ou morales qu'elles aient ou non leur siège ou des établissements au Maroc, dès lors que leurs opérations ou comportements ont un effet sur la concurrence sur le marché ou sur une partie substantielle de celui-ci".

Cet article vise implicitement les personnes morales pouvant avoir leur siège en dehors du Maroc, d'où la nature éminemment **extraterritoriale** de la loi marocaine sur la concurrence.

C'est une loi nationale de portée internationale dans la mesure où les fusions envisagées à l'échelle internationale et ayant un impact sur le marché national doivent être notifiées.

Il y a lieu de citer comme illustration la société Kraft Foods Inc. établie aux États-Unis qui a déposé, par le biais de son mandataire, une notification d'une opération de concentration auprès de notre département suite à son projet d'acquisition de la société britannique Cadbury plc.

Après analyse de cette opération, nous avons jugé qu'elle ne présente pas de problème particulier de concurrence au niveau du Maroc.

La principale faiblesse de cette portée extraterritoriale de notre loi est bien entendu celle de son effectivité puisqu'une loi doit être appliquée dans son intégralité et notamment dans son dispositif répressif. Les sanctions extraterritoriales prévues à l'article 70 de la loi disposent que « *les personnes morales peuvent être reconnues pénalement responsables lorsque les circonstances de l'espèce le justifient [...] la peine encourue est une amende dont le montant est pour une entreprise de 2 % à 5 % du chiffre d'affaires hors-taxes réalisé au Maroc au cours du dernier exercice clos.* »

Il est difficile d'imaginer que de telles sanctions puissent être appliquées à de grands groupes internationaux installés à l'extérieur du Maroc qui sont généralement dotés d'une puissance économique sans commune mesure avec celle du Maroc.

De ce fait, les sanctions prévues à l'article 70 ne semblent pouvoir être appliquées qu'aux entités établies localement et liées sous différentes formes aux réseaux des entreprises multinationales ayant initié les opérations de concentration visées.

D'autre part, on peut noter que les entreprises multinationales sont très attentives aux règles relatives aux concentrations, et prennent le soin de notifier tout projet même dans les plus petits pays, par sécurité juridique mais aussi pour des soucis d'image de l'entreprise. Mais là se pose un autre problème relatif à la capacité ou à la volonté de ces pays d'interdire ou d'exiger des engagements de ces entreprises au risque de voir ces investissements quitter le pays, au moment où la priorité pour ces économies en développement est d'attirer des investissements étrangers.

Concernant les accords bilatéraux que nous avons signés, il y a lieu de citer deux accords bilatéraux avec la Tunisie et la Jordanie sur l'échange l'information en matière de pratiques anticoncurrentielles et des concentrations économiques. Un autre accord bilatéral est en cours de signature avec l'Égypte.

Il est à rappeler que depuis l'entrée en vigueur de la loi sur la concurrence, le Maroc a autorisé une douzaine d'opérations de concentration

MOROCCAN MINISTRY OF ECONOMIC AND GENERAL AFFAIRS*

1. General description of the concentration control system in our country

Article 11 of Moroccan Act 06-99 on pricing freedom and competition states that the following operations are considered to be concentrations:

- Transfer of ownership or the right to use all or part of a firm's assets, rights and obligation; or
- Any act, the purpose or effect of which is to enable a firm or group of firms to exert a decisive influence, directly or indirectly, over one or more other firms.

An operation is subject to concentration controls of market share captured by the firms taking part in the act, or constituting the purpose thereof, during the previous calendar year accounts for more than 40% pursuant to the provisions of Article 10, paragraph 2, of the Act: *"firms which are parties to the act, or constitute the purpose thereof, or firms which have economic ties to such firms and which have together accounted for, in the course of the previous calendar year, over 40% of the sales, purchases or other transactions on a national market for goods, products or services of the same type of substitutable for a substantial portion thereof"*.

Exceeding this 40% threshold on aggregate market share makes it *de jure* compulsory to notify the Prime Minister of any planned concentration as laid down in Article 12 of the Act.

The Ministry of Economic and General Affairs, in particular the Directorate of Competition and Pricing, examines the dossier and drafts a report for the Prime Minister. Within a period of two months, the Prime Minister may, under a reasoned decision:

- Authorise the concentration;
- Authorise the concentration subject to conditions;
- Request the opinion of the Competition Council.

A two-month silence on the Prime Minister's part is tantamount to tacit acceptance of the concentration proposal and of any conditions that may have been a part of it.

If the concentration is such as to be likely to impede completion, notably by creating or strengthening a dominant position, it is submitted by the Prime Minister to the Competition Council for an opinion. The latter body prepares its opinion and submits it to the Prime Minister.

The maximum deadline for examining the concentration operation is 6 months following receipt of full notification.

After receiving the opinion of the Competition Council, the Prime Minister may by a reasoned decision:

- Authorise a concentration;
- Prohibit the concentration on the grounds that it would create or strengthen a dominant market position; or
- Request changes or additions to the proposed operation, or take any measures needed to ensure or establish adequate competition. Authorisation of the concentration operation may be made conditional on compliance with directives that could result in a tangible contribution to the country's economic progress which could offset the detrimental effects on competition.

Paragraph 5 of Article 12 of the Act expressly states that “during the above-mentioned period, the firms concerned may not proceed with the planned operation”.

The Act is currently being reformed once again. Amendments will be made to several provisions, particularly those relating to economic concentration.

The reason for this reform is that the requirement that the firms party notify the concentration operation once market share exceeds 40% poses a problem in terms of the assessment of the percentage market share of the firms concerned both for the firms and for the competition authority, which tends to take turnover in absolute terms as the threshold. Other amendments are to be made to the procedure regarding economic concentration operations.

2. Cross-border concentrations

The first article of Act 06-99 clearly states that the concentration control system requires notification of a planned merger should the latter have an impact on the domestic market. The Act provides that *“the present Act shall apply to all physical and legal persons, regardless of whether or not they have headquarters or establishments in Morocco, in all cases where their operations or behaviour have an impact on market competition or a substantial portion thereof”*.

This article implicitly addresses legal persons with headquarters outside Morocco, hence the eminently **extraterritorial** nature of Moroccan competition law.

It is national legislation that is international in scope in that notification must be given of all mergers at the international level which have an impact on the domestic market.

An example worth mentioning here is that of Kraft Foods Inc., incorporated in the United States, which through its representative notified our department of a concentration operation following its planned takeover of the British company Cadbury plc.

After analysing this operation, we decided that it did not pose any particular problems over competition in Morocco.

The main weakness of the extraterritorial scope of our Act is clearly that of its effectiveness in that an Act must be applied in its entirety, particularly in terms of its penalties. The extraterritorial penalties provided for in article 70 of the Act state that *“legal persons may be held criminally responsible where the circumstances so justify [...] the penalty incurred consists in a fine amounting for a firm to 2% to 5% of its pre-tax turnover in Morocco in the course of the previous financial year.”*

It is scarcely conceivable that such penalties could be imposed on major international groups established outside Morocco, which generally wield economic power which is wholly disproportionate to that of Morocco.

Consequently, it would seem that the penalties laid down in article 70 can only be imposed on locally established entities with ties to the networks of the multinational firms which initiated the concentration operations in question.

Moreover, it should be noted that multinational firms pay close attention to the rules governing concentrations and are careful to notify any planned concentration even in the smallest countries, not only to be legally safe but also out of a concern to safeguard their firm's image. However, another problem arises here with regard to the ability of the will of such countries to prohibit or to impose conditions of these firms in view of the risk of seeing such investments being withdrawn from the country, at a time when the priority for these developing economies is to attract foreign investment.

With regard to the bilateral agreements we have signed, it is worth mentioning two bilateral agreements with Tunisia and Jordan respectively on the exchange of information on anti-competitive practices and economic concentrations. Another bilateral agreement is in the process of being signed with Egypt.

It should be recalled that since the entry into force of the competition Act, Morocco has authorised about a dozen concentration operations.

PAKISTAN

1. General Points

1.1 *Brief overview of the merger control regime, with particular reference to the following issues*

1.1.1 *Merger control regime existing in Pakistan*

Section 11 of the Competition Act, 2010 (Act), provides that no undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

Section 11(2) of the Act provides that where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the commission of the intended merger.

Section 11(2) of the Act provides that the concerned undertakings shall not proceed with the intended merger until they have received clearance from the Commission.

The Commission issued “Competition (Merger Control) Regulations, 2007”, which lays down regulations covering notification thresholds, and the procedure for filing merger clearance application as well as procedure for the Commission to adhere to in reviewing the merger. Pakistan has two-phase merger clearing process: Phase-I has to be completed in 30 days. And in merger cases which require in-depth inquiry, Phase-II is initiated, which has to be completed within 90 days. So far, only two cases have gone to Phase-II.

- The criteria (turnover, market shares etc.) used for establishing jurisdiction over merger operations;

The merger parties will be required to make application for clearance from the Commission under sub-section (2) of section 11, in case either of the following notification thresholds are met:

- the value of gross assets of the undertaking, excluding value of goodwill, is not less than three hundred million rupees (equivalent to US\$ 3.488 million) and/or the combined value of the undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged, is not less than one billion rupees (equivalent to US\$ 11.628 million); or
- annual turnover of the undertaking in the preceding year is not less than five hundred million rupees (equivalent to US\$ 5.814 million) and/or the combined turnover of the undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged is not less than one billion rupees (equivalent to US\$ 11.628 million); and

- the transaction relates to acquisition of shares or assets of the value of one hundred million rupees (equivalent to US\$ 1.163 million) or more; or
 - in case of acquisition of shares by an undertaking, if an acquirer acquires voting shares, which taken together with voting shares, if any, held by the acquirer shall entitle the acquirer to more than 10% voting shares;
 - in the case of an asset management company carrying out asset management services, its collective exposure for itself and in all of its collective investment schemes in a single entity is more than 25% of total voting rights; or
 - the value of total assets under management of an Asset Management Company is one billion rupees (equivalent to US\$ 11.628 million) or more;
- If a notification system is in place, whether this is voluntary or mandatory; whether notification fees are payable; whether there are special requirements for merger notification;

Pakistan has a mandatory pre-merger clearance regime, if the merger meets the notifications thresholds. Parties have to pay fee, and have to apply on a prescribed form.

- The substantive test used to assess mergers

Section 11(1) of the Act lay down the substantive test, which is “substantially lessening of competition by creating or strengthening a dominant position in the relevant market.”

- Special provisions for cross-border mergers

Regulation 27 of the Competition (Merger Control) Regulations, 2007 provides that where a merger is subject to review under merger laws in more than one jurisdiction, the commission shall:

- without compromising effective enforcement of the domestic law, seek to cooperate its reviews of transnational mergers in appropriate cases;
- consider actions by which they can eliminate or reduce the impediments to cooperation and coordination;
- encourage merging parties to facilitate coordination among competition authorities, in particular with respect to timing of notifications and voluntary waivers of confidentiality rights, without drawing any negative inferences from a party’s decision not to do so;
- give the merging parties, the opportunity to consult with the concerned competition authority at key stages of investigation with respect to any significant or practical issue that may arise during the course of investigation;
- give an opportunity to third parties, with a legitimate interest, in the merger review as recognized under reviewing country’s merger laws, to express their view under the merger review process;
- treat foreign undertakings, no less favorably than domestic undertakings in like circumstances; and
- endeavor in reaching, in so far as possible, consistent, or at least non-conflicting outcomes.

2. Specific questions

2.1 *Co-operation among competition authorities (international, regional and bilateral)*

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

None, so far.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there No Agreement in existence yet on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

No agreement in existence yet.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

The Commission may consider foreign interest, if it is not in direct conflict with the local interest.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?*

The Competition Commission of Pakistan regularly contributes to the workings of OECD, ICN and UNCTAD, and draw lessons from their work products.

2.1.5 *Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?*

No regional organization of the South Asian countries yet.

2.2 *Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)*

2.2.1 *If your jurisdiction requires merger notification, are the current notification.*

The present threshold levels are adequate and appropriate for mergers notifications.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

None, so far.

- 2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

The Commission normally draws guidance from the decisions of European Union, United States and developed jurisdictions, but their decisions only hold persuasive value and not authoritative. So far no cross-border merger has been decided by the Commission.

- 2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

No.

- 2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

Only competition concerns are taken into consideration.

- 2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

2.3 Remedies (types, consultation, monitoring and enforcement)

- 2.3.1 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.*

Yes, it is possible to impose structural remedies i.e. divestiture.

- 2.3.2 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

No.

- 2.3.3 *To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?*

Pakistan has only one Competition Authority.

POLAND

1. General points

Merger control system has existed in Poland since 1990. At the moment, it corresponds to the standards elaborated in the OECD and the ICN. Merger control is a part of competition policy together with separates the anti-cartel provisions. The merger control includes all concentrations, which might have an effect on the Polish territory and meet the working criteria set out in the Act of 16 February 2007 on competition and consumer protection. The antimonopoly law does not introduce the definition of concentration, but indicates what kind of transactions are concentrations. Pursuant to Article 13(2) concentrations cover the following cases:

- a merger of two or more independent undertakings;
- takeover – by way of acquisition or entering into a possession of stocks, other securities, shares or in any other way obtaining direct or indirect control over one or more undertakings by one or more undertakings;
- creation by undertakings of one joint undertaking;
- acquisition by the undertaking, of a part of another undertaking's property (the entirety or part of the undertaking), if the turnover achieved by the property in any of the two financial years preceding the notification exceeded in the territory of the Republic of Poland, the equivalent of EUR 10,000,000.

The criteria for the notification obligation are objective in nature and are based on the turnover of enterprises engaged in concentration. Pursuant to Article 13(1) of the antimonopoly law, the concentration is subject to notification if:

- the combined worldwide turnover of undertakings participating in the concentration in the financial year preceding the year of the notification exceeds the equivalent of EUR 1,000,000,000, or
- the combined turnover of undertakings participating in the concentration in the territory of the Republic of Poland in the financial year preceding the year of the notification exceeds the equivalent of EUR 50,000,000.

Merger control system in Poland is mandatory, and entrepreneurs have an obligation to refrain from carrying out the transaction until its evaluation by the antitrust authority. Transactions must be notified using a special form, which also determines what kind of documents should be submitted. Notification applications are subject to a fee of around EUR 1,250.

Evaluation of concentration is based on the test of a significant restriction of competition. The wording of the test and its fundamental interpretation is consistent with the European law. An additional

and complementary test to assess the concentration is a test of public interest, which allows authorizing anticompetitive mergers, if it is in other overriding public interest, such as national security.

All transactions are treated in the same manner. There are no separate rules for transnational transactions.

2. Specific questions

2.1 *Co-operation among competition authorities (international, regional and bilateral)*

The Polish system of merger control is independent of other national systems of merger control. The Polish legal system recognizes and does not infringe the rights of other national competition authorities to control and decide whether the notified mergers are anti-competitive. In terms of jurisdiction over concentrations, there have never been any problems in cooperation with other national competition authorities.

Poland is not a party to any bilateral international agreements on competition law. The Polish competition authority (UOKiK) has the right to cooperate with other antitrust authorities and conclude agreements, but they are non-binding international agreements. In the opinion of Polish competition authority, there was no need to conclude such agreements, so far. The current legal system provides the possibility of effective collaboration in dealing with transnational mergers. However, certain restrictions apply to: 1. the inability to transfer evidence containing protected information; 2. Inability to benefit from waivers. In the present practice, however, restrictions do not adversely affect the cooperation with other national competition authorities in merger cases.

Polish merger control test does not take into account interests of other countries. Evaluation of a given concentration is dependent on the designation of geographic aspect of the relevant market. If the relevant market in a given case is the supranational market, then the Polish antitrust authority examines the effect of a concentration outside Polish borders. In the administrative practice, the Polish antitrust authority, whenever possible, tries to cooperate in good faith with other national antitrust authorities.

The Polish competition authority has taken an active part in international initiatives and forums of cooperation for the protection of competition, namely the OECD and the ICN. Authority's staff is involved in the work of the working groups of the forums devoted to merger control. The international standards and best practices amending the Polish antitrust legislation are a important source of inspiration of these changes.

In terms of regional initiatives in the field of multijurisdictional merger control, the most important is the membership in the European Union and the division of powers between the Commission and national authorities. Cooperation between national authorities occurs especially when using the system for referrals of cases to the Commission or the taking of cases from the Commission by national authorities. In this context, principles of cooperation developed in the ECA forum are important. The UOKiK is not a party to other agreements, which in any way affect the jurisdiction or lay down the rules for cooperation with other competition authorities.

2.2 *Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)*

The Polish system of merger control is based on compulsory notification of all transactions meeting the notification thresholds. Notification turnover thresholds were significantly increased over the past 10 years. Because of this, all transnational transactions, which even slightly could affect the markets on the Polish territory are subject to notification. The increase of turnover thresholds served to reduce business

transaction costs by limiting the obligation of notification. However, a problem can be noticed that by increasing the working turnover thresholds and adapting them to transnational transactions, they have become too high for certain transactions of a purely local nature. The result is that it becomes reasonable to restore the notification criteria based on objective indicators, such as the market share.

The UOKiK has no legal opportunities to oblige entrepreneurs from outside Poland to cooperate during the investigation. However, in many cases, such cooperation took place on a purely voluntary basis. In a few cases the Polish office helped foreign authorities to obtain a response from Polish entrepreneurs, as well. In half of the cases, through persuasion of the UOKiK, Polish entrepreneurs have responded to the call by foreign authorities.

The UOKiK has a full legal independence in exercising the jurisdiction over merger transactions affecting the Polish territory. In this sense, decisions taken by other competition authorities may not bind the Polish competition authority in while making any decision. Nonetheless, UOKiK take into account any decisions taken by the foreign competition authorities. Furthermore, this does not preclude an effective cooperation with other national authorities and the coordination of activities relating to a notified transnational concentration. In the present practice, however, there was no need to make the decision of the Office dependent on the position of other foreign competition authorities.

The UOKiK is an independent body and the political influence from other public administration or government bodies is limited. Moreover, any political intervention is excluded in reference to examination of transnational mergers notified to the UOKiK. There is no legal basis in the Polish system of competition protection for any other authority to change the decision of the UOKiK or impose obligations on it. It should be noted, however, that in addition to merger control exercised from the standpoint of competition protection, there is a possibility of merger control under other legislation. For example, the Financial Supervisory Authority also controls the concentration of entrepreneurs from the financial sector in terms of transaction safety and consumer protection. Those two perspective, do not necessarily lead to the same conclusions. Such a situation occurred in relation to the concentration of the Unicredit/HVB.

Transnational transactions are not regulated differently from domestic transactions and the same rules apply. For this reason, non-economic issues can be taken into account if the concentration is assessed on the basis of public interest test. In applying this test, the UOKiK may approve the anti-competitive concentration if:

- the concentration is expected to contribute to economic development or technical progress;
- it may exert a positive impact on the national economy.

In practice, the UOKiK relied on public interest test when assessing mergers in energy sector. In this context the Polish energy security and social security and the fight against unemployment were invoked. However, the public interest test may not be a basis for blocking a concentration, including transnational concentration.

In the current practice of the Polish competition authority, transnational transactions were not particularly complex cases. However, they could potentially be a challenge in coordinating the activities of many national bodies and the protection of the rights of entrepreneurs. In particular, this protection must involve regulation of the transmission of data containing business secrets.

2.3 Remedies (types, consultation, monitoring and enforcement)

In the current practice, the UOKiK has never issued a conditional decision in relation to a transnational merger. The Polish competition authority may use both the structural and behavioural conditions. Structural conditions consist in obliging an entrepreneur to give up certain assets, e.g. sale of stores or production line. Behavioural conditions rely on the imposition on an entrepreneur of the duty to act in a specific manner, such as providing distribution networks for third parties.

Structural conditions are the primary type of conditions applied by the UOKiK. Behavioural conditions are accepted only if the structural conditions cannot be adopted. Preference for structural conditions is due to the fact that they provide a permanent modification of the market structure and effectively counteract the anticompetitive effects of concentrations. Behavioural conditions are usually temporary and are much more difficult to monitor. Also, the determination of the wording of behavioural conditions is more difficult than in the case of structural conditions.

The practice of the UOKiK shows that very often the discussions with entrepreneurs concentrate on the period to implement the condition. Overseeing the implementation of structural conditions is easier than in the case of behavioural conditions. Entrepreneurs often want to avoid a detailed description of conditions, since it facilitates their evasion of commitments. The more accurate the description of all the commitments, the easier it is to monitor their implementation.

The primary instrument for monitoring the performance of the conditions covers the obligation imposed on entrepreneurs to periodically report progress in the implementation of conditions. In case of doubt the UOKiK may request the entrepreneur to produce all documents related to the implementation of conditions or may carry out an audit at entrepreneur's premises. As regards the monitoring of conditions, no additional agreements with other national antitrust authorities have ever been concluded. This situation resulted from the fact that the previously imposed conditions had to be implemented on the Polish territory, and so there was no need to involve other bodies. Moreover, there were no such situations under which other foreign competition authority asked the UOKiK for help in monitoring the implementation of conditions.

In the practice of the UOKiK, there has been no coordination of the activities of the Polish authority with other national competition authorities in terms of joint setting of conditions.

RUSSIAN FEDERATION

According to the Russian legislation, mergers, joining and foundation of companies as well as purchasing of stocks (shares) of companies are subject to the antimonopoly control.

At that, the antimonopoly legislation provides for both pre- and post- merger control.

Since 2006 thresholds for obtaining pre merger approval by the antimonopoly authority or provision of post merger notification to the antimonopoly authority have been repeatedly raised. It was made in order to reduce administrative burden for business and control more effectively those transactions that may affect competition in the relevant markets. The last increase of the thresholds (nearly twice) was set in the Federal Law No. 164-FZ of 17 July 2009.

Currently, prior approval of the antimonopoly authority is needed in the following cases:

- merger or joining of companies if the aggregate value of their assets exceeds 3 bln rub. (75 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 6 bln rub. (150 mln. Euro);
- foundation of a company through placing stocks (shares) or property into its capital stock if the total value of the companies' founders assets exceeds 7 bln rub (175 mln Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln. Euro);
- transactions between the companies if total value of assets of acquirer company and of the company the stocks (shares) and property or rights of which is acquired exceeds 7 bln rub (175 mln. Euro) or their total revenues from sale of products for the preceding calendar year exceed 10 bln rub (250 mln Euro) while the total value of assets (group of persons) of the acquiring company whose stocks, property or rights are acquired exceeds 250 mln rub (6, 3 mln Euro).

Besides, prior approval of the antimonopoly authority is needed if a company involved in the transaction or included in one group of persons is included in the Register of economic entities occupying more than 35% of the market share on a particular product market (the Register is maintained by the FAS Russia).

The companies have the right to send to the antimonopoly authority a post notification, instead of receiving the prior authority's approval, about similar actions or transactions if they are made within a group of persons.

The FAS Russia should receive post notifications in the following cases:

- establishment of a company as a result of merger, joining to the company of one or more companies, if the aggregate value of their assets or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro);

- transactions, if the total value of the acquiring company assets, and the company whose shares, property or rights are acquired, or their total revenues from sales of products during the preceding year exceeds 400 mln rub (10 mln. Euro) while the total value of assets, shares, property or rights of the acquired company exceeds 60 mln rub (1, 5 mln. Euro).

The different thresholds are established by the antimonopoly authority for the financial and credit organizations for obtaining pre-merger approval and submission of post notification. The thresholds are established on the basis of total value of assets of the parties to the transaction.

Currently the FAS Russia is proposing to cancel the procedure of submission of post notifications. If the remedies imposed by the antimonopoly authority are not fulfilled, the authority can bring a case to the Court and request for annulment of the transaction.

The antimonopoly authority can do the following when carrying out prior control over economic concentration:

- satisfy an application if the transaction, other action declared in the application would not lead to restriction of competition;
- satisfy an application imposing structural and behavioral remedies aimed at ensuring competition;
- prolong the period of examination of application in case if the antimonopoly authority suspects the transaction or other action can lead to restriction of competition;
- refuse to satisfy an application if the antimonopoly authority during the examination of an application comes to a conclusion that the transaction or other actions declared in the application would lead or can lead to restriction of competition.

The procedure of applications examination as well as procedure of submitting applications and notifications, including a list of information required to be submitted are provided in the Federal Law "On Protection of Competition" (hereinafter - Law), as well as in the number of other regulatory legal acts.

The merger decisions taken by the antimonopoly authority are published on the FAS Russia official website (www.fas.gov.ru) that ensures transparency of the authority's activity and allows the stakeholders to express their opinions on the cases/transactions.

If the company is established without prior approval of the FAS Russia, it has to be liquidated or reorganized; if the transaction is carried out without obtaining the prior approval of the antimonopoly authority it is recognized as invalid. However it can be done only in case if the Court upholds a decision of the FAS Russia about the fact that such an establishment of a company or such transaction has led or may lead to restriction of competition.

Failure to submit an application, as well as violation of the order of submission of application can be subject to the administrative liability.

The state fee for examination of application equals 20,000 rub (500 Euro) (according to Point 89, Part 1, Article 333.33 of the Tax Code of the Russian Federation).

It is worth mentioning that the FAS Russia, introducing changes to the legislation, followed the OECD Council recommendations on mergers and acquisitions control C(2005) 34 aimed at effective,

efficient and timely examination of transactions (increase of thresholds for obtaining pre merger approval and receiving post merger notification, facilitating of the procedure for submitting applications within a group of persons, specification of requirements for submitting the notifications and procedure of examination of transactions).

The norms of control over economic concentration prescribed in the Law are to be applied equally by the Russian and foreign legal entities (Article 3 of the Law).

With regard to international cooperation, the FAS Russia has a right to cooperate with international organizations, foreign government Agencies, to participate in development and implementation of international agreements of the Russian Federation.

The FAS Russia widely uses its powers in the field of international cooperation. It signed and implements a number of multilateral and bilateral agreements with foreign Competition Authorities and associations (Austria, Bulgaria, Brazil, Canada, Chile, China, Denmark, Italy, Japan, Korea, Latvia, Mexican United States, Mongolia, Poland, Romania, Slovakia, USA, Ukraine, Finland, France, Czech Republic, Sweden, Estonia, ICAP, BRIC) which cover various types of cooperation.

These documents contain, inter alia, provisions regulating the procedure of information exchange between Competition Authorities, including confidentiality issues, during holding of investigations and/or examination of transactions by Competition Authorities that signed these agreements.

Most clearly the mechanism and procedure of interaction between the parties in part of application of the antimonopoly legislation are provided in the two new type agreements in the field of competition policy signed between the FAS Russia and the Federal Competition Commission of the United Mexican States (June 2010) and between the FAS Russia and the Hungarian Competition Authority (September 2010).

Example of cooperation between the Russian and Hungarian Competition Authorities can be described by a request submitted by the Hungarian Competition Authority to the FAS Russia where they requested to provide information on acquisition of the EMFESZ Company (the second largest gas seller in Hungary after the German company E.ON), belonging to Gazprom group of persons, by the RosGas AG Company; and along with this it was pointed out that the Gazprom Company has denied any involvement in the transaction. The request was sent to evaluate the degree of natural gas supply influence on the Hungarian market. The FAS Russia sent an official request to the Gazprom company, the response from which was immediately resent to the Hungarian Competition Authority.

One of the practical results of cooperation between the FAS Russia and the Directorate General for Competition of the European Commission were consultations on the merits of consideration of the acquisition of the Sun Microsystems company by the Oracle Corporation Company.

Notifications for this transaction have been submitted for consideration to many competition authorities worldwide, including Russia and the European Commission. For the FAS Russia it was extremely important to understand the views of the European Commission concerning the consequences of this transaction in order to take a coordinated decision on this issue.

The precondition of the European Commission for holding the consultations was a submission of waiver by those companies by which they confirm their consent on holding of consultations between the FAS Russia and the European Commission with the possibility to exchange confidential information.

The waivers submitted by the companies to the FAS Russia and the European Commission contained restrictions that the submitted confidential information could be exchanged only within the frameworks of

consultations held between the FAS Russia and the European Commission in order to define a common position, thus imposing a ban to pass this information to the third parties, as well as to use it for any other purposes.

After receipt of these letters, the FAS Russia and the European Commission held telephone consultations during which they discussed the basic approaches to market analysis and to examination of the transaction, as well as concerns in relation to maintenance of competition in the markets where these companies operate.

Apart from the indicated above ways of cooperation, the FAS Russia attempted to cooperate with the Department of Justice and Federal Trade Commission of the United States and the DG Comp. Thus, after examination of the application submitted by the Graftech Holdings Inc and Graftech Seadrift Holding companies to the FAS Russia by which they asked for the permission to acquire 81,1% of shares in the share capital of the LLC «Seadrift Coke LP», as well as to acquire the rights allowing to operate the «Seadrift Coke LP» Company business, the FAS Russia came to a conclusion that this transaction can affect competition in the global market of graphite electrodes and informed above mentioned authorities about its position concerning this transaction with the recommendation to take it into account in case if the companies also submit to them their applications.

An example of imposing the remedies by the antimonopoly authority during consideration of cross-border transaction was the acquisition of the RUSAL assets by the Alcoa Company (the world's largest producers of aluminum). The FAS Russia approved this transaction imposing a number of behavioral remedies on the Alcoa Company.

It is important to note that one of the major restrictions for effective cooperation between the Competition Authorities of different countries is the confidentiality issues, as the right to refer the information to the confidential one belongs to its owner and without his permission such information can not be provided to the third parties.

Inability of the FAS Russia to receive confidential information from foreign Competition Authorities creates considerable difficulties during examination of cross-boarder transactions or transactions committed outside the Russian Federation, as well as during the investigation of violations of antimonopoly legislation. The FAS Russia needs such information in order to conduct a comprehensive investigation of the market and activities of economic entities operating on this market, to obtain evidences of violations of antimonopoly legislation and to assess possible consequences of the transactions or other actions performed by the economic entities.

In this regard, the FAS Russia is currently doing its best to eliminate these difficulties that would enhance the cooperation with foreign Competition Authorities within the frameworks of examination of cross-border transactions.

SÉNÉGAL *

Le droit de la concurrence est-il adapté aux économies des pays en voie de développement ? La controverse doctrinale sur cette question semble aujourd'hui dépassée. Sous le poids de l'ouverture des économies des pays en développement vers l'extérieur et la mondialisation croissante, la politique et le droit de la concurrence ont fini par faire partie intégrante de l'agenda des négociations commerciales multilatérales, bilatérales et régionales.

Ainsi, la plupart des pays en voie de développement ont adopté depuis les années 90, des politiques et des droits de la concurrence adaptés à leurs différents niveaux de développement, mais également à leurs caractéristiques économiques, culturelles et sociales. Au demeurant, la politique de concurrence des États est aujourd'hui, plus que par le passé, plus décisivement adossée à leurs stratégies de développement.

Au Sénégal par exemple, dans les années 60, même si les principes de la liberté d'entreprise et de la libre concurrence étaient reconnus dans la loi 65-25 du 4 mars 1965 sur les prix et les infractions à la législation économique, les pratiques anticoncurrentielles n'y étaient pas réglementées. Seules les ententes étaient prévues dans ce texte et une commission des ententes était censée examiner et autoriser, le cas échéant, les ententes bénéfiques au marché et à l'économie.

C'est finalement en 1994 que les pratiques anticoncurrentielles, qualifiées à l'époque de collectives (ententes, abus de positions dominantes...) ou individuelles (refus de vente, pratiques discriminatoires, etc.), ont été définies et réglementées.

Cependant, cette loi 94-63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique, ne réglementaient pas les concentrations. Sans doute les besoins de création et de promotion d'entreprises fortes, pourvoyeuses d'emplois et de recettes fiscales, mais également la volonté de mettre en place des champions nationaux compétitifs sur les marchés, ont été les principales raisons de l'exclusion des concentrations du champ d'application de la loi.

Aujourd'hui, plus précisément depuis 2002, les concentrations sont régies par le droit communautaire de la concurrence de l'UEMOA applicable dans les États membres et par conséquent au Sénégal, sous l'effet des Règlements 02 et 03/2002/CM/UEMOA relatifs respectivement aux pratiques anticoncurrentielles à l'intérieur de l'Union et aux procédures applicables.

La question des opérations de concentrations internationales revêt un intérêt majeur pour les pays de la région ouest-africaine dont les caractéristiques des marchés ne sont pas très différentes. Un autre intérêt réside dans le fait que la plupart des entreprises opérant dans ce marché sont étrangères ou sont majoritairement dominées par des ressortissants de pays développés. Par conséquent, les opérations de fusion, d'acquisition et de prise de participation se font généralement en dehors de la zone mais avec des répercussions sur le marché régional.

Après avoir dressé brièvement le régime juridique des concentrations dans l'UEMOA, nous essaieront de faire le point sur les défis et les enjeux posés par les concentrations transfrontières pour les économies

* Contribution soumise par M. Malick Diallo, Secrétaire Général de la Commission Nationale de la Concurrence du Sénégal.

des pays en développement en particulier pour le Sénégal. Enfin nous concluons par des considérations de principes aptes à faire évoluer le traitement de ces questions sur le plan international.

1. Régime juridique des opérations de concentration dans l'UEMOA

Le droit communautaire de la concurrence définit une concentration comme étant:

- la fusion entre deux ou plusieurs entreprises antérieurement indépendantes ;
- l'opération par laquelle une ou plusieurs personnes détenant déjà le contrôle d'une entreprise au moins, ou une ou plusieurs entreprises, acquièrent directement ou indirectement, que ce soit par prise de participations au capital ou achat d'éléments d'actifs, contrat ou tout autre moyen, le contrôle de l'ensemble ou de parties d'une ou de plusieurs autres entreprises ;
- la création d'une entreprise commune accomplissant de manière durable toutes les fonctions d'une entité économique autonome.

Lorsqu'une opération de concentration crée ou renforce une position dominante sur le marché susceptible d'entraver de manière significative le fonctionnement normal de la concurrence sur le marché, cette concentration est assimilée à un abus de position dominante.

Le droit communautaire de la concurrence prévoit également des attestations négatives ou d'exemptions par catégorie ou individuelles applicables aux concentrations, dont l'effet sur la concurrence n'est pas négatif (voir en annexe une décision d'attestation négative en faveur d'une concentration dont font partie des entreprises étrangères). En tout état de cause, les projets de concentration doivent obligatoirement être notifiés à la Commission.

2. Défis et enjeux des concentrations transfrontières pour les pays en développement

L'un des enjeux majeurs liés aux concentrations transfrontières pour les pays de la région ouest-africaine en général, et pour le Sénégal en particulier, réside dans l'attrait de l'investissement direct étranger. En effet, depuis quelques années le Sénégal a mis en place un programme de facilitation de la création et de l'établissement d'entreprises, qui lui a d'ailleurs valu un classement honorable dans le « Doing business » de 2009 et 2010. Les investissements étrangers s'opèrent de différentes manières, dont la conclusion de contrat avec des entreprises nationales, la prise de participation des grands groupes étrangers dans des entreprises locales ou le rachat pur et simple d'entreprises en difficulté, les opérations de concentration constituent ainsi un outil de création ou de renforcement de certaines entreprises dans les pays en développement.

Dans un contexte de difficultés économiques marquées par la crise économique et financière, ces opportunités de création d'emplois et de richesses ne sont pas forcément vues d'un mauvais œil par les gouvernements.

Un autre enjeu non moins important est la création de grandes entreprises dans la région susceptibles de faire efficacement concurrence aux entreprises étrangères. En effet, en jouant sur les avantages comparatifs des États, certaines entreprises ont procédé à des fusions dans des secteurs comme l'huile de palme ou le savon (voir la décision en annexe) afin de renforcer leur pouvoir sur le marché. De telles opérations peuvent être bénéfiques pour le consommateur en termes de baisse de prix des produits concernés.

Un autre enjeu lié aux concentrations internationales pour les PED est constitué par les transferts de technologie dont ces opérations peuvent être porteuses. En effet, pour des entreprises nationales à la recherche de nouvelles technologies et d'innovation, conclure des contrats avec de grands groupes multinationaux peut être source de bénéfices considérables.

A ces remarques s'accroissent également de nombreux défis à relever pour les autorités de la concurrence des pays en développement. Ces défis sont notamment l'examen préalable des projets de concentration, les analyses économiques à mener pour en juger les effets potentiels, les modalités de contrôle et de sanctions, la recherche des informations pertinentes dans d'autres juridictions etc.

Il est clair qu'après l'échec des négociations multilatérales sur la concurrence, l'absence de règles harmonisées sur la définition et les critères d'une bonne ou mauvaise opération de concentration, rend la tâche de l'examen des fusions et acquisitions délicate pour les autorités de la concurrence. En effet, une concentration considérée comme bonne au Sénégal, peut être considérée comme mauvaise concentration en France ou ailleurs. Cette situation est source d'une course effrénée vers la recherche de compétitivité des États et d'attrait des investissements étrangers qui n'est plus uniquement l'apanage des pays en développement comme en témoignent les récentes visites du Président français en Chine et en Inde.

Face à cette situation, les autorités de la concurrence de la zone UEMOA rencontrent d'énormes difficultés à examiner les opérations de concentration. Pour rappel, contrairement aux pays développés comme les États-Unis ou l'Union Européenne qui donnent aux entreprises la possibilité d'apprécier la conformité des opérations de concentration ou d'ententes afin de les mettre en œuvre directement sans notification, la législation communautaire (UEMOA) de la concurrence fait obligation aux entreprises de notifier les projets d'entente ou de concentration. Dès lors, se pose la question des procédures applicables aux concentrations opérées à l'extérieur de la zone mais dont les effets se ressentent dans le marché communautaire.

Cela pose la problématique de la coopération internationale en matière d'application du droit de la concurrence. La Commission de l'UEMOA n'a conclu à ce jour aucun accord de coopération bilatérale avec une autre autorité de concurrence de pays développés ou émergents. En sus, cette coopération, basée sur l'application volontaire ne garantit pas suffisamment la poursuite des infractions au droit de la concurrence et en particulier des concentrations dans d'autres juridictions.

Par conséquent, la Commission de l'UEMOA doit renforcer les prérogatives des structures nationales de concurrence qui sont parfois mieux placées pour surveiller leur marché et détecter les opérations de concentrations internationales non notifiées.

3. Conclusion

En définitive, les défis et enjeux liés aux concentrations transfrontières pour les pays en développement tiennent d'une part aux besoins de développement économique mais également à la nécessité de la protection des petites et moyennes entreprises contre la surpuissance des firmes multinationales étrangères. Ces objectifs, parfois opposés, rendent délicate l'action des autorités de concurrence et des États.

A ce titre, les challenges suivants sont à relever par les autorités de concurrence des pays en développement.

- La poursuite des négociations multilatérales pour une harmonisation des règles régissant les concentrations en particulier et les pratiques anticoncurrentielles en général ;
- La mise en place d'un organe supranational, doté de prérogatives importantes pour la poursuite des infractions au droit de la concurrence qui dépassent le cadre national ;
- Le renforcement de la coopération internationale en matière de concurrence par le biais de la CNUCED, de l'OCDE, de l'ICN, etc. ;
- La révision de l'Ensemble des Nations Unies sur les principes et règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives, pour en faire un outil efficace de lutte contre les pratiques anticoncurrentielles transfrontières.

ANNEXE

UNION ECONOMIQUE ET MONETAIRE
OUEST AFRICAINE

La Commission



DECISION N° 009 /2008 /COM/UEMOA
PORTANT ATTESTATION NEGATIVE A L'EGARD DU PROJET DE CONCENTRATION
ENTRE LES SOCIETES UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI,
SHCI et, SANIA

LA COMMISSION DE L'UNION ECONOMIQUE ET MONETAIRE OUEST AFRICAINE,

- VU le Traité de l'UEMOA, notamment en ses articles 88, 89 et 90 ;
- VU Le Règlement n°02/2002/CM/UEMOA du 23 mai 2002 relatif aux pratiques anticoncurrentielles à l'intérieur de l'Union Economique et Monétaire Ouest Africaine ;
- VU le Règlement n°03/2002/CM/UEMOA du 23 mai 2004 relatif aux procédures applicables aux ententes et abus de position dominante à l'intérieur de l'Union Economique et Monétaire Ouest Africaine ;
- VU la demande présentée par les Cabinets d'Avocats EKDB et CMS, Bureau Francis Lefebvre, sis respectivement à Cocody II Plateaux, rue des jardins, 25 BP 1592 Abidjan 25, Côte d'Ivoire et à 1 – 3, Villa Emile BERGERAT 92522 Neuilly sur Seine Cedex, France, pour le compte des entreprises UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI et, SANIA

Après avoir mis les Etats membres et les entreprises intéressées en mesure de présenter leurs observations et considérant ces observations ;

Considérant l'avis du Comité Consultatif de la Concurrence recueilli à sa quatrième session tenue à Abidjan du 06 au 10 octobre 2008,

Considérant les faits et les motifs sur lesquels la Commission se fonde et exposés ci- après :

A) Faits et procédure :

1. Par courrier en date du 25 juin 2008, les cabinets d'avocats EKDB et CMS bureau Francis LEFEBVRE, demeurant tous en Côte d'Ivoire, sur mandats respectifs des sociétés SIFCA, COSMIVOIRE et PALMCI, d'une part, et UNILEVER CI, d'autre part, ont conjointement notifié à la Commission de l'UEMOA un projet d'accord aux fins d'obtention d'une attestation négative ou, à défaut, une exemption individuelle.

Les entreprises concernées ont été présentées ainsi qu'il suit :

UNILEVER Côte d'Ivoire SA, de droit ivoirien, au capital de 8 053 000 000 F CFA, sis à Abidjan, Boulevard de Vridi, 01 BP 1751 Abidjan 01, spécialisée dans la transformation physique et chimique de tout corps d'origine végétale ou synthétique, en vue d'obtenir des produits détergents et des produits industriels à base de corps gras ainsi que dans le stockage des huiles, des corps gras et dérivés ;

SIFCA SA, de droit ivoirien, au capital de 3 000 000 000 F CFA, sis à Abidjan, Boulevard du Havre, zone portuaire, 01 BP 1289 Abidjan 01, ayant pour objet social l'étude et la réalisation d'opérations de toute nature, tendant au développement des affaires commerciales, industrielles et agricoles en Afrique noire ;

COSMIVOIRE SA, de droit ivoirien, au capital de 4 254 470 000 F CFA, sis à la Zone industrielle de Vridi, 01 BP 3576 Abidjan, ayant pour objet social, l'achat, l'entreposage, l'échange, la représentation, la transformation, la formulation et la commercialisation de tous produits chimiques et cosmétiques naturels ou artificiels, de toutes huiles végétales, animales ou minérales, naturelles ou artificielles, ainsi que de tous produits dérivés ;

PALMCI SA, de droit ivoirien, au capital de 20 000 000 000 F CFA dont le siège social est au Boulevard de Vridi, 18 BP 3321 Abidjan 18, spécialisée dans l'exploitation et la mise en valeur des plantations de palmiers à huile, terrains et établissements agro-industriels de production d'huile de palme brute et d'amandes de palmistes ;

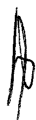
NAUVU Investments PTE LTD (Ci-après NAUVU), de droit singapourien, sis au 6 Temasek Boulevard - 29th Floor- Suntec Tower Four- Singapour 038986, ayant pour objet le commerce de gros ; société commune constituée par le Groupe WILMAR, spécialisé dans la production d'huile de palme et le groupe OLAM, en activité dans le négoce international de matières premières agricoles.

2. L'accord objet de la demande vise à réaliser une opération de concentration qui devrait permettre une spécialisation des parties prenantes, dans la filière huile de palme de la Côte d'Ivoire.

Ainsi, est-il projeté qu'à l'issue de l'opération, resteront en activité la Société UNILEVER Côte d'Ivoire qui se consacrera exclusivement aux activités relatives à la savonnerie, les sociétés SIFCA et NAUVU qui se spécialiseront dans la production et l'exploitation de l'huile brute et raffinée.

La notification déposée par les sociétés impliquées dans l'opération est composée des pièces suivantes :

- une lettre signée par Maîtres Ibrahima BAH et Soualiho DIOMANDE du Cabinet EKDB, Maîtres Olivier BENOIT et Benoît PHILIPPE du Cabinet CMS Bureau Francis LEFEBVRE mandataires des sociétés demanderesse,
- trois copies des mandats donnés respectivement par la société UNILEVER au cabinet Francis LEFEBVRE, et par les sociétés SIFCA, COSMIVOIRE et PALMCI au Cabinet EKDB,



- trois copies de l'accord cadre conclu entre les parties à l'opération,
- trois copies des rapports et comptes annuels des sociétés SIFCA, UNILEVER, COSMIVOIRE, PALMCI, PHCI, WILMAR, OLAM et NAUVUU,
- trois copies de l'Etude BOAD sur la promotion et le développement de la filière oléagineuse dans l'Espace UEMOA,
- trois copies de l'Etude réalisée par le Cabinet CCA CY sur la filière oléagineuse, à la demande de COSMIVOIRE et UNILEVER,
- trois copies d'extraits Internet relatifs à la fabrication artisanale du savon.

Ces différents documents ont été produits en originaux ou en copies certifiées conformes.

3. Au regard des dispositions du Règlement n°3/2002/CM/UEMOA du 23 mai 2002, relatif aux procédures applicables aux ententes et abus de position dominante, la Commission a considéré que la notification a été faite dans les conditions requises. Pour l'ouverture de la procédure d'examen de la notification, la Commission a procédé aux formalités suivantes, conformément aux dispositions des articles 10.4 et 28.1 du Règlement précité,

- la délivrance d'un accusé de réception aux demandeurs, par les lettres n°06571/PC/DMRC/DConc et n°06572/PC/DMRC/DConc du 01 août 2008,
- la transmission d'une copie du dossier de notification aux autorités compétentes des Etats membres,
- la publication du projet de concentration sur le site de l'UEMOA et dans deux journaux d'annonces légales par Etat membre.

4. Dans le délai prescrit par l'acte de publication de la notification (un mois), la Commission a enregistré les observations écrites de deux Etats membres et d'une entreprise sénégalaise, à savoir :

- le Togo par lettre n°909/MCIAPME/DCIC du 05 septembre 2008,
- le Niger par lettre n°0587/MCI/N/DCI/C du 10 septembre 2008,
- l'entreprise SUNEOR par lettre datée du 09 septembre 2008.

Les observations du Burkina Faso sont parvenues à la Commission le 16 septembre 2008.

5. En réponse aux réserves concernant certaines clauses des accords accessoires, formulées par la Commission par lettre n°07799/DMRC/DConc du 18 septembre 2008, les demandeurs ont fourni des compléments d'informations par lettre en date du 23 septembre 2008.



B) Position du problème :

6. La demande adressée à la Commission vise à titre principal l'obtention d'une attestation négative concernant une opération de concentration dans la filière de l'huile de palme en Côte d'Ivoire.

Ainsi est-il fait appel à l'application de l'article 88 b du Traité, de l'article 4 du Règlement 02/2002/CM/UEMOA du 23 mai 2002 relatif aux pratiques anticoncurrentielles au sein de l'UEMOA, et de l'article 3 du Règlement 03/2002/CM/UEMOA du 23 mai 2002 relatif aux procédures applicables aux ententes et abus de position dominante.

Il s'agit de vérifier si les parts de marché déclarées être détenues par les entreprises parties à l'opération de concentration les placent individuellement ou collectivement en position dominante, dans les branches de l'huilerie et de la savonnerie.

7. A titre secondaire et accessoirement, les parties à l'opération sollicitent le bénéfice de l'exemption au cas où elles succomberaient dans leur demande principale. A l'appui, elles ont fait valoir les avantages économiques qui seraient tirés de la mise en œuvre des accords notifiés.

Dans pareille hypothèse, il s'agirait d'appliquer l'article 88 a du Traité, l'article 3 du Règlement 02/2002/CM/UEMOA du 23 mai 2002 relatif aux pratiques anticoncurrentielles au sein de l'UEMOA, et l'article 7 du Règlement 03/2002/CM/UEMOA du 23 mai 2002 relatif aux procédures applicables aux ententes et abus de position dominante.

C) Analyse des arguments des demandeurs :

8. Tel que se présente le dossier de notification de l'opération de concentration, il y a lieu de distinguer l'accord principal portant sur les actifs des entreprises et leur gouvernance et les accords accessoires relatifs aux activités et aux relations commerciales entre ces entreprises.

La réglementation communautaire n'ayant pas apporté de précision sur les modalités d'examen des accords accessoires, en cas de concentration, il convient d'apprécier ceux-ci suivant les principes établis pour le contrôle des ententes.

9. Dans le dispositif de l'UEMOA, le contrôle à priori des opérations de concentration se fait indirectement, suivant les dispositions de l'article 89 b) du Traité qui interdit les pratiques assimilables à l'abus de position dominante.

Ces pratiques sont définies par l'article 4 alinéa 2 du Règlement n°02/2002/CM/UEMOA du 23 mai 2002 relatif aux pratiques anticoncurrentielles au sein de l'UEMOA qui dispose : « constituent une pratique assimilable à un abus de position dominante les opérations de concentration qui créent ou renforcent une position dominante détenue par une ou plusieurs entreprises, ayant comme conséquence d'entraver de manière significative une concurrence effective à l'intérieur du marché commun. »



Deux conditions sont ainsi posées : la création ou le renforcement d'une position dominante et l'entrave significative à une concurrence effective à l'intérieur du Marché Commun.

10. S'agissant de la première condition, les parties demanderesses ont fait valoir l'absence de position dominante ante et post concentration, en se fondant sur leurs parts de marché respectives dans le secteur de l'huile alimentaire où SIFCA et NAVU n'auront que 13%, et dans le secteur de la savonnerie où UNILEVER aura 24% de part de marché.

Un tel argument s'apprécie en fonction des paramètres suivants : l'accès à la matière première, l'importance des échanges intracommunautaires et les importations extracommunautaires.

Si on se réfère à la production de l'huile de palme brute (CPO) à partir de laquelle sont obtenus l'huile raffinée et le savon, une définition restrictive du marché géographique pourrait limiter l'analyse au seul marché de la Côte d'Ivoire qui concentre environ 89% du total régional (source rapport d'étude BOAD d'avril 2008).

En plus, la production ivoirienne étant en bonne partie consommée localement par les industriels et les transformateurs artisanaux, les échanges intracommunautaires sur ce produit (CPO) sont moindres. Les parties à l'opération notifiée occupent environ 70% de cette production, soit par des plantations exploitées en propre soit par des plantations villageoises encadrées.

Aussi, l'opération envisagée va aboutir à faire des sociétés SIFCA et NAVU les leaders pour le commerce local de la matière première.

11. Toutefois, il est difficile d'en déduire une position dominante occupée par ces entreprises pour au moins les raisons suivantes :

- en tenant compte des importations d'huile de palme, d'huile de soja et d'autres corps gras dans la région, il est peu probable que les parties à l'opération puissent se soustraire des contraintes de la concurrence, et cela d'autant plus que la filière oléagineuse de la Région affiche une faible compétitivité vis-à-vis des importations venant d'Asie, notamment.
- l'autoconsommation est assez développée dans le secteur ;
- les prix de la matière première (CPO) sont déterminés sur la base du cours mondial et fait intervenir l'Association Interprofessionnelle du Palmier à Huile.

12. Au regard des activités industrielles de production d'huile alimentaire et de savon, les parts de marché déclarées par les parties notifiantes sont moins importantes (13,9% de la consommation totale d'huile alimentaire du marché régional pour UNILEVER et COSMIVOIRE réunies et 28,6% pour le savon).

Sans confirmer l'exactitude des chiffres fournis, il est toutefois possible de constater, à travers les statistiques officielles que le pouvoir de marché est très dispersé autant pour le savon que pour l'huile alimentaire qui font l'objet d'échanges intracommunautaires considérables.



13. Les importations venant du reste du monde pour les huiles alimentaires et les savons occupent également une part significative sur le marché régional. Elles exercent une pression concurrentielle très forte sur la filière oléagineuse locale.

14. Il y a lieu également de tenir compte de la part non négligeable de la production artisanale d'huile et de savon destinés en bonne partie à la consommation locale mais qui font aussi l'objet de commerce intracommunautaire informel. Les parts de ce secteur sont évaluées dans l'étude fournie par les parties notifiantes à environ 21% du marché du savon et 32% du marché de l'huile.

Au regard de ce qui précède, il est à conclure que l'opération de concentration notifiée ne crée ni ne renforce une position dominante et de ce fait ne tombe pas sous l'interdiction de l'article 88 b du Traité.

15. Sous ce rapport l'entrave significative à la concurrence interdite comme conséquence de la création ou du renforcement d'une position dominante, devrait être d'office écartée.

16. Ainsi, l'opération de concentration notifiée devrait bénéficier d'une attestation négative, telle qu'il est prévu à l'article 3 du Règlement 02/2002/CM/UEMOA du 23 mai 2002 relatif aux procédures applicables aux ententes et abus de position dominante au sein de l'UEMOA.

17. Toutefois, il apparaît nécessaire d'indiquer dans quelle limite cette attestation négative pourrait couvrir les accords notifiés par les parties, comme étant accessoires à l'opération de concentration.

A cet égard, il est à considérer les dispositions de l'article 88 a du Traité qui interdit les accords entre entreprises ayant pour objet ou pouvant avoir pour effet de restreindre ou de fausser le libre jeu de la concurrence à l'intérieur de l'Union.

Entre autres, cette interdiction vise les « accords de répartition des marchés ou des sources d'approvisionnement en particulier ceux portant sur une protection territoriale absolue, les accords de limitation ou de contrôle de la production, des débouchés, du développement technique ou des investissements etc. »

18. Au regard de ces dispositions, la Commission a émis des réserves sur les clauses suivantes qu'elle a estimé restreindre la concurrence au-delà du nécessaire :

- l'article 5.3 b du contrat de fourniture de stéarine dont la mise en œuvre pourrait empêcher tout accès des concurrents à la matière première.
- l'article 21 du contrat fournisseur liant UNILEVER-CI et AFRICO-CI pour la fabrication d'emballages qui ne saurait être transféré en l'état à la Société SIFCA, dans la mesure où son application pourrait empêcher les concurrents d'accéder aux prestations de AFRICO-CI et de ses affiliés, sans qu'aucun droit de propriété industrielle puisse justifier cette restriction.

19. Les arguments présentés par les demandeurs insistent sur le fait que les accords de non concurrence et le contrat de fourniture de stéarine accompagnant l'opération de concentration sont nécessaires, pour assurer une transition correcte aux entreprises qui ont besoin de s'adapter à leur nouvel environnement et leur restructuration.



20. Ce point de vue n'ayant pas suffi pour justifier les restrictions en cause, la Commission a estimé utile d'amender les accords accessoires, pour soustraire du bénéfice de l'attestation négative les deux clauses objet de ses réserves.
21. Par ailleurs, afin d'éviter le prolongement des restrictions de concurrence au-delà du nécessaire, il s'avère nécessaire de procéder à une évaluation des effets des accords accessoires sur le fonctionnement du marché, à l'issue de la cinquième année de mise en oeuvre.

Ces préalables indiqués, la Commission

Emet la décision qui suit :

Article 1 :

Une attestation négative est délivrée concernant le projet de concentration entre les sociétés UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI et SANIA.

Article 2 :

La présente attestation négative couvre l'opération de concentration ainsi que tous les accords accessoires notifiés, à l'exclusion de l'article 5.3 b du contrat de fourniture de stéarine entre UNILEVER-CI, SANIA, UNILEVER PLC et NAUVU ainsi que de l'article 21 du contrat fournisseur liant UNILEVER-CI et AFRICO-CI pour la fabrication d'emballages.

Article 3 :

Les destinataires de la présente décision sont les sociétés UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI, SANIA et leurs affiliés.

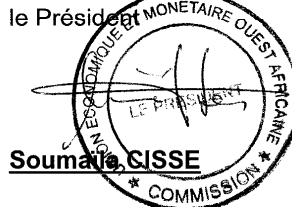
Article 4 :

Il sera procédé à l'évaluation de la mise en oeuvre des accords accessoires couverts par l'attestation négative, après une période de cinq ans à compter de la date de notification de la présente décision aux destinataires.

Article 5 :

La présente décision qui entre en vigueur à sa date de signature sera publiée au Bulletin Officiel de l'Union.

Fait à Ouagadougou le 12 2 OCT 2003
Pour la Commission
le Président



SENEGAL *

Is competition law adapted to the economies of developing countries? The doctrinal controversy over this issue now seems to be a thing of the past. Under the combined weight of the opening up of the economies of developing countries to the outside and growing globalisation, competition policy and law have finally become an integral part of the agenda of regional, bilateral and multilateral negotiations.

Accordingly, since the 1990s, most developing countries have adopted competition policies and legislation that are tailored to match their level of development, as well as their social, cultural and economic particularities. The outcome of this is that the competition law of States is now aligned more closely to their development strategies than it has been in the past.

In the 1960s in Senegal, for example, even though the principles of freedom of enterprise and free competition had been recognised in Act 65-25 of 4 March 1965 on prices and infringements of economic legislation, the Act did not regulate on anti-competitive practices. The Act provided solely for cartels and a cartel commission was supposed to examine and authorise, where appropriate, cartels that were beneficial for the market and the economy.

It was not until 1994 that anti-competitive practices, referred to at the time as being either collective (cartels, abuse of dominant positions, etc.) or individual (refusal to sell, discriminatory practices, etc.) were eventually defined and regulated.

However, this legislation, namely Act 94-63 of 22 August 1994 on prices, competition and economic disputes, did not regulate concentrations. The need to create and promote strong firms which would generate jobs and tax revenues, and also the will to establish national champions which could compete in the markets, were doubtless the main reasons for excluding concentration from the Act's scope of application.

At present, and more precisely since 2002, concentrations are governed by WAEMU Community competition law applicable in Member States and consequently in Senegal, in accordance with Regulations 02 and 03/2002/CM/UEMOA relating respectively to anti-competitive practices within the Union and to the applicable procedures.

The issue of international concentration operations is of major interest to the countries in the West African region whose market characteristics are relatively similar. Another interest lies in the fact that most firms operating in this market are either foreign or majority owned by nationals from developed countries. Consequently, merger, acquisition and share purchasing operations generally take place outside the area but nonetheless impact the regional market.

After providing a brief overview of the legal regime applicable to concentrations within the WAEMU, we shall attempt to take stock of the challenges that cross-border concentrations pose for the economies of developing countries and in particular for Senegal. We shall conclude by considering principles that might help advance the way in which such issues are dealt with at the international level.

1. Legal regime applicable to concentration operations in the WAEMU

Community competition law defines a concentration as:

- the merger between two or more previously independent enterprises;
- the operation whereby one or more persons who already have control of at least one enterprise, or of one or more enterprises, directly or indirectly acquire, either through acquisition of a stake in the capital or through the purchase of assets or through a contract or any other means, control of all or part of one or more other enterprises;
- the creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity.

Any concentration operation which creates or strengthens a dominant position on the market that is likely to significantly impede normal competition on that market is considered to be an abuse of a dominant position.

Community competition law also provides for negative clearances or exceptions, either by category or on an individual basis, for concentrations which do not have an adverse impact on competition (see attached negative clearance in favour of a concentration of which foreign enterprises are a part). At all events, the Commission must be notified of any planned concentration.

2. Challenges and opportunities for developing countries in relation cross-border concentrations

One of the major opportunities that cross-border concentrations offer countries in the West African region in general, and Senegal in particular, is the possibility of attracting foreign direct investment. Over the past few years Senegal has introduced a programme to facilitate the creation and establishment of firms, which resulted in Senegal earning an honourable ranking in the 2009 and 2010 “Doing business” chart. Foreign investment works in a variety of ways, including the signing of contracts with national firms, acquisition of stakes in local firms by major foreign groups or the straightforward take-over of firms in difficulty, and concentration operations therefore represent an instrument for creating or strengthening certain firms in developing countries.

Against a background of economic difficulties marked by the economic and financial crisis, such opportunities for job and wealth creation are not necessarily viewed unfavourably by governments.

Another opportunity afforded by concentrations is the creation of major firms in the region which can compete effectively with foreign firms. By taking advantage of the competitive advantages of States, a number of firms in sectors such as the palm oil and sugar sectors (see the ruling attached in the annex) have merged in order to strengthen their market power. Such operations can be beneficial to consumers by lowering the prices of the products concerned.

Another opportunity afforded by international concentrations to developing countries is that of technology transfer operations, which can be highly rewarding in that signing contracts with major multinational groups can generate substantial benefits for national firms seeking new technologies and innovation.

Besides these opportunities for firms there are also many challenges that the competition authorities in developing countries will need to meet. These challenges consist in the prior review of concentration projects, the economic analyses that need to be performed to assess the potential effects of concentrations, control and penalty procedures, the search for relevant information in other jurisdictions, etc.

It is clear that after the failure of multilateral negotiations on competition, the lack of harmonised rules regarding the definition of good and bad concentrations and the criteria for judging between the two complicates the task of examining mergers and acquisitions for competition authorities. What is considered as a good concentration in Senegal, for example, may be seen as a bad concentration in France or another country. This situation is driving States into a madcap race to become competitive and attract foreign investment that is no longer the sole preserve of developing countries, as witnessed by the recent visits to China and India by the President of the French Republic.

Faced with this situation, the competition authorities in the WAEMU zone are encountering huge difficulties in examining concentration operations. By way of a reminder it is worth noting that, unlike the United States or the European Union which allow firms to assess the conformity of concentration or cartel operations directly so that they can be implemented without a need for notification, WAEMU Community competition legislation requires firms to give prior notification of any planned cartels or concentrations. As a result, the question arises as to the procedures that are applicable to concentrations carried out outside the zone whose impacts are felt within the Community market;

This raises the issue of international co-operation on compliance with competition law. To date, no bilateral co-operation agreements have been signed by the WAEMU Commission with competition authorities in developing or emerging countries. In addition, such co-operation, based on voluntary compliance, does not provide sufficient guarantees that proceedings will be taken to prosecute infringements of competition law and in particular concentrations in other jurisdictions.

Consequently, the WAEMU Commission must strengthen the prerogatives of national competition structures, which are sometimes the bodies best placed to monitor the market and detect any un-notified international concentration operations.

3. Conclusion

To sum up, the challenges relating to cross-border concentrations for developing countries lie firstly in their economic development needs and secondly in the need to protect small and medium-sized enterprises against the excessive power of foreign multinational firms. These occasionally conflicting objectives mean that competition authorities and States must strike a delicate balance in their actions.

In this respect, the competition authorities in developing countries must meet the following challenges:

- The continuation of multilateral negotiations to harmonise the rules governing concentrations in particular and anti-competitive practices in general;
- The creation of a supranational body, with substantial powers to prosecute infringements of competition law that go beyond national frameworks;
- The strengthening of international co-operation on competition through UNCTAD, the OECD, ICN, etc.;
- Revision of the United Nations Conference for the Review of the Set regarding the fair rules and principles agreed at the multilateral level for the control of restrictive business practices to transform it into an effective tool to combat cross-border anti-competitive practices.

ANNEX

**WEST AFRICAN ECONOMIC AND
MONETARY UNION**

Commission

<p>RULING NO. 009/2008/COM/UEMOA GRANTING A NEGATIVE CLEARANCE REGARDING THE PLANNED CONCENTRATION BETWEEN UNILEVER-CI, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA</p>

THE WEST AFRICAN ECONOMIC AND MONETARY UNION COMMISSION:

HAVING REGARD TO	The UEMOA treaty, and in particular sections 88, 89 and 90;
HAVING REGARD TO	Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the West African Economic and Monetary Union;
HAVING REGARD TO	Regulation No. 03/2002/CM/UEMOA of 23 May 2004 regarding the procedures applicable to cartels and abuses of dominant position within the West African Economic and Monetary Union;
HAVING REGARD TO	The application submitted by the Law Firms EKDB and CMS, Bureau Francis Lefebvre, respectively located at Cocody II Plateaux, rue des jardins, 25 BP 1592 Abidjan 25, Côte d'Ivoire and 1-3 Villa Emile Bergerat 92522 Neuilly sur Seine Cedex, France, on behalf of the firms UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA;

After giving the Member States and the firms concerned an opportunity to present their comments and considering these comments;

Considering the opinion of the Competition Advisory Committee handed down at its fourth session held in Abidjan from 6 to 10 October 2008;

Considering the facts and grounds on which the Commission has based its decision and which are set out below:

A) Facts and procedure

1. By letter dated 25 June 2008, the law firms EKDB and CMS bureau Francis Lefebvre, both resident in Côte d'Ivoire, mandated respectively by Sifca, Cosmivoire and Palmci on the one hand, and

Unilever CI on the other, jointly notified the WAEMU Commission of a planned agreement with a view to obtaining a negative clearance or, in the absence of the latter, an individual exemption.

The firms concerned were presented as follows:

Unilever Côte d'Ivoire SA, a company registered under Côte d'Ivoire law, with paid-up capital of 8 053 000 000 CFA francs, with head offices in Abidjan, Boulevard de Vridi, 01 BP 1751 Abidjan 01, specialised in the physical and chemical processing of all bodies of vegetable or synthetic origin with a view to obtaining detergent or industrial products based on fatty substances, as well as in the storage of oils, fatty substances and derivatives;

Sifca SA, a company registered under Côte d'Ivoire law, with paid-up capital of 3 000 000 000 CFA francs, with head offices in Abidjan, Boulevard du Havre, port zone, 01 BP 1289 Abidjan 01, whose corporate purpose is the design and performance of all kinds of operation aimed at the development of business, industrial and agricultural affairs in Black Africa;

Cosmivoire SA, a company registered under Côte d'Ivoire law, with paid-up capital of 4 254 470 000 CFA francs, with head offices in the Vridi industrial zone, 01 BP, whose corporate purpose is the procurement, storage, trading, representation, processing, formulation and commercialisation of all natural or artificial chemical and cosmetic products, all natural or artificial vegetable, animal or mineral oils, as well as all derivative products;

Palmci SA, a company registered under Côte d'Ivoire law, with paid-up capital of 20 000 000 000 CFA francs, with head offices on the Boulevard de Vridi, 18 BP 3321 Abidjan 18, specialised in the operation and development of palm oil plantations, land and agro-industrial establishment producing crude palm oil and palm kernels;

Nauvu Investments Pte Ltd (referred to hereinafter as **Nauvu**), a company registered under Singaporean law, with head offices at Temasek Boulevard – 29th floor – Suntec Tower Four – Singapore 038986, whose corporate purpose is wholesale business; a joint company consisting of the Wilmar Group, specialised in palm oil production and the Olam Group, which is active in the international trade in agricultural raw materials.

2. The aim of the agreement that is the object of the application is to carry out a concentration operation which should allow the parties to acquire a specialisation in the palm oil sector in Côte d'Ivoire.

It is therefore planned that on completion of the operation the following companies will remain in activity: Unilever Côte d'Ivoire, which will devote itself exclusively to activities relating to soap-making, and the companies Sifca and Nauvu which will specialise in the production and exploitation of crude and refined oil.

The notification filed by the companies involved in the operation comprises the following items:

- A letter signed by Ibrahima Bah and Soualiho Diomand from the EKDB law firm, and by Olivier Benoit and Benoît Philippe from the CMS bureau Francis Lefebvre law firm acting as the legal representatives of the applicant companies;
- Three copies of the mandates given respectively by the company Unilever to the Francis Lefebvre law firm, and by the companies Sifca, Cosmivoire and Palmci to the EKDG law firm;
- Three copies of the framework agreement signed by the parties to the operation;

- Three copies of the annual reports and accounts of the companies Sifca, Unilever, Cosmivoire, Palmci, Phci, Wilmar, Olam and Nauvu;
- Three copies of the West African Development Bank (BOAD) Study on the promotion and development of oil sector in the WAEMU area;
- Three copies of the Study by the CCA CY consultancy on the oil sector, commissioned by Cosmivoire and Unilever;
- Three copies of Internet articles regarding hand-made soap production..

Originals or certified true copies of all these documents were provided.

3. With regard to the provisions of Regulation No. 3/2002/CM/UEMOA of 23 May 2002 on the procedures applicable to cartels and abuses of dominant position, the Commission considered that the notification had been made in accordance with the requisite conditions. In order to open the notification review procedure, the Commission completed the following formalities in pursuance of articles 10.4 and 28.1 of the above-mentioned Regulation:

- Issuing of an acknowledgment of receipt to the applicants in the form of letters Nos 06571/PC/DMRC/DConc and 06572/PC/DMRC/DConc of 1 August 2008;
- Forwarding of a copy of the notification file to the competent authorities in Member States;
- Publication of the planned concentration on the WAEMU web site and in two legal announcement journals by Member States.

4. Within the period specified by the act of publication of the notification (one month), the Commission registered the written comments of the two Member States and a Senegalese firm, namely:

- Togo in letter No. 909/MCIAPME/DCIC of 5 September 2008;
- Niger in letter No. 0587/MCI/N/DCI/C of 10 September 2008;
- the firm Suneor in a letter dated 9 September 2008.

The Commission received comments by Burkina Faso on 16 September 2008.

5. In response to the reservations regarding certain sections of the accessory agreement formulated by the Commission in letter No. 07799/DMRC/DConc of 18 September 2008, the applicants provided additional information in a letter dated 23 September 2008.

B) Explanation of issue

6. The application made to the Commission is primarily aimed at obtaining a negative clearance regarding a concentration operation in the palm oil sector in Côte d'Ivoire.

A petition was therefore made for application of Article 88 b of the Treaty, of Article 4 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 3 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

The issue at stake is to verify whether the market shares that are declared to be held by the firms party to the concentration operation places them individually or collectively in a dominant position in the oil and soap-making sectors.

7. The secondary and accessory purpose of the application by the parties to the operation is to seek to benefit from an exemption in the event that their application fail in its primary aim. In support of this

request, they have cited the economic benefits that would accrue from implementation of the notified agreements.

In such an eventuality, the aim would be to apply Article 88 a) of the Treaty, of Article 3 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU, and Article 7 of Regulation 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions.

C) Analysis of the applicants' arguments

8. As presented in the concentration operation notification file, a distinction had to be drawn between the main agreement relating to the assets of the firms, and their governance, and the accessory agreements relating to the activities and business relations between these firms.

Since Community regulations did not specify the procedure for examining accessory agreements in the event of a concentration, such agreements had to be evaluated in accordance with the principles laid down for the review of cartels.

9. In the WAEMU system, *a priori* review of concentration operations is conducted indirectly, in accordance with the provisions of Article 89 b) of the Treaty which prohibits practices that are tantamount to abuse of a dominant position.

A definition of such practices is given in Article 4 paragraph 2 of Regulation No. 02/2002/CM/UEMOA of 23 May 2002 regarding anti-competitive practices within the WAEMU which states that: "concentration operations which create or strengthen a dominant position held by one or more firms, the outcome of which is to significantly impede effective competition within a common market, are deemed to constitute a practice that is tantamount to abuse of a dominant position."

Two conditions must be met in order to meet the above definition, namely: the creation or strengthening of a dominant position, and the significant hindering of effective competition within the Common Market.

10. With regard to the first of the above conditions, the applicant parties argued that no dominant position existed either before or after the concentration on the basis of their respective market shares in the edible oil sector, where Sifca and Navu would have a share of merely 13%, and in the soap-making sector where Unilever would have 24% of the market.

Such an argument is assessed on the basis of the following parameters: access to raw materials, the scale of trade within the Community, and imports from outside the Community.

With reference to the production of the crude palm oil (CPO) from which the refined oil and soap are obtained, a restrictive definition of the geographical market could limit the analysis solely to the Côte d'Ivoire market where approximately 89% of the regional total is concentrated (source: West African Development Bank (BOAD) study report of April 2008).

Moreover, since production in Côte d'Ivoire is largely consumed locally by industry and small-scale processing firms, there is not much trade in this product (CPO) within the Community. The parties to the notified operation account for around 70% of this production, either from plantations exploited on own account or from managed village-owned plantations.

Consequently, the planned operation will result in the companies Sifca and Nauvu becoming market leaders for local trade in the raw material.

11. However, it is difficult to deduce from this situation that these firms occupy a dominant position for at least the following reasons:

- if account is taken of imports of palm oil, soya oil and other fatty substances to the region, it is unlikely that the parties to the operation could free themselves from the constraints of competition, particularly in view of the fact that the edible oil sector in the region does not offer strong competition to imports from Asia in particular;
- there is a high degree of auto-consumption in the sector;
- raw material (CPO) prices are determined on the basis of world commodity prices and are regulated by the Association Interprofessionnelle du Palmier à l'Huile.

12. With regard to industrial edible oil and soap-making activities, the market shares declared by the notifying parties are smaller (13.9% of total consumption of edible oil in the regional market for Unilever and Cosmivoire together, and 28.6% for soap).

Without confirming the accuracy of the figures provided, it is nonetheless possible to note, from the official statistics, that the market power is highly dispersed both for soap and for edible oil in which there is considerable trade within the Community.

13. Imports of edible oils and soap from the rest of the world also account for a significant share of the regional market and exert very strong competitive pressure on the local edible oil sector.

14. Account must also be taken of the non-negligible share of cottage industry production of oil and soap which is aimed largely at local consumers but which is also traded informally within the Community. The markets shares of this sector are evaluated in the study provided by the notifying parties at around 21% for soap and 32% for edible oil.

In view of the above, the conclusion can be drawn that the notified concentration operation neither creates nor strengthens a dominant position and as a result is not prohibited under Article 88 b) of the Treaty.

15. Seen from this standpoint, the possibility that the outcome of the creation or strengthening of a dominant position might be a significant impediment to competition of the type that is banned under the Treaty should be dismissed *de facto*.

16. Consequently, the notified concentration operation should benefit from a negative clearance as provided for in Article 3 of Regulation No. 03/2002/CM/UEMOA of 23 May 2002 regarding the procedures applicable to cartels and abuses of dominant positions within the WAEMU.

17. However, it seems necessary to indicate the extent to which this negative clearance could cover the agreements notified by the parties, as accessories to the concentration operation.

In this respect, consideration must be given to the provisions of Article 88 a) of the Treaty which prohibits agreements between firms whose purpose is or might be to restrict or distort the free play of competition within the Union.

This prohibition is aimed, *inter alia*, at "agreements to divide up markets or procurement sources and in particular those relating to absolute territorial protection, agreements to limit or control production, outlets, technical development or investment, etc."

18. With regard to these provisions, the Commission has issued reservations regarding the following clauses which it considers restrict competition more than it is necessary to do so:

- article 5.3 b) of the stearine supply contract whose implementation could deny competitors all access to the raw material;
- article 21 of the supply contract between Unilever-CI and Africo-CI for the manufacture of packaging which would not be transferred as-is to the Sifca company in that its application could deny competitors access to services supplied by Africo-CI and its affiliates, without this restriction being justified under any industrial property rights.

19. The arguments presented by the applicants stress the fact that the non-competition agreements and stearine supply contract accompanying the concentration operation are necessary to ensure a proper transition for the firms, which need to adapt to their new environment and restructuring.

20. Since this point of view was not sufficient to justify the restrictions in question, the Commission felt that it would be helpful to amend the accessory agreements to remove the two clauses regarding which it had issue reservations from the scope of the negative clearance.

21. Moreover, in order to prevent the restrictions on competition from being prolonged for longer than was needed, it proved necessary to carry out an assessment of the impacts of accessory agreements on market operation at the end of the fifth year of their implementation.

Having made this recital, the Commission

Hereby rules as follows:

Article 1

A negative clearance is granted with regard to the planned concentration between the companies UNILEVER, SIFCA, COSMIVOIRE, PALMCI, NAUVU, PHCI, SHCI and SANIA.

Article 2

The present negative clearance shall cover the concentration operation as well as all accessory agreement notified, except for Article 5.3 b) of the stearine supply contract between Unilever CI, Sania, Unilever plc and Nauvu as well as Article 21 of the supply contract between Unilever CI and Africo CI for the manufacture of packaging.

Article 3

The intended recipients of the present decision are the companies Unilever CI, Sifca, Cosmivoire, PALMCI, Nauvu, PHCI, SHCI, Sania and their affiliates.

Article 4

An assessment shall be made of the implementation of the accessory contracts covered by the negative clearance five years after the date of notification of the present decision to the parties to which it is addressed.

Article 5

The present decision, which will enter into force on its date of signature, will be published in the Official Journal of the Union.

Done in Ougadougou on 22 October 2008
On behalf of the Commission
The Chairman

[Signature and official stamp of the Chairman of the West African Economic and Monetary Union Commission]

Soulaïla Cissé

SINGAPORE

1. Introduction

1.1 *What is a cross-border merger?*

A cross-border merger broadly refers to a merger where some or all of the parties or assets involved in the merger are registered in different countries. Globalisation - the increasing economic integration of the world¹ - has led to increasing cross-border mergers around the world.² As a small, open economy, Singapore too has been frequently exposed to cross-border mergers where some or all of the merger parties are situated outside Singapore but where the merger has an effect on Singapore's economy.

1.2 *Cross-border mergers and Singapore*

Singapore has always been an open economy, founded on trade. With its small size, limited domestic population and lack of natural resources, the country's very survival depends on it.³ In 2009, Singapore's total trade⁴ as a percentage of GDP came up to 282%.⁵

Given Singapore's large exposure to international trade and the strong presence of multinational corporations (MNCs) in Singapore, cross-border mergers are particularly relevant to Singapore. Of the 22 mergers notified to CCS since the merger control regime began on 1 July 2007, 17 had a cross-border element.⁶

1.3 *Singapore's merger control regime and challenges for small economies*

Singapore has a voluntary merger regime where merger parties may, of their own accord, apply to the Competition Commission of Singapore ("CCS") for a decision if they think their merger situation could raise competition concerns. This regime was put in place in recognition that, in a small and open economy,

¹ Steve Schifferes, "Globalisation shakes the world - Defining globalisation", BBC News, [http://news.bbc.co.uk/2/hi/in_depth/business/2007/globalisation/default.stm], 21 January 2007.

² Sydney Finkelstein, "Cross-Border Mergers and Acquisitions", [http://mba.tuck.dartmouth.edu/pages/faculty/syd.finkelstein/articles/Cross_Border.pdf], p.1.

³ Margaret Liang, "Singapore's trade policies: priorities and options", I. Introduction, [http://findarticles.com/p/articles/mi_hb020/is_1_22/ai_n29189363/], April 2005.

⁴ Total trade is taken as the sum of exports and imports, where exports include domestic exports and re-exports.

⁵ Ministry of Trade and Industry (MTI) Annual Statistics, National Income and External Trade 2009, [http://app.mti.gov.sg/default.asp?id=725].

⁶ CCS, Public Register: Notified Mergers, [http://app.ccs.gov.sg/public_reg_Merger_Decision.aspx].

the competition authority has limited resources⁷, while most merger transactions involve tradable goods that do not typically raise competition concerns. A smaller authority forced to review too many transactions may have little or no resources left to pursue other important enforcement priorities, including cartel enforcement.⁸

As part of its voluntary merger regime, CCS encourages parties to consider making an application where:

1. the merged entity will have a market share of 40% or more; or
2. the merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms is 70% or more.

With such a voluntary notification system together with notification thresholds set in place for merger review, Singapore has avoided having a notification system that is unduly burdensome and instead achieved a reasonably effective and efficient one.

The operative provision in the Singapore Competition Act that regulates mergers is Section 54, which prohibits mergers or anticipated mergers that substantially lessen competition (“SLC”) or are likely to substantially lessen competition (“the Section 54 Prohibition”).

Merger situations which take place outside of Singapore or which involve parties who are not in Singapore may also be caught by the Section 54 Prohibition, as long as the merger gives rise to a SLC in Singapore. This ‘effects’ doctrine allows CCS to exercise jurisdiction over the extraterritorial activities which produce economic effects within Singapore. Indeed, many of the merger notifications CCS has received thus far are from MNCs, rather than local companies. There are no exemptions or special provisions for cross-border mergers.

Given the small size of the local market relative to that of the overall transaction, it has been discussed in the literature that for cross-border mergers, particularly for foreign-to-foreign mergers, competition agencies of small economies may face difficulties in taking effective enforcement actions undermining the merger or imposing commitments against mergers which raise competition concerns.⁹ However, this issue has not led to an undesirable outcome in Singapore to date. It is interesting to make a comparison between two cross-border mergers that have been handled by CCS. In one merger, there was some form of interdependence among various competition agencies as the competition issues were common across jurisdictions and Singapore could follow the lead of the larger agencies. In the second merger, the competition matters involved were specific to Singapore and hence it was necessary for Singapore to look at these matters independently even though it was a cross-border merger and other competition authorities’ approvals were also sought.

⁷ In enforcing competition law, small economies may need to invest comparatively more resources than in larger economies; a small competition authority’s budget to GDP ratio may be higher than that of a larger authority’s.

⁸ “Setting notification thresholds for merger review”, Report to the ICN Annual Conference April 2008, [<http://www.internationalcompetitionnetwork.org/uploads/library/doc326.pdf>], p.6.

⁹ “Implications of the Smallness of an Economy for Merger Remedies”, Juridica International, [<http://www.juridicainternational.eu/implications-of-the-smallness-of-an-economy-for-merger-remedies>].

2. CCS' experience with cross-border mergers

2.1 Case study #1: Thomson-Reuters merger

This case involved a merger between the Thomson Corporation ("Thomson") and Reuters Group PLC ("Reuters") (collectively referred to as "the parties"), both of whom are global providers of financial information products and services. Thomson and Reuters complement each other in terms of the nature of their respective businesses, and the geographical regions in which they operate. CCS reviewed the merger based on the following market definition: segmenting the financial solutions offered into discrete content sets (i.e., aftermarket broker research, earnings estimates and fundamentals).

This was a global merger which was reviewed by the European Commission ("EC") and the United States Department of Justice ("US DOJ"), amongst other jurisdictions. During CCS' period of assessment, it was announced that the US DOJ and the EC had approved the merger, subject to commitments offered by the parties to the US DOJ and the EC. CCS' assessment indicated that the merger might have resulted in a SLC in Singapore. However, as the commitments to the DOJ and the EC would essentially create another competitor that could supply its products worldwide, CCS considered that the commitments would have worldwide effect, and was of the view that any competition concerns arising in Singapore would be sufficiently mitigated by the commitments offered to the US DOJ and the EC. The feedback received by CCS from market inquiries in respect of the commitments was also largely positive. The merger was eventually cleared by CCS on the basis of the accepted commitments.

It is important to note that although the acceptance of commitments in overseas jurisdictions may be relevant in CCS' assessment of the competitive impact of the merger in Singapore, commitments accepted by overseas competition authorities do not necessarily imply that CCS will allow the merger to proceed in Singapore. Any overseas commitments must be viewed in light of the facts and circumstances of the case, to see if they are capable of addressing competition concerns arising within Singapore, if any.

2.2 Case study #2: Prudential-AIA merger

This joint notification was made on 23 April 2010 in relation to a proposed acquisition by Prudential plc ("Prudential") of AIA Group Limited ("AIA") (collectively referred to as "the parties"). The relevant good/service involved was the provision of insurance products in the life and health insurance business in Singapore.

In this merger, the only overlap between AIA's and Prudential's business was in Asia. This acquisition would allow Prudential to improve its strategic position in Asia and develop the market in Asia, which was seen as a strong growth market.¹⁰ Sources reported that a takeover of AIA by Prudential would make the company the biggest foreign insurer in Asia by far.¹¹ For AIA, the transaction would help AIG, the parent company, to raise funds to finance a bailout by the US government during the financial crisis in

¹⁰ "Prudential Plc Agrees to Buy AIA for \$35.5 Billion (Update3)", Bloomberg Business Week, [http://www.businessweek.com/news/2010-03-01/prudential-plc-to-buy-aia-for-35-5-billion-to-expand-in-asia.html], 1 March 2010.

¹¹ "Prudential's AIA bid hinges on Asia", [http://uk.reuters.com/article/idUKTRE61R1PX20100228], 28 February 2010; "S'pore watchdog looking at Prudential-AIA deal", [http://wealth1688articles.wordpress.com/2010/06/02/spore-watchdog-looking-at-prudential-aia-deal/], 2 June 2010.

2008.¹² As the merging parties' business in Singapore was mature, Singapore was an important market to the parties. As such, CCS's approval was integral to the parties' merger transaction.

The parties had sought antitrust approvals from various jurisdictions/authorities.¹³ Clearance was received from the KFTC on 13 April 2010. CCS assessed that the competition matters arising from the merger would be specific to Singapore because the relevant product/good was not homogeneous across countries. Life insurance is catered uniquely to each individual country's needs. Further, there are also regulatory requirements that are specific to individual countries. In Singapore, insurance companies are required to be registered with the Monetary Authority of Singapore (MAS) – Singapore's financial and insurance regulator - to conduct any insurance business there. Approval from the Ministry of Health (MOH) is also required for any life insurance business providing certain health insurance policies.

In the end, the merger did not proceed as it was rejected by the Prudential shareholders and the application to CCS was withdrawn.

2.3 *Comparison of case studies #1 and #2*

In case study #1 (Thomson-Reuters merger), the competition issues identified were not Singapore-specific, but common to the various jurisdictions affected by the merger as the relevant product was fairly homogeneous and the issues were relatively global in nature. Therefore, the remedies imposed by the larger competition agencies (the US DOJ and the EC), which had more leverage to assert their authority, would have helped to resolve similar concerns in other markets like Singapore. As a result, CCS could follow the lead of the US DOJ and the EU and similarly hold that there was no SLC caused by the merger in view of the commitments provided by the parties to the US DOJ and the EC.

In case study #2 (Prudential-AIA merger), the competition matters identified were specific to Singapore. As such, other jurisdictions' assessment of the merger (such as the KFTC's clearance of the merger) or their proposed commitments, if any, would not have been applicable in Singapore's context. It was therefore necessary for CCS to independently assess the Singapore-specific facts and circumstances. Similarly, had it got to the stage where proposed remedies were to be considered necessary, any proposed remedies considered by CCS would not have been directly applicable to the other Asian jurisdictions. Nevertheless, given the merging parties' large business presence in Singapore, CCS' assessment of this merger could have given other authorities in Asia some reference on the type of concerns and remedies they could consider when doing their own merger assessment.

3. **International and regional cooperation on cross-border mergers**

CCS has regular discussions with overseas competition authorities on mergers and believes that ongoing international and regional cooperation among competition authorities is very important. This is so especially in light of the common difficulties that competition authorities of small economies may face, in terms of requesting for information from overseas companies, or imposing commitments against foreign-to-foreign mergers which raise competition concerns locally.

¹² "Prudential Plc Agrees to Buy AIA for \$35.5 Billion (Update3)", Bloomberg Business Week, [<http://www.businessweek.com/news/2010-03-01/prudential-plc-to-buy-aia-for-35-5-billion-to-expand-in-asia.html>], 1 March 2010.

¹³ *I.e.* Indonesia (Commission for the Supervision of Business Competition ("KPPU")), [<http://bataviase.co.id/node/159394>], Vietnam (Vietnam Competition Administrative Department ("VCAD")), [<http://www.thanhniennnews.com/2010/Pages/20100425155402.aspx>], South Korea (Korean Fair Trade Commission ("KFTC")).

CCS is also open to cooperating and coordinating with other national competition authorities in the discussion of appropriate remedies and enforcement actions for cross-border mergers, should such a situation arise in future.

3.1 *International cooperation*

Singapore has ongoing cooperation with overseas competition authorities and international competition networks. A recent example is CCS' participation in the 2010 International Competition Network (ICN) Merger Workshop in Rome where CCS was a moderator at the conference hosted by the Italian Competition Authority.

3.2 *Regional cooperation*

In addition, together with other ASEAN member states, Singapore endeavours to develop a regional platform to facilitate cooperation between competition regulatory bodies. This is highlighted by the unveiling of the Handbook on Competition Policy and Law in ASEAN for Business and the ASEAN Regional Guidelines on Competition Policy during the 1st ASEAN Experts Group on Competition (AEGC) Business Forum in Singapore in November 2010. CCS was both the inaugural Chair of AEGC in 2008, as well as the Chair of the working group on Regional Guidelines. CCS also participated actively as a member of the Handbook working group. The forum in Singapore was jointly organised by the AEGC, the ASEAN Secretariat and CCS, and supported by InWent – Capacity Building International, Germany – and German Federal Foreign Office.

4. Conclusion

As a small and open economy with a strong presence of multinational corporations and sizeable external trade, Singapore's economic activities are highly sensitive to international merger activities. Due to its small size, a voluntary merger regime with notification thresholds is adopted for effective and efficient merger control. Singapore actively cooperates with other competition authorities to learn from one another and strengthen these inter-agency ties.

Small jurisdictions, like Singapore, can learn from larger competition agencies in cases of cross-border mergers where competition concerns are similar globally, and where major jurisdictions have greater influence and resources to negotiate commitments from the parties.

Nevertheless, it is also possible, and at times necessary, for small competition authorities to work independently in cross-border merger cases where there is a substantial lessening of competition in these small economies but not in the larger ones, and where the competition concerns, and hence remedies, are specific to the individual countries.

SLOVAK REPUBLIC

1. General points

Concentration control is realized by the Antimonopoly Office of the Slovak Republic (hereinafter only „the Office“) pursuant to the Act No. 136/2001 Coll. on Protection of Competition (hereinafter only „the Act“).¹

According to this Act merging undertakings are obliged to notify the concentration which meets the notification criteria to the Office. Concentration being subject to the Office's control must not be implemented.

However, based on the request of the undertaking, in legitimate cases the Office may enable the undertaking to exercise some rights and obligations resulting from a concentration according to the decision.

A concentration shall be subject to control by the Office if:

1. the combined global turnover of the parties to the concentration is at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration and at least two of the parties to the concentration attain a turnover of at least EUR 14,000,000 each in the Slovak Republic for the closed accounting period preceding the establishment of the concentration; or
2. at least one of the parties to the concentration attains a total turnover of at least EUR 19,000,000 in the Slovak Republic for the closed accounting period preceding the establishment of the concentration and at least one other party to the concentration attains a total global turnover of at least EUR 46,000,000 for the closed accounting period preceding the establishment of the concentration.

According to special legislation, the concentration notification is tariffed by the sum of EUR 3 319.

Documents and information included into concentration notification are specified in Decree of the Office No. 204/2009, laying down details of particulars of a notification of concentration².

Based on the request of undertaking in legitimate cases the Office may constrict the extent of information which the notifying undertakings are obliged to submit in the notification of the concentration. The Office agrees with the request to constrict the extent of required information mainly if there is no significant horizontal overlap or no vertical combination of merging parties' activities. Thus the Office reduces costs of merging parties involved in the notification of the concentration when this concentration does not have potential negative restrict conditions on effective competition.

¹ <http://www.antimon.gov.sk/files/30/2009/Act%20136-2001-novela-aj.rtf>

² http://www.antimon.gov.sk/files/30/2009/Vyhlasaka%20c%20%2020204%20o%20nalez%20%20oznam%20%20koncent_en.rtf

The Office assesses whether the concentration does not create or strengthen a dominant position resulting in significant impediments to effective competition in the relevant market.

In the case of joint ventures the Office also assesses whether such a concentration does not result in coordination of competition conduct of undertakings.

Concentrations being subject to control by the Office and at the same time meeting the notification criteria set by Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (hereinafter only “the EC Merger Regulation”), fall under the exclusive responsibility of the European Commission.

However, it is possible to use the so-called case referral system (Article 4(4), Article 4(5), Article 9 and Article 22 of the EC Merger Regulation), according to which the concentration is assessed by the competition authority which is more appropriate for carrying out a particular merger investigation.

Since 2004 the Office used the case referral system once. Based on the request of the Office the European Commission passed the part of concentration of undertakings Tesco/Carrefour, having been referred to the Slovak Republic, for the assessment by the Office. The concentration of undertakings Tesco/Carrefour created or strengthened dominant position of undertaking Tesco resulting in significant impediments to effective competition in the local relevant markets in the Slovak Republic. The Office therefore prohibited this concentration.

2. Specific questions

2.1 *Co-operation among competition authorities*

Cross-border mergers created 2 – 29 % of the total number of concentrations having been notified to the Office in years 2004 - 2010 (besides the Office, the cross-border mergers have been notified mainly to the competition authorities in Germany, Austria, the Czech Republic and Italy).

The table below presents the number of concentration notified to the Office, and the number of concentrations having been notified in more member countries each year:

	2004	2005	2006	2007	2008	2009	2010
Number of concentrations notified to the Office	78	53	44	62	74	33	34
- of which cross-border mergers	3	1	5	10	10	3	10
Share of cross-border mergers of total number of notified concentrations	4 %	2 %	11 %	18 %	14 %	9 %	29 %

The Office considers the cooperation with other competition authorities in the area of cross-border mergers to be necessary.

Presently, the cross-border mergers cooperation is realized within the platform of the European Competition Authorities (hereinafter only „ECA“), Marchfeld Competition Forum and the International Competition Network (hereinafter only „ICN“).

Cooperation within Marchfeld Competition Forum is based on establishment of case database including also cross-border merger operations. Within ECA the countries inform each other on cross-border mergers. Presently, the materials setting the rules of next cooperation within ECA are under preparation.

In the area of concentrations, the Office is actively involved in the work and deliberation of international organisations, for example in 2008 we have co-organized ICN Merger Workshop in Brno, Czech Republic. Basic information on concentration control in the Slovak Republic is available also at ICN web site ³.

OECD, ICN and the European Commission's materials from the area of concentrations are inspiring and useful for the Office's work, namely in the area of effective setting of concentration control principles and in the area of competition legislation application in concentration control.

Presently, the Office prepares the amendment to the Act and the particular institutes of concentration control are subject to in-depth analysis. For example, the Office used ICN materials on setting the notification criteria, as well as OECD materials on the substantive test to assess mergers and it proposes to shift from dominance test to SIEC test.

Regarding cross-border mergers the Office cooperates with other competition authorities on an informal basis and it comes out from the principles of mutual cooperation adopted by ECA. Currently, we have not entered into an agreement with other NCAs, as this type of contract is international and it should be only approved by executive and legislative bodies of the Slovak Republic.

Our legal system does not include a legal instrument which would enable to regard foreign interests when assessing cross-border merger operations.

2.2 Jurisdictional issues

Currently set notification criteria cause certain problems in practice, thus within the amendment to the Act we try to set these criteria more effectively. These changes aim at reducing the administrative load of undertakings.

The Office is independent without the possibility of political intervention. It acts within the Slovak Republic; it assesses cases which meet the mentioned notification criteria. As it has been mentioned before, the Office does not have a special system on cooperation and procedure for cross-border mergers control, and it even does not regard the special effects, like industrial or investment policy when assessing these operations.

The Office has been facing the problem of replies recoverability from the undertakings located outside our jurisdiction. For example, in the case of two main airports in Austria and in the Slovak Republic – Vienna Airport and Bratislava Airport there were only few airline operators at Bratislava airport. Therefore, it was indispensable to collect views on merger from operators that were present at Vienna Airport. We were not very successful. Our Austrian colleagues informally informed us about their results from their investigation process, but this information could not be used as the evidence in our proceedings.

Regarding the problems also in this case we feel the need for mutual cooperation and for setting the legal regime of such cooperation.

2.3 Remedies

The Office is entitled to impose both behavioural and structural remedies. Since 2004 we have not imposed any remedies in cross-border mergers control, however, within the concentration Vienna

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<http://www.internationalcompetitionnetwork.org/uploads/templates/merger/slovak%20republic.pdf>

Airport/Bratislava Airport, having been assessed also by the Austrian competition authority the Office rejected proposed remedies. In this case the proposed remedies were not sufficient to eliminate competition concerns of the Office. This concentration was prohibited by the Office.

Considering the recent practice, remedies enforced in cross-border mergers have never been monitored. However, we consider the cooperation of competition authorities in imposing and monitoring remedies within cross-border mergers to be necessary due to the need to ensure consistent outcomes.

The Office cooperates with other countries on an informal basis; however, we miss the legal basis setting and enabling formal cooperation. New amendment to the Act will introduce provisions which would enable cross-border mergers cooperation at the official level.

In this connection we welcome the establishment of a Merger Working Group within the European Commission enabling active discussions on the use of existing mechanisms and on the possible creation of new mechanisms for the effective cooperation within the EU member states.

SOUTH AFRICA

1. Introduction

The South African Competition Commission (the Commission) is an independent authority providing for mandatory merger notifications based on a dual threshold. Firms acquiring direct or indirect control over the whole or part of another firm that meets the minimum lower dual thresholds are required to notify transactions, these transactions are referred to as intermediate mergers. A higher threshold exists which if met classifies the transaction as a large merger. Large mergers are investigated by the Commission and are decided upon by the Competition Tribunal.

The current lower merger notification thresholds (intermediate mergers) in South Africa are:

- Combined turnover and/or asset value of the acquiring firm (for the entire group) and target firm needs to exceed R 560 million (approximately US\$ 77,463,500); and
- The target firm turnover and/or asset value needs to exceed R 80 million (approximately US\$ 11,066,214.39).

The current higher merger notification thresholds (large mergers) in South Africa are:

- Combined turnover and/or asset value of the acquiring firm (entire group) and target firm needs to exceed R 6, 6 billion (approximately US\$ 912,779,227); and
- The target firm turnover and/or asset value needs to exceed R 190 million (approximately US\$ 26,276,977).

The current merger notification fees amount to R100 000 (approximately US\$ 13,836) for an intermediate merger and R350 000 (approximately US\$ 48,425) for a large merger. The substantive test applied in determining whether or not to approve, conditionally approve or prohibit a merger is: “*whether the merger is likely to substantially prevent or lessen competition*” (the SLC test).

In considering whether or not a transaction is likely to meet the SLC test the competition authorities consider the following factors:

- Barriers to entry;
- Level and trends of concentration;
- History of collusion in the market;
- Degree of countervailing power;
- The dynamic characteristics of the market (including growth, innovation and product differentiation);
- The nature and extent of vertical integration;

- Whether or not a party to the merger has failed or is likely to fail; and
- Whether the merger will result in the removal of an effective competitor.

In addition to the above factors the competition authorities considers the following factors that impact on public interest:

- The effect of the transaction on a particular industrial sector or region;
- The effect of the transaction on employment;
- The ability of small businesses, or firms controlled or owned by historical disadvantaged persons, to become competitive; and
- The ability of national industries to compete in international markets.

In the assessments of mergers the authorities explore and consider unilateral effects and co-ordinated effects, as well as the effects of the transaction on the above public interest grounds, which is evident from the judgements of the Competition Commission, Competition Tribunal and Competition Appeal Court.

The South African Competition Act¹ (the Act) does not provide for any special provisions for cross border merger control and the competition authorities analyse cross border mergers with the same criteria used to analyse domestic mergers.

South African firms are often the target of foreign take-overs and hence cross border issues often arise. South African firms are often used as the springboard to enter the African market. The Commission also see various notifications arising from multinational firms acquiring each other and invariably either firm has some local subsidiary in South Africa which triggers the obligation to file. The major challenge with these types of cross border mergers relates to the timely filing of the transaction and respect for local legislation. Regrettably, major jurisdictions are prioritized by merging parties and we find that it is only at the later stages of the merger process that attention is given to non-priority jurisdictions. Our experience is that merger filings are then submitted late and enormous pressure is place on the jurisdiction to finalise its analysis to 'fit in' with the corporate time table. This often leads to frustration and conflict which could be prevented.

2. Co-operation among competition authorities

The Commission has not experienced any conflict with foreign jurisdictions in analysing and deciding on the effects of merger transactions. At present the South African competition authorities are not party to any international agreements in the field of competition law which provide for cross-border merger control.

However, South Africa is a member of the Southern African Development Community (SADC) and signatory to the SADC Declaration on Regional Cooperation in Competition and Consumer Policies (the SADC Declaration). As a member of the SADC Competition Committee (emanating from the SADC Declaration), the Competition Commission is committed to contributing to the policy on regional integration with regard to competition law and policy within SADC.

SADC does not have rules dealing with the regulation of cross-border merger operations at either the domestic or regional level as yet but does commit Member States to "pursue case specific cooperation to the extent consistent with each member's laws, regulations, and important common interests in preventing hardcore cartels, abuse of dominance, *anticompetitive mergers* and unilateral conduct"². The SADC

¹. Act 89 of 1998, as amended.

². Article 1(g) SADC *Declaration on Regional Cooperation in Competition and Consumer Policies*.

Declaration also emphasises that there is a need to: “*formalize a system of cooperation* between national regimes that can harness the collective efforts of relevant national authorities and add value to national enforcement efforts in the face of problems affecting more than one country”³.

The SADC Declaration is especially relevant as the economic effect of mergers within South African markets is sometimes also felt across our borders – given the free-trade agreements that are in place in the region.

Other regular interactions occur through networks such as the ICN and the OECD where the competition authorities participate in the respective merger working groups and strive to keep abreast of the latest developments and cutting edge methods of analysis used in merger regulation worldwide.

3. Jurisdictional issues

The merger thresholds in South Africa have been increased effective from 1 April 2009 and the Commission is confident that the mandatory regime ensures that the majority of relevant transactions are notified. It is important to note that the Commission also has the authority to call on parties that enter into transactions that fall below the lower threshold to notify such transaction and may subject them to the jurisdiction of the Competition Act if the Commission is of the view that the merger might substantially prevent or lessen competition in any market.

The Commission will only consider transactions which have an effect in South Africa - however the Commission does consider the decisions of foreign jurisdictions to the extent where there are similarities between our markets. The Commission regularly interacts with the officials from the European Commission or the US jurisdictions on transactions which are also notified in these jurisdictions and are engaging more and more with competition authorities within the SADC region (e.g. the Namibian Competition Commission).

The competition authorities are independent from Government and are required by law to take independent decisions. Should Government wish to making submissions regards transactions being investigated by the Commission, these could be made⁴ in the same way as other interested parties and will be considered using the substantive test. The Act does, however, make provision for the Minister of Finance to intervene and establish exclusive jurisdiction in respect of Bank mergers when it is considered to be in the interest of financial stability⁵.

The Competition Act requires the Commission and Tribunal to consider the effects of a merger on the following non-competition or public interest grounds:

- A particular industrial sector or region;
- Employment;
- The ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive; and,
- The ability of national industries to compete in international markets.

³. Preamble of the SADC *Declaration on Regional Cooperation in Competition and Consumer Policies*.

⁴. Please see section 18 (1) of the Competition Act 89 of 1998, as amended.

⁵. Please see section 18 (2) (b) of the Competition Act 89 of 1998, as amended.

The Commission considers the above effects in all transactions and where necessary has imposed conditions to remedy any negative effects but has never prohibited a transaction based on any of these factors.

Cross border transactions are dealt with in the same manner as domestic transactions. From a commercial implementation point of view the parties often experience challenges in coordinating obtaining clearances from all the regulatory authorities. Often these pressures are made known to the Commission and where able the Commission tries to accommodate the parties. Where parties trade with international customers this often provides for challenges in getting adequate responses however, these are not uniquely different from domestic transactions.

4. Remedies

The Commission has recently imposed conditions on the cross border merger involving Unilever and Sara Lee which required the parties to divest of a deodorant brand (Status) in order to remedy the competition concerns identified. The Commission defined the market as national and negotiated an effective remedy with the parties that specifically addressed the South African issues. Subsequent to the South African decision the European Commission also imposed conditions to the merger requesting a different brand (Sanex) to be divested. During the investigation the Commission has been in contact with the European Commission in order to understand the focus of their investigation. It appeared that their investigation included markets that were not considered by us (South African Commission) as significantly problematic (i.e liquid soap). However the remedy imposed by the European Commission (to divest the Sanex brand) also had an effect in that this brand was also competing in the deodorants market. Although the parties are not obliged to divest the Sanex brand in South Africa it does not make practical and commercial sense to partially own a brand in certain parts of the world. The resultant effect is that the parties will likely divest of two deodorant brands in South Africa as a result of the two different authorities authorising different divestiture conditions. The relevant question needs to be asked whether the divestiture of Sanex alone in South Africa would have sufficiently addressed the competition concerns identified and the answer thereto is an unlikely no. This brand is still small in the deodorant market in South Africa and would have been an unlikely choice to request the parties to divest. Although this problem did not arise during negotiation the parties did approach the Commission in wanting to amend the order of the Competition Tribunal to align the South African condition with the European decision, had this been envisaged likely difficulties with respect to the effectiveness of the remedy would have been encountered.

With respect to the monitoring of conditions the Commission takes responsibility for this task and has to date not made any arrangements with other countries to assist with the monitoring of conditions. Parties are obliged to provide at least annual reports confirming compliance and/or trustees are appointed to ensure timely divestitures are made. Where countries in close proximity are affected the Commission will consider in future sharing such responsibility as it would be of mutual benefit.

SWITZERLAND

1. Introduction

The Swiss merger control was introduced in 1995 and can now be considered as a well established system. It is based on a mandatory pre-merger filing, i.e. filing prior to completion of the transaction if statutory turnover thresholds are met. The test in use for the assessment of mergers in Switzerland is the dominance test. A merger may be prohibited or authorized subject to conditions or obligations if it creates or strengthens a dominant position liable to eliminate effective competition.

The Swiss Competition authorities have to deal since the very beginning of the merger control system with a comparatively high proportion of cross-border mergers transactions, i.e. mergers which are filed in multiple jurisdictions. This can be explained on the one hand by high turnovers thresholds in international comparison that are often reached by multinationals undertakings and on the other hand by the fact that Switzerland does not belong to a regional organization like the European Union in charge of examining transnational mergers.

This contribution starts with an overview of the legal framework regarding merger control in Switzerland (2). Then it illustrates the practice of the Swiss competition Authorities when dealing with cross-border mergers (3) and finishes with an outlook regarding a possible revision of the Swiss merger control provisions in regard with cross-border mergers and international cooperation mechanisms (4).

2. Merger control provisions by the Swiss Competition Law

2.1 Generalities

The Federal Law on Cartels and Other Restrictions of Competition (Cartel Act, CartA) and the Swiss Merger Control Regulation regulate merger control in Switzerland. The Competition Law came into effect on 1 July 1996 and was revised in 2003 but without any major amendments concerning merger control. The authorities that enforce the merger control provisions of the Competition Law are the Competition Commission (Comco) and its secretariat.

Subject to the Swiss merger control are statutory mergers and takeovers ('transactions as a result of which one or more enterprises directly or indirectly gain control over one or more previously independent enterprises or parts of it'), as well as corporate joint ventures if the company exercises all the functions of an independent business entity on a permanent basis.

Planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the accounting period prior to the concentration (art. 9 CartA):

1. the undertakings concerned reported a joint turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and
2. at least two of the undertakings concerned reported an individual turnover in Switzerland of at least 100 million Swiss francs.

Notwithstanding paragraph a and b, notification is mandatory if a legally enforceable decision establishes that one of the undertakings holds a dominant position in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or an upstream or downstream market. So far, there are only a few undertakings fulfilling this condition and they are all Swiss.

2.2 *Special provisions for transnational mergers*

Irrespective of its actual effects in Switzerland, a merger is considered to have an effect on the Swiss market when the turnover thresholds of article 9 CartA are met. This interpretation was upheld by the Swiss Supreme Court.¹

In 2009, the Swiss competition authorities clarified that only product sales which are intended for customers located in Switzerland are taken into account for calculating turnover thresholds. This means that if for example the invoice of a product is done by a company based in Switzerland, but the product is neither produced in Switzerland nor intended for sale in the Swiss market, the revenue connected to this product is not counted to the turnover for the notification. As many multinational firms have their domicile in Switzerland, many mergers were notified in Switzerland even without having much connection to the Swiss economy. Thanks to this clarification, less international mergers with little effect on the Swiss market have been notified to the Swiss Competition Commission.

Moreover, the Swiss competition authorities have introduced an exemption to the mandatory notification for “foreign” full function joint venture. It is not uncommon that several multinationals found together a joint-venture company abroad which has no connection with Switzerland. In particular, this joint-venture will neither be active in Switzerland nor is expected to do so in the future. In this case, even if the joint-venture partners reach the turnover thresholds, they do not have to notify this kind of joint-venture (see notice about recent practice in mergers available on our website in French, German and Italian: www.weko.admin.ch).

3. *Practice with cross-borders mergers*

3.1 *Cross-borders mergers and waiver of confidentiality obligations*

As mentioned above, the Swiss competition authorities examine frequently cross-border mergers. It is now a routine practice for this type of mergers to ask the notifying parties for a waiver of confidentiality obligations. If necessary, the authorities request as well the notification filed in other jurisdictions. This waiver enables the Secretariat to cooperate in the notified case directly with other competition authorities and to exchange confidential information. In the vast majority of cases, the waiver is granted in order to cooperate with the EU-Commission or with some EU-Members States. Although undertakings and their legal counsels were at the beginning reluctant in this regard, they have now understood their interest to grant this waiver and file it spontaneously. It speeds up the proceedings and avoids conflicting decisions between jurisdictions. They know if they grant the waiver, they can expect the Swiss decision the same day or the day after the foreign decision. Even in transnational mergers where no waiver is granted, the Swiss Competition Authorities are nevertheless usually informed by the parties about the proceedings in foreign jurisdictions. This situation is of course less favorable, as the Swiss Authorities cannot have direct informal contacts with the foreign jurisdictions.

There are two possible scenarios: a) all the relevant markets concerned by the transaction are not national, i.e. they are for instance European or global; or b) there is at least one national or local market.

In the first case, the Swiss Competition Authorities carried out very few investigations or sometimes no investigations at all and relied principally on the results of the foreign cooperating agencies. For

¹ Joint-venture Rhône-Poulenc/Merkt, Swiss Supreme Court 24.4.2001, DPC 2001/2 p 443-451.

instance, in the case *Norddeutsche Affinerie/Cumerio*², the Swiss Competition Authorities have even closed their in-depth investigation before the Decision of the EU, as the parties have committed to refrain from the transaction prior to the EU-authorization and to apply the possible EU-remedies in Switzerland, if Switzerland is concerned too. This way, scarce resources can be employed otherwise and the authorities can focus on proceedings which are not reviewed by other jurisdictions.

In the latter case of at least one national or local market, the Swiss competition authorities carried out their own investigations for Switzerland but get regularly in touch with the authorities of other jurisdictions in order to learn about the steps that are undertaken in the according investigations and the results.

3.2 *Cross-border mergers and remedies*

For transnational mergers, it is of paramount importance to avoid conflicting decisions and therefore conflicting remedies. If there are no special concerns regarding Switzerland, the Swiss competition authorities usually take note of the remedies imposed by the other jurisdictions and state that these remedies solve as well the competition concerns in Switzerland.³

When the merger transaction raises a special concern regarding Switzerland, for instance because some assets which should be divested in accordance with the remedies are located in Switzerland, the remedies can be imposed by the Swiss Competition Authorities in a decision. This decision is appealable before the national courts.

4. *Cartels Act revision and international cooperation*

In 2007/2008, an evaluation of the Cartel Act was carried out by an Evaluation Group under the direction of a Steering Group composed of independent experts and representatives of the Competition Commission (Comco), its Secretariat and the State Secretariat for Economic Affairs (SECO).

The provisions of the Cartel Act concerning mergers were part of the evaluation. The results of the evaluation and the recommendations of the evaluation group were compiled in a report that was presented to the Ministry of Economy in December 2008.

Based on these recommendations, a project for a revision of the Cartel Act was launched in 2009. The project is currently at an early stage and it has not been decided yet whether the revision will be submitted to the Parliament. The project includes a proposal to add a new provision on cross-border mergers that have to be notified both in Switzerland and in the EU. The proposed article provides for an exemption from the notification requirement if certain conditions are met.

Furthermore, the project for a revision of the Cartel Act includes a proposal to introduce an article enabling the Competition Commission to exchange information with other Competition Authorities, including confidential information in cross-border mergers without authorization of the notifying parties, provided that certain conditions are met.

In the context of international cooperation, it can also be noted that the Implementing Agreement of the Agreement on free trade and economic partnership between Japan and Switzerland provides for notification in case of cross-border mergers, sets a timing for such notification, and includes provisions on the coordination of enforcement activities and the avoidance of conflicts. However, in light of the provisions of the Agreement concerning confidentiality, the exchange of confidential information in merger cases would require a waiver from the parties.

² *Norddeutsche Affinerie/Cumerio*, DPC 2008/1, p. 113.

³ As one of the many examples, see *Alcan/Pechiney*, published in DPC 2003/4, p. 809.

CHINESE TAIPEI

1. General points

In the 2002 amendments to the Fair Trade Act, the merger control system has adopted a “pre-merger notification system” to replace the “prior approval system” in order to streamline the review process for mergers. Any merging party meeting the merger notification thresholds prescribed in the Fair Trade Act is required to notify the Fair Trade Commission (hereinafter the Commission) before implementing a merger. The merger is automatically cleared if the Commission does not raise any objection within a prescribed period after the filing of the merger. To facilitate the process and make it more efficient, the Commission has also set forth the “Guidelines on Handling Merger Filings”, “Directions for Application of Merging Parties” and “Guidelines on Extraterritorial Mergers” to serve as guidance in reviewing the merger proposal and as a reference for enterprises.

Chinese Taipei’s notification system is mandatory. If a merger filing falls within one of the merger types in Article 6 of the Fair Trade Act and falls below the notification thresholds including market shares and turnover prescribed in Article 11 of the Fair Trade Act, the merging parties are required to notify the Commission before implementing a merger. At the same time, the merging parties are required to present sufficient documents and information on the merger, but do not need to pay any notification fees.

As defined in Article 6 of the Fair Trade Act, the term “merger” refers to a situation where:

- an enterprise and another enterprise are merged into one;
- an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one-third of the total voting shares or total capital of such other enterprise;
- an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
- an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter’s business; or
- an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

For any merger that falls within any of the following circumstances, a notification shall be made to the Commission prior to the realization of the merger:

- as a result of the merger the enterprise(s) will have one-third of the market share;
- one of the enterprises in the merger has one-fourth of the market share; or
- sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

With regard to the turnover for filing a pre-merger notification, currently the Commission has set the threshold as follows:

- an enterprise in a merger is a non-financial one, its sales for the preceding fiscal year exceed NTD 10 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion; and
- an enterprise in a merger is a financial enterprise, its sales for the preceding fiscal year exceed NTD 20 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion.

Pursuant to Article 12 of the Fair Trade Act, the Commission may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission's standard for merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulted from its restraint on competition. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition restraint resulting from the merger is the basis of the substantive test. If there is no suspicion of obvious competition restraint in the merger filing, then the overall economic benefits of the merger can be considered to outweigh the disadvantages resulting from competition restraint. On the other hand, the Commission is also empowered to attach conditions or require undertakings in its decision to the notified merger if it is satisfied that the measure taken can produce enough economic benefits to outweigh the disadvantages resulted from competition restraint.

In practice, when reviewing different types of mergers, the Commission considers different factors in weighting the "disadvantages resulted from competition restraint."

1.1 Consideration of disadvantages resulted from competition restraint

Horizontal mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from a horizontal merger:

Unilateral Effects: After the merger, the enterprises participating in the merger are not restrained from market competition and can thus elevate the goods price or services remuneration. The Commission may assess the above-mentioned circumstances according to the market shares of merging enterprises, the homogeneity of goods or services, production capacity and import competition.

Coordinated Interaction: After the merger, the merging parties and their competitors restrict business activities among themselves or, even though they are not mutually restricting one another from competition, they have taken concerted actions to remove market competition in practice. The evaluations of whether the market conditions are conducive to concerted actions among competing enterprises, the ease of monitoring and detecting deviation from collusion and the effectiveness of punishments are all factors to determine the success of coordinated interaction.

Degree of Entry: The likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

- **Countervailing Power:** Refers to the ability of trading counterparts or potential trading counterparts to prevent the merging parties from raising the prices of goods or the remuneration for services rendered.
- Other factors affecting the result of competition restraints.

Vertical mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from the vertical merger:

- The probability that other competitors could choose their trading counterparts after the merger.
- The degree of difficulty for an enterprise not participating in the merger to enter the relevant market.
- The possibility of merging parties abusing their market power in the relevant market.
- Other factors that may result in market foreclosure.

Conglomerate mergers: The Commission shall take the following factors into consideration when determining the likelihood of material potential competition:

- The impact of regulation and control being lifted on the merging parties' cross-industry operations.
- The probability of cross-industry operations by the merging parties because of technology advancements.
- The original cross-industry development plan of the merging parties besides the merger.
- Other factors that affect the likelihood of material potential competition.

1.2 *Consideration of overall economic benefits*

With regard to the merger filing that raises suspicion of obvious competition restraints, the filing enterprises shall submit information on the following factors regarding the overall economic benefits to the Commission for deliberation:

- Consumer interests.
- The merging parties are originally in a weaker position when trading.
- One of the merging parties is a failing enterprise.
- Other concrete results related to overall economic benefits.

As the Commission reviews a merger proposal, the first step is to define the relevant market and calculate the market share or market concentration ratio. Next, the anti-competitive effect will be measured. If the proposed merger will not cause substantial harm to the relevant market, then the Commission doesn't necessarily review further the effects on the overall economic benefit. On the other hand, for merger applications with a significant concern of causing competition restraints, the enterprises filing the application may provide the above-mentioned overall economic benefit factors for the Commission's reference.

If a merger is pursued without prior notification, regardless of the Commission's decision to allow or prohibit such a merger, or if the merger fails to perform the undertakings required by the Commission, the Commission may prohibit the merger, and if so, it may prescribe a period for such enterprise(s) to split, to

dispose of all or a part of its shares, to transfer a part of its operations, to remove certain persons from position, or to make any other necessary disposition.

The Commission is inclined to require merger notification where a merger has an impact on its jurisdiction, regardless of the regions where a merger takes place. Hence, all mergers that conform to the merger types and thresholds described in the Fair Trade Act shall be filed with the Commission. The Commission has enacted the “Guidelines on Extraterritorial Mergers” for dealing with mergers involving two or more foreign enterprises merging outside Chinese Taipei’s territory. Its contents can be divided into two parts. The first concerns the issue of jurisdiction, and the second relates to cases falling under the Commission’s jurisdiction as the participating enterprises have the obligation to make notification. Whether or not mergers with foreign enterprises fall under the jurisdiction of the Commission primarily depends on whether it could be reasonably predicted that the merger would directly and substantially have an impact on Chinese Taipei. As for how to assess the impact of mergers of foreign enterprises in the Chinese Taipei market, the Commission still relies on Paragraph 1, Article 12 of the Fair Trade Act.

According to Point 3 (1) of the Guidelines on Extraterritorial Mergers, the jurisdiction over extraterritorial merger cases shall be determined in line with the following considerations:

- the relative weight of the merger’s effects on the relevant domestic and foreign markets;
- the nationalities, residence, and main business places of the merging enterprises;
- the explicitness of the intent to affect market competition in Chinese Taipei and the foreseeability of effects on market competition;
- the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises;
- the feasibility of enforcing administrative dispositions;
- the effect of enforcement on the foreign enterprises;
- rules of international conventions and treaties, or, regulations of international organizations;
- other factors deemed important by the Commission.

In addition, in accordance with Point 3 (2) of the same Guidelines, if none of the merging enterprises in an extraterritorial merger case has production or service facilities, distributors, agents, or other substantive sales channels within the territorial domain of Chinese Taipei, jurisdiction shall not be exercised.

2. Co-operation among competition authorities and jurisdictional issues

So far, no conflicts have arisen between Chinese Taipei and a foreign jurisdiction over the regulation of a cross-border merger. The bilateral agreements between Chinese Taipei and foreign jurisdictions in the field of competition law have not been used in practice in cross-border merger cases. However, Chinese Taipei has an active involvement in the work and deliberation of international organizations such as OECD and ICN in the area of merger control to serve as reference in handling similar cases in the future.

A merging party involved in cross-border mergers with its main business places located outside of the territory of Chinese Taipei will normally designate an agent registered in Chinese Taipei to file the cross-

border merger on its behalf. If the Commission requires information from such a party, the designated agent usually provides it. When the Commission conducts investigation or adopts final decisions, the Commission may refer to decisions made by foreign competition authorities in relation to cross-border mergers as well as the industrial and investment policies established by the domestic regulatory authorities. However, the decision of the Commission on cross-merger cases will not be bound by such reference.

The Fair Trade Act is a domestic law but it does, just the same, apply to foreign enterprises as far as their conduct in Chinese Taipei is concerned. To explain this more clearly, this is the case where their conduct affects market competition in Chinese Taipei, irrespective of whether those foreign enterprises have representatives, subsidiaries or branches in Chinese Taipei or are recognized by the government of Chinese Taipei. The merger notification thresholds are currently appropriate to catch mergers which have an impact on Chinese Taipei's territory. Whether a party of an intended merger is based domestically or in a foreign country, it is required to provide all necessary documents and to file them with the Commission, so that the Commission can make formal and substantial reviews. If the materials submitted with the merger report fail to comply with the requirements of the regulations or are deficient in content, the Commission may issue notices to require supplementations or corrections within a specified period of time. If such supplementations or corrections are not made within a specified period of time or are made but the submitted materials remain deficient, the filing will not be accepted by the Commission. So far, the Commission has not encountered difficulty when making such requests.

3. Merger remedies

Pursuant to Paragraph 2 of Article 12 of the Fair Trade Act, the Commission may attach conditions or require undertakings in any of the decisions it makes on the filing merger cases in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission's practice regarding the treatment of merger remedies includes structural and behavioral remedies. The Commission usually imposes behavioral remedies on parties to a cross-border merger when it attaches conditions or requests undertakings in its decisions.

Take as an example the extraterritorial merger of US-based Microsoft Corporation (hereinafter Microsoft) and US-based Yahoo! Inc. (hereinafter Yahoo). The two corporations proposed to merge outside of the territory of Chinese Taipei. Yahoo authorized Microsoft to use part of its core search technology. Microsoft consolidated the search engines and keyword-based advertising platforms of both companies and became the exclusive provider of these services for Yahoo. After the said consolidation, Yahoo stopped operating the above-mentioned businesses and instead became responsible for the promotion and management of "Premium Direct Advertisers" (PDAs). Such a merger constituted the merger type set forth in Subparagraph 4 of Paragraph 1 of Article 6 of the Fair Trade Act. In addition, the sales of the subsidiaries of both corporations in Chinese Taipei exceeded NTD 4.5 billion for the preceding fiscal year and Yahoo's subsidiary Yahoo! Taiwan Holdings Limited (Hong Kong), Taiwan Branch (hereinafter Yahoo Taiwan) had more than 65% of the market share in the keyword-based advertising market in 2008. Therefore, the extraterritorial merger of Microsoft and Yahoo had a direct, substantial and reasonably foreseeable impact on the relevant market in Chinese Taipei and thus fell under the jurisdiction of the Commission. At the same time, as Yahoo Taiwan already had more than a 25% market share in the internet advertising and keyword-based advertising service markets, this reached the threshold for pre-merger notification filing as required by Subparagraph 2 of Paragraph 1 of Article 11 of the Fair Trade Act and also did not fall into the exceptions provided in Article 11-1 of the same Act. Therefore, the subsidiaries of both corporations in Chinese Taipei (i.e., Microsoft Taiwan and Yahoo Taiwan) filed a merger with the Commission according to the Fair Trade Act.

Before the merger, Microsoft had not provided the keyword-based advertising platform service in Chinese Taipei, thus competition between the two firms had not existed. After the merger, Microsoft consolidated the technologies of both firms and became the provider of the keyword-based advertising platform service, whereas Yahoo stopped providing such a service. Based on the distribution mechanism for the revenue from keyword-based advertising sales as well as each firm's interests, both firms were to make separate endeavors to increase income from keyword-based advertising businesses. Each firm operated its portals and, although Microsoft was responsible for providing the search technology, Yahoo retained the right to edit the contents of the web pages. After investigation, the Commission made a decision that a merger of Microsoft and Yahoo did not have a significant concern about causing competition restraints and the overall economic benefit of the merger outweighed the disadvantages resulting from competition restraints. Therefore, the Commission did not prohibit the merger.

However, in order to prevent the applicant from employing market power through such a merger and engaging in competition restraint or unfair competition in the search service and keyword-based advertising service markets, the Commission imposed undertakings on merging parties in its decisions in accordance with Paragraph 2 of Article 12 and requested that merging parties should perform undertakings. Those behavioral remedies included:

- The applicant shall not employ its market position after the merger to improperly restrict any keyword-based advertising trading counterparts from trading with any particular enterprises;
- The applicant shall not employ its market position after the merger to engage in other unfair transactions with any trading counterparts or enter into agreements concerning trading conditions that may lead to competition restraint;
- The applicant shall not employ its market position after the merger to improperly determine, maintain or alter prices, or impede other enterprises' fair competition or other actions abusing its dominant market position;
- The applicant is required, within three years from the day after the receipt of this merger decision, to provide the Commission with the following information before the end of December each year: the operating scale of the keyword-based advertising, the numbers of employees and researchers in Chinese Taipei, and the industrial structure such as the market share, and so on.

TUNISIE*

Dans une économie ouverte qui adopte les mécanismes du marché, la concurrence devient un principe et un passage obligé. Ce choix économique cherche des objectifs tels que l'efficacité, la compétitivité, la maîtrise de l'inflation et le bien être du consommateur. Mais l'adoption d'un régime libéral ne peut pas fonctionner tout seul il doit s'accompagner des instruments et des moyens pour fixer les règles de fonctionnement et de sauvegarde.

A ce titre, tous les pays qui ont opté pour l'économie du marché sont obligés de promulguer des règles de concurrence de manière directe ou indirecte. Ce mouvement a concerné la majorité des pays développés et en développement.

La Tunisie n'a pas échappé à ce processus. Elle a dès 1991 adopté une loi relative à la concurrence et aux prix, cette loi consacre la liberté des prix et le principe de la concurrence comme règle du marché, elle a prévu comme toute réglementation des dispositions de nature à garantir le fonctionnement du marché et notamment les obligations et les droits des parties.

Il convient de rappeler, que l'expérience a montré les limites de la théorie de la concurrence pure et parfaite qui conduit tôt ou tard à la situation de monopole et aux abus. La réglementation moderne prévoit des mesures préventives de nature à maintenir le fonctionnement concurrentiel et éviter tout dérapage vers une situation qui s'éloigne de la logique de concurrence.

Nous savons qu'au fond les entreprises n'aiment pas la concurrence, elle les soumet en continue à des pressions de compétition et d'innovation.

Pour échapper à la concurrence, souvent les entreprises ont deux possibilités : elles s'entendent ou elles se fusionnent et se restructurent.

Le législateur tunisien, conscient du comportement attendu des entreprises a prévu, comme dans toute réglementation moderne, la prohibition des ententes anticoncurrentielles mais aussi le contrôle de concentration et fusions, c'est-à-dire les opérations de restructuration.

Si la réglementation tunisienne a prévu la prohibition des PAC dès son apparition en 1991, le contrôle de concentration a fait l'objet d'un grand débat concernant son opportunité pour une économie composée des petites entreprises et pour laquelle, la concentration peut être un moyen de faire face à la concurrence étrangère.

En effet, pour une économie qui s'ouvre sur l'extérieur et dont sa stratégie de développement est basée sur l'exportation, elle doit se doter des moyens de compétition nécessaire pour maîtriser la qualité et les prix.

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Contribution soumise par Monsieur Khalifa Tounakti, Directeur Général de la Concurrence et des Enquêtes Economiques, Ministère du Commerce et de l'Artisanat, Tunisie.

La concentration est une voie parmi d'autres pour réaliser des économies d'échelle et disposer de la même arme que les entreprises concurrentes.

Un contrôle de concentration, pour une économie au stade de libéralisation donne un mauvais message aux entreprises qui ne maîtrisent même pas le concept et l'étendu, un mécanisme de contrôle veut dire souvent interdiction pour le monde des affaires.

Il a fallu attendre 1995 pour introduire un régime de contrôle de concentration. Ce régime consiste à soumettre les opérations de concentration ou de fusion à l'autorisation de ministère chargé du commerce après avis du conseil de la concurrence.

Par souci d'efficacité et de simplification, ne sont soumises au contrôle que les opérations de concentration étant susceptibles de permettre à une entreprise ou groupe d'entreprises d'exercer une influence déterminante sur une ou plusieurs autres entreprises et par là, sur le marché. L'une de deux conditions doit être remplie pour l'exercice du contrôle :

- la part du marché des entreprises parties de l'accord dépasse 30% du marché intérieur ;
- le chiffre d'affaires réalisé par ces entreprises dépasse le montant de 20 millions de dinars (15million \$).

Les entreprises concernées doivent notifier au ministère chargé du commerce, le projet de concentration selon une procédure fixée par la loi. Le dossier est composé de nombreuses pièces notamment le projet de l'accord, les comptes (bilans) des entreprises, la liste des actionnaires, les filiales et l'évaluation économique des intérêts de l'opération.

L'autorisation est accordée après avis du conseil de la concurrence, mais sur la base de l'examen approfondie par les services du ministère (DGCEE) de l'économie de l'opération et son impact sur la concurrence et la structure du marché. Pour l'évaluation de l'opération de fusion ou de concentration plusieurs critères sont utilisés :

- bilan concurrentiel, effet attendu sur la concurrence à la lumière de la situation actuelle du marché ;
- impact attendu pour le consommateur notamment sur le prix des produits ;
- effet prévisible sur l'économie nationale en matière d'exportation, de création d'emploi, d'investissement et d'innovation et progrès technique ;
- orientation de la politique économique et choix sectoriels stratégiques.

Les fusions transnationales préoccupent les pays développés mais surtout les pays en développement et les pays émergents.

En effet, si les pays développés notamment l'Union Européenne, les États Unis, le Japon... qui sont à l'origine des multinationales ont des dispositifs juridiques et des moyens de contrôle sur les opérations de fusions qui se réalisent par des entreprises installées sur leur territoire. Les autorités de concurrence dans ces pays contrôlent les fusions à la lumière de leur effet sur le marché intérieur.

L'autorisation ou le refus tient compte des considérations propres à ces pays et ne prend jamais en compte les intérêts étrangers sauf dans le cas de coordination et de coopération entre les autorités de concurrence des grandes puissances. A notre connaissance cette coordination est presque absente pour les pays en développement.

En effet, le mouvement de concentration et de fusion qui a touché plusieurs secteurs comme par exemple le marché aérien (quatre principales alliances aériennes star alliance, Qualiflyer, Oneworld, et Skyream), financier (BNP-Pribas...), des télécommunications (France telecom-Deutsche Telecom - Sprint...), pétrolier (Exxon-Mobil, Total-Petrofina-Elf Aquitaine...), de l'automobile (General Motors, Ford-Mazda, Daimler-Chrysler, Renault-Nissan...) et pharmaceutique (Rhone Poulenc-Hoechst, Glaxo Wellcome-SmithKline Beecham...) ne manque pas d'avoir des effets négatifs dans les pays en développement dans la mesure où les entreprises parties de fusion opèrent dans ces pays directement ou indirectement par leur filiales.

Souvent les pays en développement ne sont ni informés ni consultés même si leurs intérêts sont en jeu notamment dans les domaines pharmaceutique, de l'information, de la télécommunication et de l'énergie.

Malheureusement, face à cette situation, les pays en développement subissent les conséquences sans beaucoup des moyens d'action faute d'une vraie volonté de coordination. L'expérience tunisienne en matière de contrôle des fusions transnationales est très limitée, elle s'appuie sur une approche pragmatique de traitement des cas qui ont été soumis aux autorités de concurrence.

Souvent les autorisations de fusions concernent les entreprises transnationales qui ont des filiales en Tunisie. Dans ce cas, l'autorité de la concurrence examine le dossier sur la base des critères fixés par la réglementation et donne son avis en tenant compte l'effet sur le marché intérieur et l'intérêt national. Par contre pour les opérations des fusions qui se réalisent à l'extérieur et dont l'effet sur le marché tunisien est évident, on ne dispose d'aucun moyen de contrôle en l'absence d'une coordination avec les autorités homologues des pays partenaires.

Pour éviter les effets néfastes transfrontaliers des fusions, la réglementation nationale a montré ses limites. Il convient de progresser dans la voie de coopération entre les autorités de la concurrence et de mieux coordonner des actions contre les abus des sociétés multinationales.

Convaincue de cette démarche, la Tunisie a essayé de nouer des relations étroites avec les organismes spécialisés tels que l'OCDE, UNCTAD, OMC, ICN pour acquérir leurs expériences et appliquer leurs recommandations dans le traitement des dossiers relatifs au contrôle des fusions.

Par ailleurs, la Tunisie a signé une série d'accords de coopérations bilatérales en matière de concurrence avec quatre pays de la région méditerranéenne. Ces pays sont le Maroc, l'Égypte, la Jordanie et la Syrie, des négociations sont en cours avec l'Union Européenne et la Turquie.

Par ces accords, la Tunisie espère jeter les jalons d'une coopération étroite et fructueuse dans le domaine de la concurrence, si ces accords doivent commencer par l'échange d'expérience et d'information, ils mènent tôt ou tard à une coordination plus efficace du contrôle des pratiques anticoncurrentielles et des effets des fusions partagés par les deux parties.

La coordination entre les autorités de concurrence doit se faire dans un cadre régional. La Tunisie n'a pas manqué de faire un effort dans ce sens en participant à l'élaboration des règles communes de concurrence destinés aux membres de la ligue des États arabes. Notre pays est très favorable à toute action de concertation ou de coordination de la politique de la concurrence dans le cadre des groupements régionaux tels que le Maghreb arabe, l'accord Aghadir ou les pays d'Euromed en espérant un jour à parvenir à un accord multilatéral.

TUNISIA^{*}

In an open economy that is adopting market mechanisms, competition becomes a fundamental principle essential to a successful transition. This economic choice is aimed at achieving objectives such as efficiency, competitiveness, control of inflation and consumer welfare. However, a free-market regime can function properly only if it is accompanied by the tools and means for establishing the appropriate operating rules and safeguards.

For this reason, all countries that have opted for a market economy must adopt rules governing competition either directly or indirectly, and the majority of developed and developing countries have already taken steps to do so.

Tunisia has been no exception to this process. As early as 1991, it enacted a law on competition and prices that enshrined free pricing and the principle of competition as the rules of the market; like all such legislation, it laid down provisions aimed at ensuring the proper functioning of the market, and in particular at defining the obligations and rights of parties.

It should be borne in mind that experience has shown the limits of the theory of pure and perfect competition, which sooner or later leads to a monopoly situation and to abuses. Modern regulation provides for preventative measures aimed at maintaining competition and averting any slippage towards a situation that might undermine the principle of competition.

We know that, ultimately, businesses do not like competition, which continuously subjects them to pressures to compete and innovate.

Businesses often seek to escape competition in two possible ways, *i.e.* either by forming cartels or by merging and restructuring.

Tunisian lawmakers, aware of how businesses can be expected to behave, have, as in any modern regulatory system, passed laws that prohibit anti-competitive agreements but that also control concentrations and mergers, *i.e.* restructuring operations.

Although the Tunisian legislation provided for the prohibition of anti-competitive practices when it was enacted in 1991, there has been considerable debate on whether it is advisable to control concentration in an economy made up of small companies for which concentration can be a means of countering foreign competition.

The fact of the matter is that an economy opening up to the outside world and having an export-based development strategy must provide the means of competition necessary to keep quality and prices under control.

^{*} Contribution submitted by Mr. Khalifa Tounakti, Director-General for Competition and Economic Surveys, Ministry of Trade and Crafts, Tunisia.

Concentration is but one way to achieve economies of scale and gain the same advantages as competing businesses.

Controlling concentration in an economy still in the liberalisation stage sends a wrong message to businesses, which do not even fully understand the concept and scope of a control mechanism, which they often perceive as tantamount to a ban.

For this reason, it was necessary to wait until 1995 before introducing a concentration control regime. This regime consists of submitting concentration and merger operations to the Ministry of Trade for authorisation after obtaining the opinion of the Competition Council.

In the interest of efficiency and simplification, this control is limited to those concentrations that may enable a company or group of companies to exert a decisive influence on one or more other companies, and thus on the market. This control is undertaken only if the concentration meets one of the following two conditions:

- the market share of the companies involved in the agreement exceeds 30% of the domestic market;
- the companies' combined turnover exceeds 20 million dinars (US \$15 million).

The companies concerned must notify the Ministry of Trade of the planned concentration, following a procedure defined by law. The file submitted consists of numerous documents, including the draft agreement, the companies' accounts (balance sheets), the list of shareholders, subsidiaries and the economic assessment of the aims of the operation.

Authorisation is granted after obtaining the opinion of the Competition Council, on the basis of an in-depth examination of the concentration by the services of the Ministry of the Economy (DGCEE) assessing its impact on competition and the structure of the market. A number of criteria are used to evaluate the merger or concentration operation:

- expected overall impact on competition in the light of current market conditions;
- expected impact for consumers, in particular on product prices;
- foreseeable impact on the domestic economy with respect to exports, job creation, investment and innovation and technological progress;
- economic policy aims and strategic sectoral choices.

Although cross-border mergers are of concern to developed countries, they are of even greater concern to developing and emerging countries.

The developed countries where multinationals originate, such as the European Union, the United States, Japan, etc., have legal systems and means of control over the merger operations carried out by companies established within their borders. These countries' competition authorities control mergers in the light of their impact on the domestic market.

However, the decision to authorise or deny the merger takes account solely of considerations specific to those countries, but never of foreign interests, except when there is co-ordination and co-operation in

this regard between the competition authorities of the major powers. To our knowledge, such co-ordination is virtually non-existent in the developing countries.

For example, the trend towards concentrations and mergers that has affected a number of sectors, such as air transport (four main air carrier alliances: Star Alliance, Qualiflyer, Oneworld and Skyteam), finance (BNP-Paribas, etc.), telecommunications (France Telecom-Deutsche Telecom – Sprint, etc.), oil (Exxon-Mobil, Total-Petrofina-Elf Aquitaine), automobiles (General Motors, Ford-Mazda, Daimler-Chrysler, Renault-Nissan, etc.) and pharmaceuticals (Rhone Poulenc-Hoechst, Glaxo Wellcome-SmithKline Beecham, etc.), has inevitably had a negative impact on developing countries since the companies involved in the mergers operate directly or indirectly in these countries through their subsidiaries.

Developing countries are often neither notified nor consulted, even when their interests are at stake, for example in the fields of pharmaceuticals, information technology, telecommunications and energy.

Unfortunately, developing countries suffer the consequences of this situation with scant means of action for want of a genuine will to engage in co-ordination. The Tunisian experience with regard to cross-border merger control is very limited, and is based on a pragmatic approach to dealing with the cases that have been submitted to the competition authorities.

Merger authorisations often involve transnational companies that have subsidiaries in Tunisia. In such cases, the competition authority examines the application on the basis of criteria set by law and gives its opinion in the light of the domestic market impact and the national interest. However, for merger operations that take place abroad and have an obvious impact on the Tunisian market, there is no means of control since there is no co-ordination with the corresponding authorities of the partner countries.

Domestic legislation has shown its limits in preventing the negative cross-border effects of mergers. Steps must be taken to improve co-operation between competition authorities and do a better job of co-ordinating action to counter the abuses of multinational enterprises.

Convinced of the need for this approach, Tunisia has sought to forge close ties with specialised bodies such as the OECD, UNCTAD, WTO and ICN to learn from their experience and to apply their recommendations in handling merger control cases.

Tunisia has also signed a series of bilateral co-operation agreements in the field of competition with four countries of the Mediterranean region – Morocco, Egypt, Jordan and Syria – and negotiations are under way with the European Union and Turkey.

Through these agreements, Tunisia hopes to lay the groundwork for close and fruitful co-operation in the field of competition. While the agreements must begin with the exchange of experience and information, they must ultimately lead to more effective co-ordination of the control of anti-competitive practices and of the impact of mergers that affect both parties.

Co-ordination among authorities should be carried out within a regional framework. Tunisia has already made an effort in this direction by helping to prepare common rules of competition for the members of the League of Arab States. Our country is strongly in favour of any co-operation or co-ordination initiative in the field of competition policy within regional groupings such as Arab Maghreb Union, the Agadir Agreement or the Euromed countries, and it hopes that one day a multilateral agreement will be reached.

UKRAINE

1. General issues

1.1 *Review of the merger control system in Ukraine*

The Ukrainian legislation has a comprehensive control system for concentration of economic entities, represented by the Law of Ukraine «On Protection of Economic Competition» (hereinafter referred to as the Law) and the Provision on the Procedure of Filing Applications to the Antimonopoly Committee of Ukraine on Pre-Approval of Concentration of Economic Entities (Provision on concentration), approved by the order of the Antimonopoly Committee of Ukraine (hereinafter referred to as the Committee) dated 19.02.2002 No. 33-p (hereinafter referred to as Provision on concentration).

The Law specifies that the following shall be deemed concentration:

- the merger of economic entities or the affiliation of an economic entity to another entity;
- the acquisition of control directly or through other persons over one or several economic entities or over parts of economic entities by one or several economic entities, in particular by means of:
 - the direct or indirect purchase or acquisition (by other means) of assets in the form of an integrated property complex or of a structural subdivision of an economic entity; the receipt (for further management), lease (leasing), concession or acquisition (by other means) of the right to use assets in the form of an integrated property complex or of a structural subdivision of an economic entity, in particular the purchase of assets of a liquidated economic entity;
 - the appointment or election of a person — occupying one or several positions of the head, a deputy head of the supervisory board, the board of directors or the mentioned positions at other supervisory or executive boards of other economic entities — as the head, a deputy head of the supervisory board, the board of directors or of other supervisory or executive boards of the economic entity or the creation of a situation where there is the coincidence of more than half of the members of the supervisory board, the board of directors, of members of other supervisory or executive boards of two or more than two economic entities;
- the establishment of such an economic entity by two or more than two economic entities that will independently perform economic activities for a long period, whereas the mentioned formation does not result in the co-ordination of competition behavior between economic entities which established the economic entity or between them and the newly-established economic entity.
- such direct or indirect purchase, acquisition (by other means) or receipt (for management) of shares (stocks) that ensures attaining or exceeding 25 or 50% of the votes at the higher board of management of the relevant economic entity.

Besides, the Law specifies threshold values; should such values be exceeded. Concentration may be carried out only on condition that prior authorization for it is granted by the Antimonopoly Committee of Ukraine or an administrative board of the Committee. Such threshold values are:

- the total cost of assets or the total product sales of the participants in the concentration, with relations of control being taken into account, in the last financial year, including those abroad, exceed the sum equivalent to 12,000,000 euros, while:
 - the assets (total assets) or the sales (total sales) of products, including those abroad, of at least two participants in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros, and
 - the assets (total assets) or the sales (total sales) of products, in Ukraine only, of at least one participant in the concentration, with relations of control being taken into account, exceed the sum equivalent to 1,000,000 euros;
- regardless of total assets or total sales of the participants in the concentration, when:
 - a product share in a certain market of any one participant in the concentration, or the total share of the participants in the concentration, with relations of control being taken into account, exceeds 35%, and the concentration is to take place in this or related commodity market.

The Merger notification system is based on the principle of obligatoriness, as economic entities are obliged to receive an authorization for concentration, if the threshold values are exceeded.

Payment shall be charged for granting an authorization for concentration in amounts envisaged by the Law.

The procedure of submitting applications for authorizing concentration, requirements to the application and documents attached thereto, and the procedure of considering applications and cases for authorizing concentration are determined by the Law and the Provision on concentration.

Article 26 of the Law stipulates that participants in concentration shall submit an application for authorizing concentration to the Committee.

According to the legislation, the Committee or an administrative board of the Committee shall consider the applications for authorizing concentration within 30 days of its submission for consideration.

The following shall be performed in considering applications on concentration:

- determination of the participants in the concentration with relations of control being taken into account;
- determination of affected markets;
- significance analysis of concentration effect on commodity markets, total share of participants in the concentration in the affected market, evaluation of market shares of main competitors, presence and significance of obstacles for market entry, presence of potential competitors;
- analysis of presence and significance of anticompetitive effects of concentration.

The laws of Ukraine on protection of economic competition do not envisage any exceptions or special provisions for cases of international merger.

2. Special issues

2.1 *Cooperation between competition institutions (international, regional and bilateral)*

There were no conflicts between the Committee and foreign jurisdictions regarding the regulation of international mergers. However there were cases when a foreign department would authorize concentration, while the Committee, due to certain circumstances, would delay in taking the relevant decision. This can be exemplified with a situation of authorizing SCOR S.A. (Paris, France) to purchase shares of Converium Holding AG (Zug, Switzerland), providing the buyer with exceedance of 50 percent of votes in the company's supreme management body. Then, due to non-amicable takeover, the applicant failed to provide information on the company being object of takeover according to the legislation in effect, resulting in a necessity for the Committee to send requests to the company being object of takeover to submit information. The application was suspended until receipt of the relevant information. Before the Committee made a decision on the said concentration, SCOR S.A. had taken over Converium Holding AG, due to which the Committee initiated a case on breach of legislation on protection of economic competition and imposed a fine on SCOR S.A. The concentration was authorized.

The Committee's international cooperation in the field of competition protection based on bilateral agreements with competition institutions of EU and CIS member countries, specifically, Slovakia, Hungary, Bulgaria, Latvia, Poland, Austria, Russian Federation, Armenia, Georgia and Azerbaijan. Currently, these agreements were not applied in cases of international merger.

The Committee takes into account that decisions made for authorizing concentration in any case affect the interests of its participants, and regarding international merger – other countries' interests as represented by their residents.

However in considering applications for authorizing concentration the priority is always non-admission of monopolization or substantial limitation of competition in Ukrainian markets.

The Committee is an active participant in events held by international organizations in the field of competition policy, including in the field of merger control, inter alia: United Nations Conference on Trade and Development (UNCTAD), Organization for Economic Cooperation and Development (OECD), International Competition Network (ICN) and the Interstate council for Antimonopoly Policy (ICAP or the Antimonopoly Council) of CIS member countries. The Committee studies and uses in practice the recommendations and principles developed by international organizations.

On 16 January 2003 the Verkhovna Rada of Ukraine ratified the Agreement on harmonized antimonopoly policy, signed at the council meeting of government executives of CIS member countries on 25 January 2000 in Moscow. The main purpose of the Agreement is to discover and terminate transnational limitations of competition.

Taking into consideration the positive international experience in the said field, the Agreement is currently a qualitatively new document ensuing competition protection by means of cooperation, effected solely on voluntary basis and under no circumstances, it is viewed as a tool to influence sovereign positions of partner states. Besides, the Agreement does not envisage application of any regional rules in the territory of signatory countries.

Developed on a modern concept base, the Agreement determines an interaction procedure for competition bodies, grounded on the principles of harmonized application of the parties' national legislation and taking into consideration the relevant recommendations of the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), as well as the experience and cooperation principles of countries with stable market traditions. It should be mentioned that the Agreement may be acceded by other non-CIS member countries.

2.2 *Legal issues*

The Law determines threshold values, under which economic entities should obtain the Committee's authorization for concentration. Information regarding threshold values is provided in item 1.2 of section I.

Certainly, the Committee attempted to receive information from non-resident economic entities, being members of international mergers.

However, it may be difficult to get responses to various requests of the Committee, so it should obtain support and interact with the Ministry of Foreign Affairs as well as other countries' competition institutions in order to receive assistance in getting the necessary information.

The Committee takes into account decisions made by foreign competition institutions. At the same time, the Committee performs compulsory independent research of the concentration effect on commodity markets of Ukraine.

The Law of Ukraine on « the Antimonopoly Committee of Ukraine» stipulates that in considering applications and cases on concentration, effecting other powers in the field of control of observing legislation on protection of economic competition, control of concentration, bodies and officials of the Antimonopoly Committee of Ukraine shall exercise its powers, observing the laws on protection of economic competition irrespective of bodies of power, bodies of administrative and economic government and control, bodies of local self-government, their officials, economic entities, associations of private citizens or their bodies.

The interference of central and local bodies of state executive power, bodies of local self-government, their officials, associations of private citizens and their representatives in activities of the Antimonopoly Committee of Ukraine and its territorial offices shall be prohibited, except in cases stipulated by the laws of Ukraine.

The Law stipulates that the Cabinet of Ministers of Ukraine may allow a concentration, prohibited by the Antimonopoly Committee of Ukraine as causing monopolization or substantial limitation of competition in the market in general or its major part, if a positive effect on social interests due to such concentration exceeds adverse effects of competition limitation. No such cases occurred lately. No such difficulties arose in practice.

2.3 *Additional issues*

The legislation envisages that a decision of the Antimonopoly Committee of Ukraine and the Cabinet of Ministers of Ukraine for authorizing concentration may be stipulated by fulfillment of certain requirements and obligations by participants in concentration, eliminating or alleviating the adverse effect of concentration on competition. Such requirements and obligations may concern, specifically, restrictions of management, use or disposal of property, as well as an economic entity's obligation to alienate the property.

Example: in September 2009 the Committee decided to authorize a concentration comprising companies located in Great Britain and Cyprus^{1 2}. The said concentration occurred at the condoms market.

¹ Footnote by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognizes the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus" issue;

² Footnote by all the European Union Member States of the OECD and the European Commission: The Republic of Cyprus is recognized by all members of the United Nations with the exception of Turkey. The

The relevant decision was stipulated by additional terms fulfilled by participants in concentration in order to alleviate the effect of concentration on competition. Specifically, the Committee imposed obligations on the participants in the concentration regarding price policy, goods sale and purchase terms etc.

It should be mentioned that imposition of such additional terms is not sign of special treatment of international mergers.

The Committee may adopt additional terms both as certain actions and as attitude adjustment. Specifically, the aforementioned additional terms relate to attitude adjustment (see clause 1 of this section).

In the example presented in clause 1 of this section participants in concentration undertook to fulfill the additional terms without any objections, though imposition of additional terms to authorize concentration usually requires lengthy negotiations with the applicant, explanation of the Committee's position and review of alternative options.

In order to control fulfillment of the additional terms imposed by the decision for authorizing concentration, in the example presented in clause 1 of this section, the Committee obligated the participant in concentration being resident of Ukraine, connected by control relations with economic entities, to provide the Committee (for 3 years annually in the 1st quarter) with information regarding volumes and prices for condoms for the preceding accounting period.

The national legislation does not envisage the Committee's duty to reconcile additional terms with other competition institutions. At the same time, international agreements made in the field of competition (acceded to by Ukraine or the Antimonopoly Committee of Ukraine) stipulate the parties' right for various consultations. These provisions were not applied in practice in considering applications for authorizing concentration.

Applications for authorizing concentration recently reviewed by the Committee, where international companies were members:

- In September 2010 the Committee received an application for authorizing Hewlett Packard Company (Palo Alto, USA) to purchase shares of ArcSite Inc. (Cupertino, USA), providing the buyer with exceedance of 50 percent of votes in the company's supreme management body. Concentration occurred at the services market of complex problem solution, business securing, loss and risk prevention of companies and state agencies. The Committee permitted the said concentration.
- In May 2010 the Committee received an application for authorizing:
 - Zhejiang Geely Holding Group Co., Ltd (Hangzhou, China) and Daqing State Owner Assets Operating Co. Ltd (Daqing, China) to found company Beijing Geely Wanyuan Investment Co., Ltd (hereinafter referred to as Beijing HoldCo) (Beijing, China);
 - Beijing HoldCo and Shanghai GearAirWar Investment Co., Ltd (Shanghai, China) to found company Shanghai Geely ZhaoYuan International Investment Co., Ltd (Shanghai, China);

information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

- Geely Sweden AB (Stockholm, Sweden) to purchase shares of Volvo Personwagnar Aktiebolag (Goteborg, Sweden), providing the buyer with exceedance of 50 percent of votes in the company's supreme management body;
- Meantime North America LLC (Wilmington, USA) to purchase shares of Volvo Cars of North America LLC (Rockly, USA), providing exceedance of 50 percent of votes in the company's supreme management body.

Concentration occurred at the vehicles market. The Committee permitted the said concentration.

- In May 2010 the Committee received an application for authorizing L'ORÉAL S.A. (Paris, France) to acquire control over a part of ESSIE COSMETICS, LTD. (New York, USA), namely its assets related to activity in development, production, marketing and sale of body and hand care, cosmetic and SPA products (nail polishes, nail care, nail accessories, lip glosses). Concentration occurred at the cosmetic products market. The Committee permitted the said concentration.

UNITED KINGDOM

1. General points

1.1 *Introduction: Summary of UK merger regime*

1.1.1 *Outline of UK merger regime*

The UK established a merger control regime in 1965. Since then the regime has been updated, most recently in 2002 by the Enterprise Act which established a competition based test and made the UK Competition Authorities (i.e. the Office of Fair Trading (OFT) and the Competition Commission (CC)) determinative.

Both anticipated and completed mergers are capable of review by the UK Authorities. UK merger control law does not require that a qualifying merger (see (b) below)) be notified to the OFT. However, a voluntary notification system exists which enables firms to obtain legal certainty by informing the OFT about a prospective merger in advance, a fee being payable for this procedure. The OFT may also hold discussions with a party prior to the notification being made. In practice the notification system is seldom used. The OFT also provides a number of opportunities through which the parties may obtain informal advice.¹ However, the regime contemplates the OFT initiating review of mergers where it believes that it may have jurisdiction. This is the case whether or not parties have informed the OFT of the merger and may occur following a complaint from a third party. The OFT is responsible for obtaining and keeping under review information relating to its functions, including its merger functions. The OFT has a dedicated Mergers Intelligence Officer responsible for monitoring non-notified merger activity and liaising with other competition authorities.

Mergers that have a ‘Community dimension’ under the EC Merger Regulation (ECMR) (ie mergers above certain thresholds) fall outside the scope of the Enterprise Act. Instead they must be notified in advance to the European Commission in Brussels.

Subject to some limited exceptions, any qualifying merger (see (b)) that is investigated by the OFT is subject to a fee irrespective of whether a reference is made to the CC (see (d)). The fees are based on UK turnover of the value of the enterprise acquired.

The remainder of the paragraphs in this section explain which mergers may be reviewed by the authorities, the statutory test that the Authorities consider and the institutional arrangements. In addition to the present fee structure being based on the UK turnover (of the value of enterprise acquired), it is notable that the two jurisdictional tests (see (b)) are also focused on the UK as is the SLC test.

¹ The notification requirements and the OFT’s practice regarding informal advice are described in the OFT’s published guidance *Mergers: Jurisdictional and Procedural Guidance* 2009 OFT 527, available on OFT website.

1.1.2 *Qualifying mergers*

The UK Authorities are able to review qualifying mergers. A qualifying merger is one in which two or more enterprises² cease to be distinct and which satisfies either the turnover test or the share of supply test or both. The legislation stipulates that 'ceasing to be distinct' can be brought about through the acquiring company gaining: (i) legal control of the target company; (ii) 'de facto' control; or (iii) material influence over the behaviour of the target company despite having a minority shareholding.³ In addition, the merger must not yet have taken place or (subject to certain exceptions) the merger must have taken place not more than four months before the reference to the CC is made.

Turnover test: the value of UK turnover of the enterprise which is being acquired exceeds £70 million

Share of Supply test: the enterprises which cease to be distinct supply or acquire goods or services of any description and after the merger together supply or acquire at least 25 per cent of all those particular goods or services supplied in the UK or in a substantial part of it.

The merger must result in an increment to the share of supply or consumption. In practice, therefore, the share of supply test can only be met where the enterprises concerned supply or acquire goods or services of a similar kind.

There are no exemptions or special provisions for cross border mergers.

1.1.3 *Merger assessment*

In assessing a merger, the UK Authorities must consider whether:

- a relevant merger situation has been created (or, for anticipated mergers, will be created); and if so,
- whether or not this situation will lead to a substantial lessening of competition within any market or markets in the United Kingdom for goods or services (SLC).

Further explanation of the approach the UK Authorities take when assessing mergers is available in published guidelines.⁴

1.1.4 *Institutional arrangements*

The assessment of mergers in the UK is conducted as a two-phase process, giving distinct but interrelated roles to the OFT, the CC and, exceptionally in the case of public interest cases, the Secretary of State for Business, Innovation and Skills.

At Phase 1, the OFT obtains and reviews information relating to merger situations. The OFT has a duty to refer to the CC for further investigation any relevant merger situation where it believes that it is or may be the case that the merger has resulted or may be expected to result in a substantial lessening of competition (SLC). A decision by the OFT not to refer may be made unconditionally or be made subject to the provision of undertakings in lieu of reference.

² The meaning of "enterprise" is defined as the activities, or part of the activities, of a business (section 129 Enterprise Act).

³ Further explanation can be found in *Mergers: jurisdictional and procedural guidance* 2009 OFT527, Chapter 3.

⁴ *Merger Assessment Guidelines* 2010, CC2 (Revised) OFT 1254, available on CC and OFT websites.

At Phase 2, the CC investigates mergers that are referred to it by the OFT, the CC having no ability to investigate any merger unless it has been asked to do so. The CC determines the outcome of merger cases referred to it by the OFT. In the event that it finds that the merger will lead to an SLC, the CC decides upon remedies and has powers to implement them.

2. Specific questions

2.1 *Co-operation among competition authorities (international, regional and bilateral)*

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

There have been no conflicts.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

There are no bilateral agreements of the sort described.

However, recently (10th January 2011) the OFT entered into a non binding Memorandum of Understanding on Cooperation with the National Development and Reform Commission of the People's Republic of China which aims to establish and develop co-operation in the enforcement of competition policy and related matters between the participants.⁵

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

UK merger control law stipulates that the UK Authorities examine whether a merger is likely to lead to a substantial lessening of competition within the UK. Mergers capable of review by the UK Authorities therefore include those where one or more of the merger parties is foreign if the firm that is the subject of the merger operates in the UK (and either the turnover or share of supply thresholds are satisfied) whether or not that firm is a UK registered company. It is relatively common for the UK authorities to investigate mergers where one or more of the parties is foreign.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?*

Yes, the UK authorities are very active in international organizations such as the OECD, ICN and EU working groups. We do implement the principles of these where we can. In particular we have regard to the OECD Recommendation of the Council on Merger Review and materials published by the ICN Merger Working Group. The UK Authorities have contributed to many of the ICN materials also (including the Recommended Practices for Merger Notification and Review Procedures, the Merger Remedies Report and Model Confidentiality Waiver).

2.1.5 *Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger*

⁵ http://www.of.gov.uk/shared_of/about_of/international/China.pdf.

operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?

The UK is a member of the European Union and the EU has a mergers working group of which the UK competition authorities are members. The EU mergers working group cannot set rules. However it affords the opportunity for discussion of issues of best practice in international cooperation in merger investigations which result in recommendations for member states.

Various provisions of the EC Merger Regulation enable mergers, in some circumstances, to be transferred to/from the European Commission from/to the Member States at the request of either the merger firms or the Member States (which in the case of the UK is the OFT).

2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

2.2.1 *If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?*

Yes, as explained in Section A, the UK has a voluntary notification regime and mergers capable of review by the Authorities meet either a turnover threshold or share of supply threshold (or both). The appropriateness of these thresholds is periodically reviewed, as is the appropriateness of a voluntary regime.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

Yes, we quite often seek information from parties involved in cross border mergers. In the large majority of instances parties are cooperative. We have also sought and received information from foreign competition authorities via use of a waiver from the merger parties.

2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

We always undertake our own assessment based on the evidence available to us. Previous decision by foreign authorities can be helpful for some aspects of our cases. For example, when developing theories of harm we would consider the issues that the other authority considered, the body of evidence available to the authority and the authority's understanding of the relevant industry sector. This information may be helpful not only to the theories of harm but also to informing the case teams at an early stage of review and so helping to quickly reach a view on the approach that should be taken when carrying out the review. However, as informative as these decisions may be, the case team is alert to the possibility that the UK market and the issues raised by the merger may be different. Even so, the consideration by the European Commission of such factors as market definition and barriers to entry are often helpful to us, particularly in Phase 1 and the early stage of the Phase 2 investigation.

In addition to conducting desk top research, the Authorities will also talk to case teams in foreign authorities if we are investigating the same merger in our respective jurisdictions either in parallel or sequentially or we are believe that it may be useful to discuss with another agency a previous merger review by that other agency.

The issues covered in such conversations will vary according the stage of investigation by the UK Authorities and also the overseas authority. For example, if the UK Authorities are at an early stage, they might wish to explore the functioning of the market. There may be occasions when the Authorities might wish to discuss their analyses and, if remedies are being considered in Phase 2, the teams will typically explore the thinking on remedies in the other jurisdictions (particularly if the reviews are proceeding in parallel or the other jurisdiction is ahead of the CC's investigation).

Such discussions are often helpful and are taken into account in forming our own thinking. They may also influence the design of remedies. Although the possibility of either of the UK Authorities not taking remedial action is not ruled out, the likelihood of no action being taken when either considers that the merger results in an SLC is remote. This is because the UK Authorities' analysis is focused on the competitive effects of the merger in the UK. The UK Authorities would need to be satisfied both that the remedy advanced by another jurisdiction did remedy the SLC found by the UK Authorities and that it would need to be able to enforce compliance of the remedial action itself. However, UK Authorities would take into account the remedy implemented by the foreign authority when devising its remedy.

The UK Authorities are prevented by the Enterprise Act from disclosing sensitive information (including confidential information about the merging parties) unless one of a limited number of gateways apply. Disclosure is permitted, for example, if necessary for the exercise of either of the UK Authorities' functions. Disclosure is also permitted with the consent of the person to whom the information relates. The UK Authorities have sought consent from the parties on several occasions, and when doing so, the consent often being based on the ICN waiver.

2.2.4 Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

The scope for political (or public interest) intervention in qualifying mergers is set out in the legislation. It is confined to areas of media plurality, national security and the stability of the UK financial system. While Ministers may intervene and ultimately decide the outcome of the case taking into account the competition and the public interest issues, Ministers must accept the conclusions of the UK Authorities as to the competitive effects of the merger. If a Minister decides that the merger is against the public interest, the Minister may determine the remedial action to be taken. He may also allow the merger to proceed (i.e. without any remedies being implemented) on public interest grounds notwithstanding the UK Competition Authorities' decision that the merger will result in an SLC.

2.2.5 Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

There are no specific provisions relating to cross-border mergers. There is limited scope for scope for non-competition issues to be considered are in the public interest intervention cases (see II Q4 above).

2.2.6 Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

The issues the UK Authorities face are common across jurisdictions.

2.3 Remedies (types, consultation, monitoring and enforcement)

2.3.1 *Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.*

The Authorities have implemented remedies following review of such mergers. Recent examples include:

- Transocean/GlobalSantaFe (offshore drilling rigs)⁶
- Air France / VLM Airlines (airport slots)⁷
- Nufarm / AH Marks (herbicide products)⁸
- Dräger/AirShields (neonatal warming therapy products)⁹

In Nufarm/AH Marks the CC decided that the merger did result in an SLC and considered whether to require divestment of a factory that was situated in the UK. However, the CC decided to accept a package of behavior remedies. While the CC did not think that divestiture would have been disproportionate, it did take into account the effects of the merger and the expected duration of these, and the fact that, in comparison to the divestiture remedy, the behavioural package of remedies would be more closely targeted at the SLC (ie the fact that the UK based factory manufactured goods for export).

In Dräger the location of the manufacturing assets (i.e outside the UK) limited the CC in its choice of remedies. Undertakings which included a commitment to supply and put in place price controls for 4 years were accepted from both the German parent and the UK subsidiary. Additionally the CC made to buyers to address the harmful effects on competition in the longer term.

2.3.2 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.*

Both the UK Authorities have a strong preference for structural remedies.¹⁰ The OFT is able to implement remedies through undertakings. If it anticipated that implementing a structural remedy might be difficult (this is a possibility for some completed merger cases) it would be likely to refer the merger to the Competition Commission for Phase 2 investigation rather than to implement a behavioural remedy.

The CC guidance on merger remedies sets out three circumstances in which CC may select behavioural remedies rather than structural remedies.¹¹ The first of these circumstances is that “divestiture and/or prohibition is not feasible ...” Dräger/Airshields (see III Q1) is an example where divestiture was not feasible.

2.3.3 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

Enforceability is a relevant consideration when determining the effectiveness of a particular remedy. An additional issue to consider, when accepting undertakings from a company registered in another

⁶ http://www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/2007/516034

⁷ <http://www.oft.gov.uk/OFTwork/mergers/decisions/2008/airfrance>

⁸ <http://www.competition-commission.org.uk/inquiries/ref2008/nufarm/index.htm>

⁹ <http://www.competition-commission.org.uk/inquiries/completed/2004/dragair/index.htm>

¹⁰ CC guidance of remedies in mergers.

¹¹ *Merger Remedies* 2008 CC 8, para 2.16

jurisdiction, is whether the proposed execution of the undertakings (usually by a director or another official of the company) is sufficient for the UK Authorities to be satisfied that undertakings are entered into with full authority.

2.3.4 What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

The UK Authorities have not relied on other countries to assist in the monitoring of remedies. This is most likely the case because care is taken that the remedy addresses the adverse effects of the merger on competition in the UK and also because when designing a remedy, the ability for the UK Authorities to monitor compliance is a relevant factor (whether that involves a formal compliance programme actively monitored by the Authorities or reliance upon third parties bringing potential issues to their attention).

An advantage of structural remedies is that they seldom require long term monitoring. If the CC requires a divestment, it will monitor compliance with the undertakings or Order put in place until such point as the divestiture has been completed and the undertakings discharged or Order complied with. It does this usually by receiving reports from the party subject to the Order or who gave the undertakings (the obligation to provide reports and information is one of the standard obligations of the remedy). In many situations, compliance is also monitored by a Monitoring Trustee who reports regularly to the CC on the progress with the divestiture as well as ensuring hold separate arrangements remain in place. In unusual circumstances where parties have not been able to divest the business/assets with sufficient speed, a Divestiture Trustee may also be appointed.

The OFT has the statutory responsibility for monitoring compliance with remedies and does so via third party comments. Additionally, if the CC puts in place remedies that require ongoing monitoring, it may consider it necessary to require the merger parties to appoint and remunerate a third-party monitor who reports to the OFT. Remedies (i.e. behavioural) may be varied or revoked if there is a material change of circumstance so that they are no longer appropriate. Parties will draw to the OFT's attention the possibility that the remedy should be varied (in turn this will be referred to the CC if the remedy at issues followed a Phase 2 review).

2.3.5 To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?

Both Authorities recognize that coordination may be helpful when considering they are considering remedies to be put in place. In practice it is more likely that that such coordination would occur in Phase 2. As explained, (see *III Q 4*) such co-ordination would likely be for the purpose of appreciating the overseas' authorities proposed remedy. An example of coordination by the CC.

In Nufarm / AH Marks the merger (see *III Q 1*) several agencies, including the CC, were reviewing the merger. The CC held discussions with the Federal Trade Commission, the Competition Bureau, Canada and the ACCC at a number of points during its investigation. This included discussion while the CC was considering the type of remedy to impose.

The CC has developed its practice in respect of remedy design and implementation having regard to the experiences of other jurisdictions, drawing on lessons learnt from the reviews of US agencies, DG Comp and its own work on the effectiveness of past remedies. The CC has published its review of past remedies, *Understanding past merger remedies*.¹²

¹²

http://www.competition-commission.org.uk/our_role/analysis/understanding_past_merger_remedies.pdf.

UNITED STATES

1. Introduction

Recognizing the growth in the number of merger review regimes and the number of multi-jurisdiction merger reviews over the past two decades,¹ the United States antitrust agencies (the U.S. Federal Trade Commission and the Antitrust Division of the Department of Justice) have increasingly cooperated and coordinated with counterpart agencies reviewing the same merger, and worked with sister agencies both bilaterally and through multilateral organizations, to promote cooperation and convergence toward sound merger review policies and practices internationally. We describe below our merger review processes and approaches to cooperation, coordination and, as appropriate, convergence. We discuss cross-border merger review, addressing guiding principles and efforts at convergence, and then describe our approaches to cooperation and coordination during the three main phases of a merger review: the notification, the investigation, and the development of effective remedies to alleviate anticompetitive concerns raised in individual transactions.

2. Merger review in the United States

The principal statute governing mergers and acquisitions in the U.S. is Section 7 of the Clayton Act, which prohibits such transactions “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”² The U.S. antitrust agencies enforce Section 7, and benefit from the pre-merger notification requirements of the Hart-Scott-Rodino Act (“HSR Act”),³ which provides for mandatory pre-merger notification with a waiting period for certain transactions above thresholds relating to the size of the transaction (and, in some instances, the size of the parties).⁴ These thresholds capture the majority of transactions likely to have an impact on a relevant market in the U.S. A filing fee set at levels depending on the size of the transaction is payable upon notification. The U.S. agencies can also challenge under Section 7 transactions that are not subject to the HSR Act’s notification and waiting period requirements.⁵ There are no special rules for cross-border transactions, although jurisdiction is dependent on effects within the territory of the United States.

¹ On the growing trend of transnational mergers and acquisitions see Joseph Wilson, *GLOBALIZATION AND THE LIMITS OF NATIONAL MERGER CONTROL LAWS* (Kluwer Law International 2003), pp. 30-32.

² 15 U.S.C. § 18. Mergers may also be challenged under the Sherman Act as unreasonable restraints of trade or as monopolization or attempts to monopolize (15 U.S.C. §§ 1, 2), but such challenges are rare.

³ Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976, 15 U.S.C. § 18a. *See also* 16 C.F.R. §§ 801, 802, and 803.

⁴ Notification thresholds are adjusted annually to reflect changes in the Gross National Product. In addition, certain types of transactions are exempt from filing requirements, such as acquisitions of certain real property or assets located outside the U.S. that generated sales in or into the U.S. falling below certain dollar thresholds. *See* 16 C.F.R. Parts 802.2, and 802.50.

⁵ The notification thresholds are based primarily on the size of firm and the size of transaction. Accordingly, smaller mergers, which may pose competitive problems in smaller markets, are often not reviewed before

As noted below, the U.S. has a number of bilateral antitrust cooperation agreements that have been used in merger cases, but is not a member of any regional competition organization. The U.S. agencies have been actively involved in merger-related work of both the ICN and OECD, and merger review procedures in the U.S. are consistent with the recommendations of these organizations. Non-competition considerations and political intervention do not play a role in merger review in the U.S.

3. Cross-border merger review: Guiding Principles

The goal of any merger review program is to identify mergers that may harm competition in the reviewing jurisdiction, and prevent them from going through in that harmful format. We have found that the vast majority of mergers reviewed by the U.S. antitrust agencies do not harm competition: approximately 95 percent of transactions notified to the U.S. agencies have not resulted in further investigation.⁶ For transactions requiring more in-depth investigation, the agencies have developed policies and procedures to identify and remedy competitive issues as quickly as possible,⁷ and have shared their experience with other antitrust enforcement agencies, new and old.

Now that over 100 jurisdictions have merger laws, it is particularly important that agencies seek to ensure that their processes do not create conflicts or impose inconsistent demands for parties that are before more than one agency. As Assistant AG Varney noted recently, “In today’s world, competition agencies can no longer cooperate on investigations with only one or two other jurisdictions and call it a day.”⁸ In addition, learning from the experience of others in handling similar issues can, in some cases, help to identify best practices.

Through our technical cooperation work, the U.S. agencies have had the opportunity to send our attorneys and economists to work side-by-side with our counterparts in many agencies in Central and Eastern Europe, South and Central America, Africa, and Asia over the past two decades.⁹ The U.S.

they occur. The agencies, however, also may challenge consummated mergers, and will challenge them if they suspect that a transaction has harmed or is likely to harm competition. Since challenging consummated mergers requires undoing a completed deal, it poses particular difficulties with regard to remedies and coordination with other nations’ enforcers.

⁶ Such experience is consistent with that of other OECD members. See OECD, Analysis and Discussion of Selected Responses to the Questionnaire on Harmonisation of Merger Control Procedures (DAFFE/COMP/WP3(2002)14) (January 10, 2003).

⁷ Any person filing a merger for review by the U.S. antitrust agencies may request “early termination”, i.e. that the waiting period be terminated before the statutory period expires. See <http://www.ftc.gov/bc/earlyterm/2008/11/index.shtml>. Statistics show that most filers now request early termination of the waiting period. 84% of mergers filed in the U.S. in 2009 were subject to early termination requests, which were granted in 69% of these cases – see the 2009 Hart-Scott-Rodino Annual Report available at <http://www.ftc.gov/os/2010/10/101001hsrreport.pdf> at p. 5; see also the same report at p. 16 (“[a]lways cognizant of the program’s impact and effectiveness, the enforcement agencies continue to seek ways to speed up the review process”).

⁸ Christine A. Varney, Assistant Attorney Gen., U.S. Dep’t of Justice, *International Cooperation: Preparing for the Future*, remarks at the Fourth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 21, 2010).

⁹ See, then FTC Chairman, Deborah Platt Majoras, *Looking Forward: Merger and Other Policy Initiatives at the FTC*, Remarks at the ABA Antitrust Section Fall Forum (November 18, 2004) available at <http://www.ftc.gov/speeches/majoras/041118abafallforum.pdf> (“with antitrust regimes continuing to spread around the globe, the FTC will continue to devote significant resources to assisting new agencies as they strive to formulate and implement sound competition policy”).

agencies also host visitors from other agencies that wish to learn about U.S. antitrust experience or to study particular sectors or enforcement methods. Similarly, through the FTC's International Fellows program, officials and staff of many sister agencies have worked with FTC case teams for three to six month periods to experience first-hand how FTC competition investigations are structured, conducted and managed. The focus of the FTC and DOJ technical cooperation programs is on the development of sound competition policy principles and institutions, recognizing that no single model is suitable for all circumstances, given different legal, cultural, and economic contexts.

Multilateral organizations such as the OECD and the International Competition Network (ICN) have provided further opportunities for older and newer agencies to share their experiences with each other to the benefit of all. Several multilateral organizations facilitate dialogue and convergence toward sound competition policy and enforcement, particularly the OECD and the ICN, the United Nations Conference on Trade and Development (UNCTAD) and regional organizations such as the Asia-Pacific Economic Cooperation (APEC). The United States antitrust agencies participate in each of these fora. Recently, the U.S. Federal Trade Commission, together with competition agencies from Mexico, Chile and Panama, led the founding of the Inter-American Competition Alliance to foster enforcement cooperation in the Americas.¹⁰ The Alliance plans to cover merger practice in a future conference call, and both U.S. agencies have actively participated in previous calls.

Sharing merger review experience among competition agencies has led to the development and publication of international best practices in this area. These include the OECD Council Recommendation on antitrust enforcement cooperation ("OECD Cooperation Recommendation"),¹¹ the OECD 2005 Council Recommendation on Merger Review,¹² the ICN's Guiding Principles and Recommended Practices on Merger Notification and Review Procedures,¹³ and the ICN's Recommended Practices on Merger Analysis.¹⁴ Exchange of views and experience, bilaterally and through multilateral organizations, also has allowed the U.S. agencies to help sister competition agencies to work with other institutions, such as the legislature, regulators, courts and other government bodies, to build a "culture of competition" in their jurisdictions.¹⁵ Antitrust agencies can also benefit from undertaking competition advocacy within their own governments to help legislators understand the benefits of efficiency and consumer-welfare focused merger review. The need for such advocacy may be more pronounced in jurisdictions with relatively new

¹⁰ See <http://www.cfc.gob.mx/index.php/CONTENIDOS/acerca-de-nosotros.html>.

¹¹ Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade, *available at* http://www.justice.gov/atr/public/international/docs/council_recs.htm. The Recommendation was first adopted in 1967, and has been revised several times since.

¹² *Available at* <http://www.oecd.org/dataoecd/3/41/40537528.pdf>. The Department of Justice chairs the OECD Working Group that drafted this recommendation.

¹³ *Available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

¹⁴ *Available at* <http://www.internationalcompetitionnetwork.org/uploads/library/doc591.pdf>. The U.S. agencies led the efforts to create both sets of recommended practices; the Department of Justice co-chaired the Merger Working Group and the Federal Trade Commission chaired the Notification and Procedures Sub-Group.

¹⁵ See, for example, Promoting a Culture of Competition, Remarks by then-FTC Chairman, Deborah Platt Majoras, Before the Chinese Academy of Social Sciences (April 2006) *available at* <http://www.ftc.gov/speeches/majoras/060410chinacompetitionadvocacy.pdf>.

competition regimes, and in which the importance of competition is not yet enshrined in the social and legal culture, though similar challenges are faced by all enforcement agencies.¹⁶

4. U.S. cooperation with other Competition Agencies on merger review

U.S. law does not provide for consideration of a merger's competitive effects that do not affect U.S. commerce. However, as mergers reviewed by the U.S. agencies increasingly involve non-U.S. parties, U.S. parties with assets located abroad, relevant evidence located abroad, and/or parallel review in other jurisdictions,¹⁷ the United States antitrust agencies often work with their international counterparts to investigate and remedy potentially anticompetitive mergers.¹⁸ The U.S. antitrust agencies cooperate with other competition agencies through formal and informal agreements and arrangements, although cooperation also takes place in the absence of such agreements. The United States has bilateral antitrust cooperation agreements with eight jurisdictions: Australia, Brazil, Canada, the European Union, Germany, Israel, Japan, and Mexico.¹⁹ In addition, the United States antitrust agencies recently signed a Memorandum of Understanding with the Russian Federal Anti-monopoly Service.²⁰ The agreements all involve cooperation on significant competition policy and enforcement developments in the respective jurisdictions, and therefore are also applicable to cross-border mergers.

Under these formal agreements, as well as through informal cooperation under the auspices of the OECD Cooperation Recommendation, the United States agencies may notify other nations of their enforcement actions that implicate other nations' important interests, coordinate parallel investigations, and/or provide investigative assistance. This type of cooperation enables the agencies to identify issues of common interest, share their competitive analyses, and seek to avoid inconsistent outcomes. There have been few cases of "conflict" between decisions of one of the U.S. antitrust agencies and the decision of a non-U.S. agency reviewing the same merger (e.g., *Boeing/McDonnell Douglas*; *GE/Honeywell*; *Sun/Oracle*); those rare instances of conflict have led to increased efforts at mutual understanding, consultation, and cooperation. For example, in 2001, following *GE/Honeywell*, the European Commission and the U.S. agencies formed a bilateral working group that concentrated its efforts on several aspects of merger analysis including efficiencies and vertical and conglomerate effects.

¹⁶ See OECD Secretariat Note, Competition Advocacy: Challenges for Developing Countries, available at <http://www.oecd.org/dataoecd/52/42/32033710.pdf>; the 2009 ICN Report on "Assessment of ICN Members' Requirements and Recommendations on Further ICN Work on Competition Advocacy," available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc362.pdf> (that reflects advocacy experience of both old and new competition agencies); and the ICN Toolkit for Effective Advocacy, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc361.html>.

¹⁷ See Wilson, *supra* note 1, p. 52.

¹⁸ See e.g. the FTC 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, available at <http://www.ftc.gov/opp/gpra/2009parreport.pdf>, p. 14, demonstrating that during the years 2007-2009, the FTC cooperated with non-U.S. competition authorities in 61, 79, and 87 cases, respectively. The DOJ has a similar record of cooperation.

¹⁹ The agreements are available at <http://www.ftc.gov/oia/agreements.shtm> and at http://www.justice.gov/atr/public/international/int_arrangements.htm. Under U.S. law, these agreements are "executive agreements," which are formal, binding international agreements.

²⁰ Available at <http://www.ftc.gov/os/2009/11/091110usrussiamou.pdf>. To date, the agreements have been between the governments of the U.S. and these respective countries, while the Memorandum was signed between the U.S. antitrust agencies and the Russian antitrust agency.

Below, we outline the specific measures in place for U.S. agencies to cooperate in cross-border merger review, including notification, contact with other agencies to share information and analysis, and the development of remedies, with recent examples of cooperation.

4.1 *Making contact: The beginning of cooperation*

Once an agency opens a merger investigation,²¹ its staff determines whether its enforcement action may affect non-U.S. interests -- for example, because one of the parties is based outside the U.S., or relevant U.S.-owned assets are located outside the U.S. Pursuant to a bilateral agreement or the OECD Recommendation, the U.S. agency will notify the relevant jurisdictions; notification can also occur where appropriate in the absence of a bilateral agreement or OECD obligation.²² Historically, such notifications were formally conveyed from the U.S. government to the other government. However, given review timetables and the relations developed between the antitrust agencies, agency case teams when appropriate will contact each other informally, *e.g.* via e-mail or telephone, to determine whether they will be reviewing the transaction concurrently. Some of our arrangements, *e.g.*, the Brazil and Mexico bilateral agreements, have enhanced communication by providing for direct contacts between antitrust agencies.

We believe it is useful for antitrust agencies reviewing mergers with cross-border implications to ask the merging parties to identify all other reviewing jurisdictions, as recommended in the OECD's 1994 Wood-Whish report.²³ For example, a preliminary item on the HSR Notification and Report Form asks filers to list voluntarily any international competition authorities that have been or will be notified of the proposed transaction. Further, in instances in which FTC or DOJ decide to investigate a transaction, staffs routinely follow up with the parties to identify other reviewing agencies and consult with them to determine whether the merger raises common concerns. Early notification is useful in allowing the respective agencies time to address mutual concerns before the review process of one agency has concluded.

4.2 *Cooperation during investigations*

Many transnational mergers entail review of the same or similar competitive issues in more than one jurisdiction. Cooperation, including the sharing of information, permits more complete communication among the reviewing agencies and the coordination of their respective investigations, with the aim of improving the analysis and achieving consistent results, where appropriate. Agencies routinely share non-confidential information, such as public information, and what is referred to as "agency confidential" information -- information that the agency does not routinely disclose publicly but as to which there are no statutory disclosure prohibitions. Examples of "agency confidential" information include general staff views on market definition, competitive effects, and remedies. This type of consultation can entail frequent contact between U.S. staff and their international counterparts and helps to identify common areas of concern.²⁴ Pursuant to the pertinent bilateral agreement or OECD Recommendation, the information is

²¹ To avoid internal conflict or duplication, only one U.S. agency investigates a particular antitrust matter under an informal "clearance process" whereby the other agency defers to the relative expertise of the investigating agency in the affected markets.

²² Over the years, the United States has provided notice of antitrust actions to dozens of jurisdictions.

²³ Richard Whish & Diane Wood, *MERGER CASES IN THE REAL WORLD – A STUDY OF MERGER CONTROL PROCEDURES* (OECD, 1994) available at www.oecd.org/dataoecd/4/40/31587583.pdf.

²⁴ The United States and the EU antitrust agencies have established a specific set of Best Practices on Cooperation in Merger Investigations (available at <http://www.ftc.gov/opa/2002/10/mergerbestpractices.shtml>) to govern the frequent simultaneous review of the same transaction. In keeping with the 1991 US-EC bilateral agreement, these best practices are designed to further enhance cooperation in merger review and to avoid conflicts in the enforcement of our respective competition laws. They are also intended to

shared on the condition that the recipients maintain the information in confidence. The U.S. agencies often seek information located outside the U.S. from parties involved in cross-border mergers; parties often provide such information on a voluntary basis, in an effort to expedite the process of reviewing the merger.

Waivers. U.S. law generally prohibits the agencies from sharing confidential business information obtained during a merger investigation unless the submitter voluntarily waives its confidentiality rights.²⁵ The parties to a proposed merger (as well as third parties) can facilitate consistent resolution of parallel investigations by granting reviewing agencies limited waivers of confidentiality regarding particular documents or information.²⁶ A waiver allows the authorities to discuss information that has been submitted to one of the reviewing agencies,²⁷ and could also permit joint interviews, which saves time for both the reviewing agencies and business personnel, but would not permit wider disclosure to third parties or the public. The sharing of confidential business information pursuant to a waiver facilitates the identification of competitive concerns in each reviewing jurisdiction and thus reduces the risk of inconsistent outcomes. Parties are encouraged to voluntarily waive the protection of confidentiality restrictions to allow agencies to share confidential information with each other²⁸ (recognizing that this is up to the parties to decide).

In some cases, cross-border cooperation among competition agencies has led a U.S. agency to close its investigation in light of remedial action taken elsewhere. For example, in the *Cisco/Tandberg* acquisition, reviews by the U.S. Department of Justice and the European Commission (EC) were aided by waivers from the parties and industry participants. As a result, the agencies shared information and assessments of likely competitive effects and potential remedies in the worldwide videoconferencing market. The DOJ concluded that the transaction was not likely to be anticompetitive in light of

enhance the efficiency of the agencies' respective investigations, reduce burdens on merging parties, and increase the overall transparency of the merger review process.

²⁵ In the United States, absent a waiver, most of the information submitted by the merging parties or third parties during an antitrust investigation cannot be disclosed, including the HSR forms and materials responsive to a request for additional information. This practice comports with the confidentiality provisions of the OECD Cooperation Recommendation and ICN Guiding Principles and Recommended Practices on Merger Notification, *supra* notes 11 and 13. See art. 10 of the OECD Recommendation and art. IV.F of the ICN Guiding Principles and Recommended Practices. Disclosure of confidential business information also may be expressly permitted by an Antitrust Mutual Assistance Agreement under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. §§ 6201-6212. This law allows the United States government to enter into agreements with other governments that enable its antitrust agencies to share otherwise confidential antitrust evidence (although not HSR material) with non-U.S. antitrust authorities, to use their investigative powers to collect evidence for use by the non-U.S. authority, and to withhold from public disclosure any antitrust evidence obtained from the other authority. The United States currently has only one such agreement, with Australia, which has been used rarely.

²⁶ The ICN report, *Waivers of Confidentiality in Merger Investigations*, contains several model waivers, available at www.internationalcompetitionnetwork.org/uploads/library/doc330.pdf. The U.S. agencies have also developed model waivers for parties to a proposed merger and for third parties involved with transactions.

See <http://www.ftc.gov/oia/waivers/index.shtm> and <http://www.justice.gov/atr/public/international/206543.htm>.

²⁷ These materials are protected from disclosure by law and the penalties for unlawful disclosure are severe. See 15 U.S.C. § 50.

²⁸ See Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm> ("we should use all the tools available to us to encourage the parties to work with the agencies in parallel, and to make clear to them that they have *nothing* to gain from trying to game the system").

commitments made by Cisco to the EC facilitating interoperability between its products and those of other companies. Taking account of Cisco's commitments to the EC, along with market factors such as the evolving nature of the videoconferencing market, led the DOJ to close its investigation.²⁹

4.3 *Fashioning effective merger remedies*

Under U.S. merger law, the antitrust enforcement agencies may seek to remedy the likely anticompetitive effects of a proposed merger by requesting a federal court order blocking the merger.³⁰ In practice, because many transactions have aspects that do not raise competitive concerns, the parties often negotiate a divestiture of less than all the transaction assets, to allow the non-problematic portions of the transaction to proceed. This approach has become routine, and is in line with the general principle that merger remedies should be tailored to resolve the competitive problems created by the merger but should not block the parts of the transaction that are unlikely to substantially reduce competition.³¹

Frequently, mergers that threaten competitive harm can be modified in ways that avoid the threatened harm yet preserve the procompetitive or competitively neutral aspects of the transaction. Indeed, it has been the case for many years that settlements occur in the vast majority of merger matters where the U.S. antitrust enforcement agencies find threatened harm to competition. The majority of these settlements involve structural remedies -- which typically involve the sale of physical assets by the merging firms -- although in appropriate circumstances the U.S. antitrust enforcement agencies obtain behavioral remedies - which limit the merged firm's postmerger business conduct. In all cases, the agencies seek to fashion effective relief that "fixes" the particular harm that would likely occur from the merger. The purpose of a merger remedy is to preserve (in the case of a proposed merger) or restore (in the case of a consummated merger) competition in the market, not to enhance it.

With regard to transnational mergers, the timing and procedures for negotiating merger remedies typically differ among the reviewing jurisdictions.³² As a result, cooperation and communication among reviewing agencies help to avoid inconsistent obligations and manage different timetables for decision, e.g., with regard to divestiture packages or upfront buyers.³³ As with all merger remedies, the agencies are careful in transnational mergers to monitor the remedies imposed on the parties and ensure that they are properly implemented. Cooperation and coordination with other reviewing jurisdictions extends to this phase of the merger process as well; for example, the agencies may coordinate with another reviewing

²⁹ See March 29, 2010 press release, *available at* http://www.justice.gov/atr/public/press_releases/2010/257173.htm.

³⁰ Of course, a permanent injunction from a federal court is not available if the merger has already occurred. In such cases, divestiture may be ordered.

³¹ See ICN Recommended Practices on Merger Notification and Review Procedures, *supra* note 13, Art. XI.A, comment 2.

³² There are also some procedural differences between the FTC and the Antitrust Division, although both agencies enforce the same legal standard and are governed by the same timing constraints under the HSR Act. For a fuller discussion of the processes of each agency, see Naomi Licker and Jeanine Balbach, "Best Practices for Remedies in Multinational Mergers," *Competition Law International*, vol. 6 No. 2 (September, 2010), pp. 22-28.

³³ See e.g., *Schering-Plough/Akzo (Organon)*, FTC complaint, analysis and decision *available at* <http://www.ftc.gov/os/caselist/0710132/index.shtml>. For other examples of case cooperation see then FTC Chairman Timothy Muris, *Merger Enforcement in a World of Multiple Arbiters*, Remarks before the Brookings Institution (December 21, 2001), pp. 12-13 *available at* <http://www.ftc.gov/speeches/muris/brookings.pdf>.

agency in the choice of a common divestiture or monitoring trustee and in approving the purchaser of assets divested as part of a remedy.³⁴

Cross-border mergers may often require cross-border remedies in order to effectively prevent anticompetitive effects. Consequently, cooperation between competition agencies is often key in such scenarios.³⁵ We have learned this through experience. In 1990, Institut Merieux, the dominant U.S. seller of rabies vaccine, sought to acquire Connaught BioSciences, a Canadian firm. Connaught was one of two potential entrants into the market. Failing to consult or coordinate with Canadian counterparts, the FTC staff negotiated a consent order that required Institut Merieux to lease Connaught's Canadian-based rabies vaccine business to an FTC-approved buyer for 25 years. Had the agencies coordinated, the FTC staff would have learned that the remedy was problematic for the Canadian authorities. The Canadian government protested that the remedial order would reduce availability of rabies vaccine in Canada. In response, the FTC modified its order to require Canadian government approval of the lessee.³⁶ This case serves as an example of the importance of coordinating with international counterparts, as antitrust remedies may have unintended harmful consequences in other jurisdictions.

Inter-agency cooperation in the *Panasonic/Sanyo* merger presents a case in point. This merger between two Japanese companies was reviewed by several competition authorities, and close cooperation among the EC, the Japan Fair Trade Commission ("JFTC"), Canada, and the FTC was made possible through bilateral agreements and waivers from the parties to allow the sharing of confidential information. The FTC staff identified competitive concerns in the worldwide market for portable nickel metal hydride (NiMH) batteries, which led to an FTC consent order requiring divestiture of Sanyo's NiMH manufacturing facility in Japan. The EC identified competitive concerns in two additional battery markets, leading to the divestiture of an additional production facility for these batteries. One of these markets was also of concern to the JFTC, which subsequently cleared the merger based on the undertakings with the FTC and the EC.³⁷

³⁴ See, for example, *U.S. v. General Electric Co. and Instrumentarium OYJ*, available at <http://www.justice.gov/atr/cases/general.htm>; *In re BASF SE*, available at <http://www.ftc.gov/os/caselist/0810265/index.shtm>; and *In Re Agilent Technologies*, available at <http://www.ftc.gov/os/caselist/0910135/index.shtm>.

³⁵ See Christine A. Varney, *International Cooperation: Preparing for the Future* (September 21, 2010), available at <http://www.justice.gov/atr/public/speeches/262606.htm>; Christine A. Varney, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (Feb. 15, 2010), available at <http://www.justice.gov/atr/public/speeches/255189.htm>; Rachel Brandenburger, *Transatlantic Antitrust: Past and Present* (May 21, 2010), available at <http://www.justice.gov/atr/public/speeches/260273.htm>.

³⁶ See *In re Institut Merieux*, Docket C-3301, Order Vacating Order to Show Cause, 116 F.T.C. 849, available at [http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_\(JANUARY_-_DECEMBER_1993\)PAGES_740-863.pdf#page=110](http://www.ftc.gov/os/decisions/docs/vol116/FTC_VOLUME_DECISION_116_(JANUARY_-_DECEMBER_1993)PAGES_740-863.pdf#page=110) and Modifying Order available at [http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_\(JANUARY_-_JUNE_1994\)PAGES_419_-514.pdf#page=55](http://www.ftc.gov/os/decisions/docs/vol117/FTC_VOLUME_DECISION_117_(JANUARY_-_JUNE_1994)PAGES_419_-514.pdf#page=55). Ultimately, no lessee could be found and the FTC set aside the remedial order.

³⁷ The FTC's press release, available at <http://www.ftc.gov/opa/2009/11/sanyo.shtm>, noted the FTC's cooperation with counterpart agencies in Japan, Canada and the EU. The U.S. agencies also actively coordinate with sister agencies to ensure complementarity of their respective remedies, for example to avoid conflicting remedies with respect to the same asset. See, e.g., *Ciba-Geigy/Sandoz*, materials available at <http://www.ftc.gov/os/caselist/9610055.shtm>, and discussion of this point in John Parisi, ENFORCEMENT COOPERATION AMONG ANTITRUST AUTHORITIES, p. 15, available at <http://www.ftc.gov/oia/speeches/1008enforementantitrust.pdf>.

The review last year of the merger between *Ticketmaster* and *Live Nation* is another recent example of effective cooperation, this time between the Antitrust Division and the Canadian Competition Bureau. The Division coordinated closely with the Bureau at the investigative stage, and the two agencies worked closely together to obtain a remedy, announced the same day, that preserved competition across North America.³⁸ The proposed relief in *Ticketmaster/Live Nation* is both structural and behavioral. It is designed to give concert venues more choice for their ticketing needs and promote incentives for competitors to innovate and discount. In particular, Ticketmaster -- the world's largest ticketing company - is required to divest ticketing assets. Ticketmaster must also license its ticketing software to AEG, providing AEG the opportunity and incentive to compete in primary ticketing both in its own venues and third-party venues, thereby opening the door for AEG to become a vertically-integrated competitor with incentives similar to the merged firm. In addition, Ticketmaster was required to subject itself to ten-year anti-retaliation provisions that prohibit anticompetitive bundling.

5. Conclusion

Cross-border merger review presents challenges even for antitrust agencies with well-established policies and procedures for international cooperation. The U.S. antitrust agencies will continue to work to develop strong relationships with counterpart agencies, seeking to promote and deepen cooperation with both established and younger competition agencies in the area of merger review, with the goal of promoting efficient and effective cross-border merger review. We also will continue to work to identify appropriate areas of convergence on best practices as regards the substantive review of mergers, through organizations such as the OECD. Such best practices are valuable tools for both newer and established antitrust agencies alike.

³⁸

U.S. Dep't of Justice, *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.* (Jan. 25, 2010), available at http://www.justice.gov/atr/public/press_releases/2010/254540.pdf; Press Release, Canadian Competition Bureau, *Competition Bureau Requires Divestitures by Ticketmaster-Live Nation to Promote Competition* (Jan. 25, 2010), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03191.html>.

UZBEKISTAN¹

1. Introduction

The procedures of the implementation of the competition law, such as merger control are strictly implemented usually in large economies. Smaller economies, such as Uzbekistan do not engage in significant merger control, because there is an assumption that large firms are better able to compete in international markets. Nevertheless, structural concentration in the weak merger control policy eventually raises competition concerns, and the most recent proposals for changes and additions to the laws on competition (e.g. in Canada, the United Kingdom, France, Spain and other EU countries) have sought to focus more on merger control issues. Active merger control requires mandatory notice, because the costs of breaking the illegal transaction *ex post facto* usually make it more inefficient and costly.

Antimonopoly regulation in the Republic of Uzbekistan is aimed to protect competition in the commodity markets of Uzbekistan and requires business entities that want to merge or acquire significant part (share, etc.) of another competitor (entity):

- to obtain a preliminary consent of State Committee of the Republic of Uzbekistan on *Demonopolization and Development of Competition* (later in the text as AMC – Antimonopoly Committee) for accomplishing transactions on:
 - Reorganization or liquidation of commodity markets' participants which lead to occurrence of commodity market's participant holding dominant position.
 - Purchase of assets of a commodity market participant by another participant, including transactions on:
 - Acquisition by an individual (group of individuals) of voting shares (participatory shares) of the commodity market's participant entitling the purchaser to dispose of more than thirty five (35) per cent of indicated shares (participatory shares);
 - Acquisition by an individual (group of individuals) of rights allowing to define terms of conduct of business by commodity market's participant or to perform functions of its executive body.

The above mentioned transactions require a preliminary filing consent from the AMC. The waiting period for clearance shall not exceed thirty (30) days from the moment of submission of necessary documents from the applicant.

There is also ten (10) days *post factum* notification of the AMC in the event of change of value of the charter capital of corporate entity if it results in the increase of shareholding of a shareholder already holding more than thirty five (35) per cent of total shares in the charter capital.

¹ Prepared by the Director of Antimonopoly Policy Improvement Center of Uzbekistan – Dr. G.Kholjigitov.

- To inform the antimonopoly body of the following facts:
 - Merger and association of business entities;
 - Participation of individuals in executive bodies or supervisory boards of two or more business entities which total book cost of assets exceeds two thousand times amount of minimum wage, or business entities entered the register on the same commodity group or entered the register on groups of commodities of different stages of the same production-distribution process.

The M&A transactions in Uzbekistan have deadlines for their filing. There is a 15-day term for notification of the AMC relating to mergers and accessions. The notification must be filed by either founders of the related companies or bodies or individuals making a decision on the merger or accession. The above mentioned notification is a *post factum* notification.

2. Main normative acts of the Republic of Uzbekistan regulating antimonopoly issues

- Law of the Republic of Uzbekistan “On competition and limitation of monopolistic activity in commodity markets” dated 27.12.1996:
 - covers relationships influencing competition in commodity markets of Uzbekistan;
 - also applies in cases when actions and agreements made outside the Republic of Uzbekistan lead or may lead to limitation of competition or entail other negative consequences in commodity markets of the Republic of Uzbekistan³;
 - prohibits activity of entities occupying dominant position in commodity market of the Republic of Uzbekistan, i.e. holding a share of thirty five (35) and more per cent in definite market aimed at:
 - the abuse of competition conditions (including establishment of monopoly high or monopoly low prices, intrusion of unfair terms on concluding agreements to contractors, creation of obstacles to access to commodity market for other individuals);
 - making cartel agreements (including agreements aimed at establishment and maintenance of fixed prices or establishing price limitations for resale of goods or prohibiting sale of goods produced by competitors);
 - regulates issues of merger and takeover of business entities;
 - contains other regulations.
- Instruction “On order of control over acquisition of more than thirty five (35) per cent of business entity’s shares” (approved by the resolution of the State Committee on Demonopolization; registered by the Ministry of Justice of the Republic of Uzbekistan No.1896 of 05.02.2009), which establishes the order of AMC’s control over acquisition by investor of more than thirty five (35) per cent of business entity’s shares as well as of each next acquisition.

3. Recent analysis of current merger control practices in Uzbekistan has identified a number of problems that adversely affect the efficiency of regulation in this sphere. In this regard, the merger control is about to:

- Introduce specific criteria of the merger transaction under consideration and to include them within the scope of all mergers and acquisitions of business entities;
- Improve, supplement and unify all types of economic concentration (merger, takeover, acquisition) of the mandatory pre-notification, and the order of cases on them, dramatically changing the provisions of Articles 14, 15 of the Law on Competition;
- Lower the bar the acquisition of 35% to a blocking stake of 25% and significantly increasing the notification threshold;
- Provide a legislative mechanism in which AMC reserves the right to review mergers, which are below the threshold level, but raise serious concerns / suspicions of the possibility of providing a significant impact on the competition;
- Implement a flexible system of review of applications for merger, developing a mechanism for granting exceptions and conditional consent, as well as monitoring and taking actions on the deals that were given the conditional agreement;
- Change the mechanism for raising questions (issues) on the merger of economic entities, establishment of associations of various types (holding companies, associations, companies, etc.) on the initiative of the government of Uzbekistan;
- Implement the provisions on the deadline of the AMC's decision regarding the merger control and time period for the AMC's possible claims to the M&A parties.

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- BIAC ¹ --

1. Introduction

The author and the Business and Advisory Committee (BIAC) to the OECD appreciate the opportunity to submit these comments to the OECD Global Forum on Competition concerning the challenges faced by developing and emerging economies in the area of cross-border merger control.

The Global Forum's consideration of this topic is particularly timely. New enforcement agencies continue to proliferate, and this expansion in competition law enforcement—most often accompanied by merger control—shows no sign in abating. Concurrently, there has been a recent increase in cross-border mergers and acquisitions, as part of a broader increase in M&A activity in general and as a consequence of the increasing pace of globalization of business, as many OECD Members and other countries gradually emerge out of recession.

As an initial observation, the challenges arising from cross-border mergers are not limited to competition agencies in developing and emerging economies. The coordination of cross-border merger control is complex for all competition law enforcement agencies, regardless of their size and experience. These complexities are likely to be most attenuated, however, with smaller or relatively inexperienced competition law agencies, due to fewer resources and less relevant experience in merger review. Not all of these smaller or relatively inexperienced competition law enforcers come from developing and emerging economies. Similar challenges may be faced by relatively newly established competition law enforcers in transition economies (such as Russia, Ukraine, or China) and new competition law enforcers in relatively developed economies (such as Jersey or Mauritius). Thus, the proper focus of this discussion should be on challenges in cross-border merger control faced by developing and emerging *agencies*, which are not necessarily limited to developing and emerging *economies*.

On the whole, great strides have been made in the past decade in identifying the common problems associated with the review of mergers by new and evolving competition regimes. Numerous jurisdictions have built their regimes or made changes to their existing notification and merger review mechanisms in light of best practice recommendations authored initiated by the OECD Competition Committee and carried forward in more detail by the ICN Mergers Working Group. These have sometimes necessitated amendments to laws, regulations and rules of practice and reflect the dedication and commitment of agency officials to improve the efficiency and effectiveness of their process. These efforts are to be commended. With regard to other jurisdictions, however, enough has not been done by way of implementation of best practices, largely as a result of a failure of many jurisdictions to consider the externalities of their systems with respect to multi-national mergers. In some cases, there is a failure to

¹ This paper is submitted by John M. Taladay as a panelist for this session and on behalf of the Business and Industry Advisory Committee of the OECD. Special thanks are made to Chuck Webb, a partner at Howrey LLP and former Executive Director of the Jersey Competition Commission, who provided significant assistance in the preparation of these comments.

realize that their practices are not “best” or a dismissal of such best practices as inconsequential to an efficient global scheme for merger review.

In other cases, the cause of the shortfall stems instead from a fundamental capacity problem. Small economies and developing agencies often do not have the resources necessary to identify and adopt a comprehensive merger review mechanism in view of a global economy. These jurisdictions need help from more established agencies and experts and need the opportunity to observe and share in the experience of other agencies – not just developed agencies – that have faced similar problems and successfully have undertaken efforts to implement and amend their procedures to reflect best practices.

In addition to training provided by more experienced agencies, smaller agencies may take a number of steps to conserve their resources engaged in merger review. These steps include focusing their analysis exclusively on the potential economic effects arising from the transaction in local markets (while ignoring other, noneconomic considerations); cooperating with larger, more experienced agencies that may be reviewing the same transaction; and, potentially, free-riding on remedies imposed on the transaction by more experienced agencies, if these remedies are sufficient to address competition concerns in local markets.

It is important that jurisdictions representing economies and agencies at all levels of development undertake the challenge posed by the process of implementing merger review schemes that are compatible with the scores of established merger regimes already in operation around the world. Like other areas of competition law enforcement in the field of dominant-firm conduct or cartel conduct, a poor review system can have far-reaching effects that can slow or deter efficiency enhancing conduct, including cross-border mergers. It is in the interest of all who participate in the global economy, including consumers and workers, to ensure that this does not occur.

2. Challenges faced by newer competition agencies in cross-border merger control

This is not the first time the Global Forum has considered the challenges faced by younger competition law agencies. In February 2009, the Global Forum considered the challenges faced by younger agencies in competition law enforcement in general.² Many of the common challenges considered in that Roundtable included “meager resources for the new agency, limited indigenous expertise on the subject, tepid support for competition policy (what today is called “competition culture”), deficient judicial systems and limited access to business information.”³

Unlike other areas of competition law enforcement such as cartels or dominance, merger control relies predominantly on an *ex ante* assessment of likely economic effects. This sometimes requires a complex legal and economic assessment of competitive conditions in the affected sector before and after the proposed merger or acquisition. In addition, unlike other areas of competition law enforcement, with merger review timing is of the essence, often as a matter of statutory imperative. Enforcement agencies most often have to conduct their investigations and make decisions under strict timetables set out in national laws or agency guidelines. These time-frames reflect the business reality of the pressure the parties are under in financial markets to conclude the merger or acquisition. In light of these broader ramifications, the challenges faced by younger competition enforcers, and the consequences of their action (or inaction), can be particularly acute for cross-border merger control.

² OECD Global Competition Forum, *Challenges Faced by Young Competition Agencies*, Note by the Secretariat (Feb. 11, 2009), available at <http://www.oecd.org/dataoecd/2/53/42073659.pdf>.

³ *Id.* at 3.

One of the main challenges to younger competition law agencies identified in the February 2009 Roundtable was a lack of capacity, in terms of financial and human resources. Jurisdictions establishing competition law enforcement systems may have limited domestic expertise in competition law enforcement.⁴ Often, as a newer agency's staff gains relevant experience through casework and training, the agency faces the additional pressures of retaining its key, experienced staff members.⁵ These problems are made worse if the agency lacks the financial resources necessary to recruit and maintain qualified and experienced staff. In the February 2009 Roundtable several newer competition law agencies cited challenges arising from inadequate financial resources contributing to high staff turnover.⁶

Problems in capacity can be made worse for a younger competition law agency by a lack of a competition culture in the jurisdiction. A lack of a competition culture can also increase the risk that local political interests may interfere with effective competition law enforcement and potentially favor local interests or noneconomic considerations – risks discussed in more detail below. Insufficient awareness of competition law concepts, precedents and analytical tools may also plague a country's judiciary, giving little comfort to both the reviewing agency and the parties.⁷ The February 2009 Roundtable found a lack of a basic competition culture to be a problem in virtually every country implementing a new competition law.⁸

The potential problems of a lack of resources and a sufficient competition culture are typical across all areas of effective competition law enforcement for newer agencies. However, these challenges become greater in the context of cross-border merger review, which as noted above is typified by complex *ex ante* legal and economic assessments made under strict time pressures. In this regard, the following observations can be made:

- The review and approval of mergers and acquisitions within strict time-frames is greatly facilitated by *both* established procedures and case handling experience. Newer competition enforcement agencies may not have detailed case handling procedures, or may be in the process of developing them. Even if procedures exist on paper, agency staff may have a lack of experience in dealing with them in actual merger cases. While training from bilateral exchanges with more experienced agencies, as well as best practices learned from forums such as the OECD and ICN are extremely valuable, they are no substitute for actual case handling experience.
- Newer agencies may also lack industry-specific experience that can greatly facilitate merger review. Merger reviews in industries such as pharmaceuticals, airlines, e-commerce, and other industries, which often are cross-border, often involve very complex and detailed questions of fact, many of which are peculiar to the industry. It is largely for this reason that more established

⁴ See, e.g., William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. CIN. L. REV. 1075, 1092 (1998) (“Most transition economies embark in the process of implementing new antitrust systems with relatively little indigenous expertise in competition law or industrial organization economics.”).

⁵ *Id.* at 1093 (“Transition economy competition agencies often find that professionals who have become experts in antitrust economics or law become extremely attractive to private sector employers.”).

⁶ These included competition law agencies from Argentina, Brazil, Chile, Estonia, Latvia, Mexico, Peru, Russia, and Ukraine. See *supra* note 2, at 4.

⁷ See International Competition Network (“ICN”), *Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies* at 35 (2003) (“If there is one common concern expressed across the diverse jurisdictions that responded to the questionnaire, it is directed at the perceived difficulty of the judiciary to come to grips with competition law.”)

⁸ See *supra* note 2, at 4, 16.

competition law and antitrust agencies have dedicated “shops” that regularly handle merger reviews arising in particular industries.⁹ With limited resources and experience, younger agencies often do not have this luxury of specialization.

- In their efforts to learn about the facts of an industry, newer agencies may have limited access to relevant information, compared to more established agencies in larger jurisdictions.¹⁰ For smaller jurisdictions in particular, major suppliers in their markets may conduct business through imports or agents only, and have no subsidiaries or on the ground presence in the jurisdiction— even if their sales are substantial for the jurisdiction in question. While, for more established agencies, the ability to conduct joint investigations on each other’s behalf may be facilitated by formal interagency cooperation agreements; the Background Note recognizes such agreements are relatively rare between more established and newer agencies.¹¹
- Finally with respect to cross border merger reviews, there are potential challenges associated with prioritization of a newer agency’s limited resources. Even with limited resources, a developing competition agency will almost always have various and potentially conflicting priorities. These include, in the competition law field, enforcement efforts against cartels and abuses of dominance as well as competition advocacy efforts. In addition, newer agencies often have non-competition law responsibilities, such as consumer protection or sector-specific regulatory responsibilities.¹² Thus, merger control, and the review of a potentially complex cross-border merger in particular, can be just one of many pressures faced by a newer competition law agency’s limited staff and resources. While additional resources can always be acquired on a case-by-case basis (and indeed, review of complex mergers often is facilitated by specialized economic assistance) this could place additional pressure on a newer agency’s limited financial resources, which may not necessarily be recovered.

In addition to potential challenges faced by younger competition agencies in cross-border merger review arising from a lack of sufficient resources and insufficient competition culture, effective merger review may also be impeded by complex and multifaceted institutional arrangements. Brazil, for example, has a tripartite merger control system, with responsibility for merger investigations and decisions split among the Secretariat of Economic Law, the Secretariat for Economic Monitoring, and the Administrative Council for Economic Defense. Challenges arising from multi-agency jurisdiction over merger decisions are not unique to newer competition law agencies,¹³ nor are they unique to merger review. Given the

⁹ To take one example, both the US DOJ and the EC have merger teams dedicated to the energy sector.

¹⁰ See *supra* note 4, at 1095 (“Transition economy antitrust agencies typically must operate with limited access to data that offers an accurate view of existing market conditions and the competitive significance of individual firms.”)

¹¹ See OECD Global Competition Forum, *Cross-Border Merger Control: Challenges for Developing and Emerging Economies*, Background Note, 22-23 (Jan. 13, 2011), available at [http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF\(2011\)1&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocumentpdf?cote=DAF/COMP/GF(2011)1&doclanguage=en).

¹² For example, in Jersey the Jersey Competition Regulatory Authority (“JCRA”) is responsible for telecommunications and postal regulation in addition to competition law enforcement. Similarly, in Barbados, the Fair Trading Commission is responsible for telecommunications and electricity regulation and also consumer protection, in addition to being a competition law enforcer.

¹³ In the UK, for example, there currently is a two-stage process for merger review, with the OFT conducting the initial assessment and referring cases that raise potentially serious competition concerns to the Competition Commission for a detailed assessment. In the US, battles for so-called “clearance” between the DOJ and FTC can occur and result in duplication of effort, delay and additional expense to the merging parties.

potential challenges identified above; however, the effects of such institutional challenges may be more pronounced in merger enforcement.

3. Potential challenges for companies in dealing with developing and emerging competition agencies in cross-border mergers

Corresponding to the challenges faced by younger competition agencies in dealing with cross-border merger control are the challenges faced by companies seeking to engage in cross-border mergers and acquisitions. Multinational companies and their legal representatives make large investments in understanding and complying with the laws of the jurisdictions in which they operate.

Companies engaging in cross-border mergers and acquisitions must identify jurisdictions where their transaction is subject to merger control. This task has become immensely more complex over the past decade with the proliferation of national competition laws that incorporate some form of merger control (either mandatory or voluntary). In less than 20 years the number of countries with competition regimes has grown from less than 30 to more than 100. Determining whether or not a merger requires notification and approval in these jurisdictions typically requires the merging parties to receive localized legal advice, which can add considerably to a transaction's costs. The difficulty and complexity of this task can have other important adverse effects. For example, where there are competing bidders seeking control of a business enterprise or an important collection of productive assets, the relative merits of a transaction with any particular bidder often depend – sometimes in a critical way – on the burden, expense and delay that will be experienced due to merger notification obligations. The inability to identify and assess the extent and nature of these obligations for each bidder clearly and promptly often creates uncertainty in the process of evaluation. The resulting burden and uncertainty can delay a transaction, significantly enhance the burden and expense of assessing competing bids, and even lead to the choice of a specific transaction that ultimately is not in the best of interests of competition and consumers, to say nothing of the transacting parties and their shareholders.

This task is made more complicated by the widely diverging jurisdictional thresholds among countries with merger control systems. While the ICN Recommended Practices calling for notification thresholds to be based on objectively quantified criteria and to have an appropriate jurisdictional nexus have been widely adopted, their implementation is not complete, particularly in countries with newer competition law systems. Some countries still rely on market share or share of supply based merger thresholds,¹⁴ while others still incorporate global turnover thresholds.¹⁵

Even for countries with jurisdictional thresholds that do comply with ICN Recommended Practices, turnover or asset-based thresholds for the country in question are often set at very low levels.¹⁶ This means that, in practice, multinational companies operating in those countries may have to file for merger approval simply by virtue of their presence in jurisdiction for a merger or acquisition that has *de minimis* or no actual or potential local effect.

If a cross-border merger or acquisition requires merger control filings in multiple countries, merging parties face additional challenges in dealing with differing filing requirements, filing deadlines, information requirements and waiting periods. While such problems are not specific to merger control in small or developing agencies, they have been made much more complex by the proliferation of merger control systems.

¹⁴ See, e.g., Barbados, Israel, Jersey, Spain, Turkey.

¹⁵ See, e.g., Austria, China, Denmark.

¹⁶ See, e.g., Faeroe Islands, Germany, Norway, Ukraine.

Furthermore, parties engaging in cross-border mergers often face different substantive standards for merger review. The main focus of merger control is to prevent the creation, enhancement or exploitation of market power through a substantial lessening of competition arising from the transaction under review. However, there are still instances—in both developing and developed economies—where noneconomic considerations are either explicitly or implicitly incorporated into merger review.¹⁷ While common to both developing and developed economies, the risk associated with including potential noneconomic considerations in merger review may be greater in jurisdictions with a limited competition culture, where outside political influences can come into play, or where competition has to be balanced against other perceived national interests, such as a merger’s potential effects on domestic companies or national champions, domestic employment, or regional dislocations or development opportunities within a country.

Even if a jurisdiction follows sound economic analysis in its approach to merger assessment, there is still a risk of inconsistent outcomes in merger assessment by distinct jurisdictions. Given its *ex ante* nature, the risk of inconsistent outcomes among jurisdictions is perhaps more pronounced in merger control compared to cartel enforcement and possibly compared to other areas of competition law enforcement.¹⁸ The risk of inconsistent outcomes among different jurisdictions reviewing the same cross-border merger is not particular to younger competition agencies—as evidenced by differing outcomes between U.S. and E.U. competition enforcers in transactions such as GE/Honeywell or Boeing/McDonnell Douglas. The risk of potential divergence in outcomes, however, increases with the greater diversity of agencies and jurisdictions engaging in merger control. Merger analysis is a highly fact-dependant inquiry, and the facts that exist in markets of different sizes or in different states of development may differ substantially. Therefore, “[t]wo different national agencies may reach legitimately different conclusions on the basis of the same data, simply because standards are imprecise, the evidence is uncertain, and the core biases are different—or even because factual evidence of adverse market effects is different in different geographic markets. Thus, having a common substantive standard (especially one that was a vague compromise between opposing viewpoints) does not seem a likely or promising form of harmonization.”¹⁹

At the same time, there are situations in which differing outcomes are difficult to justify, particularly where the merger involves commodity goods sold in a global geographic market. In such situations, divergent outcomes create a level of uncertainty that can have a chilling effect on cross-border mergers and can highlight some of the “non-economic” interests that risk the credibility of competition law enforcement on the whole. Although few actual mergers fall into this category, there are a number of attempted mergers, frequently involving China either as a buyer or reviewing agency, that have been shouted down or rejected, calling the objectivity of the process into question.

¹⁷ In South Africa, for example, a merger is reviewed based on public interest considerations, in addition to whether or not it substantially lessens competition. These public interest considerations include the impact of the merger on employment, small businesses, and the ability of national industries to compete in international markets.

¹⁸ See Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW at 72 (Global Forum for Competition and Trade Policy 1998) (“Merger review is an unusual activity because it requires *ex ante* judgments on often imponderable questions concerning the medium- or long-term future of markets and enterprises Thus, there is more room for inconsistency and controversy in merger review than when more than one antitrust agency prosecutes a global cartel.”).

¹⁹ *Id.* at 75, accord Charles Webb, *One Size May Not Fit All – Merger Control in Small Market Economies*, Concurrences 3/2008 at 11 (“[W]hile large and small economies may engage in the same type of merger analysis, economic circumstances that exist in smaller economies may materially influence the outcome of the assessment.”).

These challenges of adhering to the merger notification requirements of scores of jurisdictions can add immensely to the costs of cross-border mergers and acquisitions. These increased costs arise from the out-of-pocket expenses for legal and economic advice for the merging parties, as well as costs associated with delayed implementation of efficiencies arising from mergers and acquisitions, and the diversion of management time to the regulatory process. A 2003 PricewaterhouseCoopers Study, commissioned by the American Bar Association and International Bar Association, estimated that an average transaction involving competition filings in eight jurisdictions had external merger review costs of approximately €3.3 million.²⁰ These estimated costs most likely have increased further as a result of the greater proliferation of merger control systems since 2003. Given that a merger of €100 million would trigger the notification requirements (as a “size of transaction”) of many jurisdictions, these costs are not insubstantial to a significant number of mergers.

In addition to increasing costs, the proliferation of merger control, and the potential delays associated with it, may actually deter cross-border mergers and acquisitions that are procompetitive. This could be particularly true in rapidly changing industries such as the software industry, which is typified by collaborating development efforts, the need to adapt to rapid changes in technologies, and cross-border operations. As stated by a witness before the U.S. Antitrust Modernization Commission in 2005:

Here, even more than in other industries, a procompetitive merger transaction that is delayed may be derailed altogether. Whether delay results from procedural overload or duplication, or from the sincere regulatory pursuit of an aggressive but unverifiable theory of competition, the additional time spent in the regulatory process may be the largest and most important transactions cost of all—and the one that thwarts the most potentially procompetitive transactions. Product design decisions occur on short cycles in the software industry. When a transaction is held up for many months, product design decisions—and thus, to a substantial extent, innovation in the merging companies—may be frozen to a significant extent because the companies cannot predict which resources from each company will be at their disposal when the product ultimately reaches market.

While this general concern with the pace of regulatory investigations has many hidden costs, our principal specific concern pertains to the fragmentation of antitrust enforcement among dozens of different sovereign states around the world. Because the nature of their business does not depend on significant physical facilities, new economy companies often conduct operations in a large number of jurisdictions. The wide divergence in rules, procedures and standards produces a multiplicity of traps for the wary and unwary alike, while increasing transactions costs and deal risk sufficiently to deter procompetitive alliances and consolidations.²¹

4. Practical suggestions for improvement

Cross-border mergers potentially raise a number of serious challenges, both for younger competition agencies and for the merging companies that appear before them. To reduce these challenges for both younger competition agencies and private parties, consider the following recommendations.

²⁰ See William J. Rowley & Omar K. Wakil, *International Mergers: The Problem of Proliferation*, in INTERNATIONAL ANTITRUST LAW AND POLICY: FORDHAM COMPETITION LAW 2006 at 305 (Barry Hawk ed., 2007).

²¹ Testimony of Daniel Cooperman, Senior Vice President, General Counsel and Secretary, Oracle Corporation, before the Antitrust Modernization Commission at 1-2 (Nov. 8, 2005); see also Simon J. Evenett, *How Much Have Merger Review Laws Reduced Cross-Border Mergers and Acquisitions?*, INTERNATIONAL MERGER CONTROL: PRESCRIPTIONS FOR CONVERGENCE (William J. Rowley ed., 2002) (estimating that mandatory merger control laws reduce cross-border M&A activity by almost half).

4.1 *Implement ICN recommended practices on merger notification procedures*

As an initial matter, all jurisdictions enforcing competition law – both developing and developed – should adopt and implement the ICN Recommended Practices for Merger Notification and Procedures. Notification thresholds should be based on objectively quantifiable criteria (not on market shares or similar measures) and have an appropriate jurisdictional nexus (not based on global levels of turnover). Even when complying with these recommendations, jurisdictions should attempt to set their thresholds at levels high enough to not capture mergers and acquisitions that may be of no competitive consequence in the jurisdiction's markets. Following these recommendations can both reduce an agency's workload associated with the review of mergers and acquisitions (a factor that may be particularly important to younger or smaller agencies with limited resources) and reduce compliance burdens for companies engaging in cross-border mergers and acquisitions.

This recommendation applies equally to developing agencies as well as developed agencies. Many developed agencies have concluded that they are in compliance with ICN Recommended Practices despite clear indications that they are not. This applies frequently to the recommendation that agencies rely on objectively identifiable information in their initial notification form. Many significant agencies observe this recommendation only in the breach and should undertake a realistic self-examination of this point, as well as other recommended practices, in order to set the example for developing jurisdictions.

4.2 *Focus exclusively on local competitive effects*

If a merger is reportable in a jurisdiction, the reviewing agency should focus exclusively on the local competitive effects potentially arising from the merger. That is, the reviewing agency should focus its attention on defining relevant markets; assessing pre- and post-merger concentration levels within those markets; determining whether the merger will result in the combined entity being in a position to exercise market power or substantially lessen competition in the jurisdiction; and whether other factors such as entry, potential repositioning, or the merger's efficiencies counteract a risk of anticompetitive effects arising from the merger.

Focusing an agency's review solely on competitive effects in local markets corresponds with both OECD and ICN Recommended Practices concerning merger review.²² As stated by the ICN's Recommended Practices for Merger Analysis: "The legal framework for competition law merger review should focus *exclusively* on identifying and preventing or remedying anticompetitive mergers. A merger review law *should not be used to pursue other goals*."²³ Focusing exclusively on identifying and preventing or remedying anticompetitive mergers should facilitate a younger or smaller agency's review of cross-border mergers, as all other potential considerations that local interests may wish to bring (such as the protection of local competitors, local employment, or regional disparities in development) become irrelevant to the question of the merger's potential effect on consumer welfare. The agency's review of a

²² See, e.g., OECD, *Recommendation of the Council on Merger Review* (Mar. 23, 2005), available at [http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C\(2005\)34](http://acts.oecd.org/Public/Info.aspx?lang=en&infoRef=C(2005)34) ("When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.").

²³ ICN, *ICN Recommended Practices for Merger Analysis*, ¶ I.A., Comm. 1, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf> (emphasis added).

cross-border merger should focus solely on potential effects in local markets, taking into account potential competition from imports and international competition.²⁴

In conducting a substantive merger review, a younger agency should match its criteria of assessment to its resources and capabilities. In particular, recently issued Horizontal Merger Guidelines by the U.S. Department of Justice and Federal Trade Commission, which incorporate advanced techniques such as reliance on the “upward pricing pressure” index, may be difficult to apply – considering both the sophistication of the technique as well as the numerous caveats and qualifications that are necessary when attempting to use it – even for experienced antitrust lawyers and economists. Given their inherent complexity and difficulty, such concepts may not be particularly useful to younger agencies with less resources and limited experience in merger review. More standard analysis, such as that set out in the ICN’s Recommended Practices for Merger Analysis, may be more useful for younger agencies to frame their merger analyses.

4.3 *Seek international inter-agency cooperation in information sharing and substantive assessment*

As noted above, younger competition agencies may potentially face challenges in collecting information from merging parties located outside its jurisdiction. Less experienced agencies may also lack experience in dealing with particular industries. In addition, parties engaging in cross-border mergers may face added and unnecessary expense in satisfying duplicative or closely analogous information requests from different countries.

To reduce these challenges, younger agencies should seek to cooperate with more experienced agencies in reviewing the same merger, and potentially coordinate their reviews with the more experienced agency. In turn, more experienced agencies should provide assistance to younger agencies in mergers reportable in both countries.

Such cooperation among younger and more experienced agencies in merger review is consistent with both ICN and OECD recommended practices.²⁵ The ability to share information between agencies can facilitate the merger review process and lower compliance burdens. A younger agency with less experience in a particular industry may be able to gain valuable insight into the industry in question through cooperation with more experienced agencies. It may even be efficient for younger agencies to base their own assessment of a merger’s competitive effects in a jurisdiction on a more experienced agency’s analytical framework, if the competitive conditions in the two countries correspond. Doing so can both reduce compliance burdens and facilitate consistent outcomes across jurisdictions.²⁶

²⁴ See MICHAL GAL, COMPETITION POLICY FOR SMALL MARKET ECONOMIES 237 (2003) (“If entry barriers are low and importers enjoy a significant cost advantage over domestic producers, contestability might provide sufficient checks on the exercise of market power, even in highly concentrated markets.”).

²⁵ See OECD, *supra* note 22 (“Member countries should, without compromising effective enforcement of domestic laws, seek to co-operate and to co-ordinate their reviews of transnational mergers in appropriate cases.”); ICN, *Recommended Practices for Merger Notification Procedures*, ¶ X.A, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> (“Competition agencies should seek to coordinate their review of mergers that may raise competitive issues of common concern.”).

²⁶ See Michal Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdictions*, 33 FORDHAM INT’L L.J. 1, 41 (2009) (“the type of evidence gathered and the economic and legal analysis may be common to all countries, large and small, developed and developing. This might save resources for small and developing countries wishing to bring cases and provide a better prospect for reaching a similar legal outcome.”).

The exchange of information in merger reviews often depends on the willingness of the merging parties to give consent. Such consent is routinely given by merging parties when they have assurance that the confidentiality of their information will be protected. Thus, younger agencies should ensure that appropriate safeguards exist under their national laws to ensure the protection of confidential information and thereby facilitate inter-agency cooperation.²⁷

4.4 *Apply flexibility on timing*

There may be instances where a particular agency's statutory time-frame for review may not correspond to the timing of a merger or acquisition. This can be particularly true for public tender offers, where the timing of the acquiring party gaining beneficial control over the acquired party's shares may be externally driven by national stock exchange rules. This type of situation could place merging parties in a difficult situation: such parties want to comply with all national merger control laws but they also need to consummate their acquisition by a particular date. Even newer agencies should strive to complete merger review within a reasonable timeframe that allows a multi-national transaction, unless anticompetitive, to be completed in a timely manner. At times, however, this may not be possible.

To resolve such difficulties, merging parties are often willing to consider "hold separate" arrangements with respect to particular countries. Countries with younger competition agencies should consider this alternative in individual cases. Such an arrangement allows the parties to consummate the acquisition abroad while maintaining the local businesses as separate and preserving the domestic agency's ability to impose remedies concerning the local effects of the merger, if appropriate:

- In Jersey, Kraft Foods entered into such an arrangement with the Jersey Competition Regulatory Authority (JCRA) to facilitate that agency's review of the acquisition of Cadbury plc under national competition law. Pursuant to that agreement, while Kraft was required by relevant stock exchange rules to assert beneficial control over a majority of Cadbury's shares, Kraft agreed to not integrate its business associated with Jersey until after the JCRA completed its review. Kraft also agreed to supply the JCRA with all information necessary to complete its investigation, and to agree to any remedies the JCRA may wish to impose to prevent a substantial lessening of competition arising from the acquisition in Jersey.²⁸
- While not reported publicly, similar procedures have been utilized in merger reviews in other countries, such as South Africa and Brazil.

4.5 *Apply flexibility in remedies*

Finally, younger competition agencies should remain flexible in their imposition of merger remedies.

The Background Note observes that, while structural remedies may be preferred internationally over behavioral remedies, in practice the ability of a younger agency to impose structural remedies on a cross-border merger may be limited.²⁹ The Background Note states that this is particularly the case when the merging parties maintain no relevant assets within the jurisdiction in question, or when the merging parties

²⁷ See OECD, *supra* note 22 ("Member countries should establish safeguards concerning the treatment of confidential information obtained from another competition authority.").

²⁸ See JCRA, Decision M547/10, Proposed Acquisition of Cadbury plc by Kraft Foods Inc. at 3-4 (Feb. 24, 2010).

²⁹ OECD, *supra* note 11, at 28.

may have the “upper hand” in dealing with the authority.³⁰ With respect to smaller economies in particular, Dr Michal Gal has observed that seeking to impose disproportionate merger remedies, such as attempting to prohibit the consummation of a cross-border merger, may not be a practical alternative:

*The main problem is that small economies can rarely make a credible threat to prohibit a merger of foreign firms. Given that trade in the small economy is usually only a small part of the foreign firm’s total world operation, were the small jurisdiction to place significant restrictions on the merger, the foreign firm would most likely choose to exit the small economy and trade only in other jurisdictions. That is, the foreign firm will exit the small economy if its loss of revenue from terminating its trade there is smaller than the increase of revenues it anticipates as a result of the proposed merger elsewhere.*³¹

Given the potential practical difficulties in seeking to block cross-border mergers or impose structural conditions on them concerning assets located abroad, younger agencies may have greater need to consider the use of behavioral remedies.³² Such remedies can include conditions that seek to maintain competitive conditions in local markets. An example is the Israeli Antitrust Authority’s disposition of the merger between Unilever and Best Foods.³³ This transaction concerned the acquisition of Best Foods, an American-based food company, by Unilever, based in the Netherlands and UK. The acquisition of Best Foods by Unilever had been cleared by both the Federal Trade Commission and the European Commission.³⁴ However, the merger risked a substantial lessening of competition in some Israeli food markets. To remedy this situation, the Israeli Antitrust Authority conditioned its approval of the merger on behavioral remedies. These included limiting information transfer between the local operating companies and maintaining structural or personnel separation between them.

Another option that agencies may want to consider is coordination on remedies – in other words to ensure that the remedy of another jurisdiction is sufficient and then “free ride” on that remedy. This could be a useful application of positive comity in a cross-border merger context. In particular, an agency should consider if, in light of the remedies imposed on a merger by other reviewing jurisdictions, the imposition of additional remedies by the agency serves any additional purpose to avoid a substantial lessening of competition in the country in question. Examples of this occurring in practice are the following:

- In its review of the proposed acquisition of the Instrumentarium Corporation by the General Electric Company (“GE”), the Canadian Competition Bureau determined that the proposed acquisition risked a substantial lessening of competition for patient monitors used in high acuity areas of hospitals and healthcare facilities in Canada. However, the Bureau noted that, to resolve competition concerns already raised in Europe and the U.S., GE had already agreed to divestitures and behavioral remedies. At the Bureau’s request, GE confirmed that the behavioral remedies required by the European Commission would apply globally, and the divestiture also applied to the worldwide business. The Bureau therefore concluded that the remedies applied by

³⁰ See *id.*

³¹ Gal, *supra* note 24, at 242-43.

³² See Webb, *supra* note 19, at 12 (“Another enforcement consideration is the potentially greater opportunity to consider behavioural remedies, compared to larger economies.”).

³³ The following summary of the Unilever/Best Foods case is based on summaries of that case provided in Gal, *supra* note 26, at 6-7; and Gal, *supra* note 24, at 246.

³⁴ In the U.S., the HSR statutory waiting period expired with respect to the acquisition. In Europe, the Commission’s approval was conditioned upon certain divestitures to remedy competition concerns in Nordic, UK and Irish markets. See European Commission, Case No. COMP/M.1990, 2000 O.J. (C 311) 6.

enforcers in other jurisdictions resolved the potential competition concerns arising in Canada, and determined that additional remedies in Canada were not necessary to clear the acquisition.³⁵

- In Jersey, the JCRA considered the proposed acquisition of the worldwide body care business of the Sara Lee Corporation by Unilever.³⁶ As a result of its examination of potential market effects in Jersey, the JCRA concluded that the proposed acquisition would substantially lessen competition in Jersey with respect to certain types of deodorants. The JCRA also concluded, however, that the market conditions in Jersey with respect to these products were highly analogous to market conditions in the UK, which the European Commission was already investigating. Thus, the JCRA considered that “it would be more efficient for the Applicants, relevant third parties and the JCRA itself, if the JCRA and the EC coordinated their investigations.”³⁷ The remedy commitments the parties eventually reached with the European Commission applied to Jersey as well. On that basis, the JCRA determined that it could approve the proposed acquisition without the need for additional conditions.
- An earlier example of positive comity concerned the WorldCom/MCI merger, the investigation of which involved a high degree of cooperation between the DOJ and European Commission, and in which the DOJ followed the Commission’s required remedy of MCI divesting its Internet backbone business to Cable & Wireless.³⁸

If a younger agency decides that structural remedies must be imposed, they should be targeted to address the perceived substantial lessening of competition arising from merger in the markets in question. For smaller and developing economies, this may be possible without the agency seeking to block the consummation of the cross-border merger.³⁹ An example of targeted structural remedies is the consideration of the acquisition of Financière Franklin Roosevelt SAS by the German company Südzucker AG by the Hungarian Competition Authority (GVH). This acquisition of a French-incorporated company by a multi-national company based in Germany resulted in a change of control among domestic sugar producers in Hungary. The European Commission approved the acquisition with conditions to address potential competition concerns in sugar markets in southern Germany and in Belgium.⁴⁰ The merger also had potential competitive effects in the sugar market in Hungary, however, there were “serious doubts regarding whether a national competition authority could examine the exercising of controlling rights in a foreign jurisdiction, and whether the GVH has enough bargaining power against the companies

³⁵ See Press Release, Canadian Competition Bureau, Bureau Resolves Competition Concerns with Medical Equipment Merger (Sept. 16, 2003), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00379.html>.

³⁶ JCRA, Decision M597/10, Proposed Acquisition of the worldwide body care and European laundry care businesses of Sara Lee Corporation by Unilever (Nov. 30, 2010).

³⁷ *Id.* at 2.

³⁸ See Press Release, Department of Justice, Antitrust Division, Justice Department Clears Worldcom/MCI Merger After MCI Agrees to Sell its Internet Business (July 15, 1998), *available at* http://www.justice.gov/atr/public/press_releases/1998/1829.pdf.

³⁹ See Baker, *supra* note 18, at 77 (“Where a merger involves a number of local operations (e.g., distribution and retail facilities), it is quite possible to agree on locally-tailored relief in the settlement process. The same may also be true where the merging companies have local manufacturing facilities and patents in different countries; these may be divested without barring the overseas merger of the parent companies[.]”).

⁴⁰ See European Commission, Case No. COMP/M.2530, 2003 O.J. (L 103) 1.

concerned.”⁴¹ As a practical alternative to attempting to seek prohibition, the merger was approved in Hungary conditioned on the divestment of a controlling interest in a sugar manufacturing facility in Hungary.

5. Conclusion

Developing agencies face a formidable task in implementing a merger review mechanism that meets the needs of their local consumers while at the same time comporting with a global business environment. The task need not be daunting, however, as tools exist to assist developing jurisdictions to strike the right balance. Meeting international norms requires looking outside one’s own borders to the best practices developed by the international community. With these practices in place, the challenge is now for developing – and also developed – agencies to implement these practices in a thorough manner. Doing so will preserve the ability of firms to consummate efficient mergers without imposing costs that will undermine the very efficiencies sought to be achieved.

⁴¹ See ICN Merger Working Group: Analytical Framework Subgroup, *Merger Remedies Review Project*, Report for the fourth ICN Annual Conference at 44 (June 2005), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf>.

CUTS ¹

1. Introduction

Globalisation, characterized by trade liberalisation, reduction of restrictions on finance and investment, regional integration, deregulation and to some extent privatization, saw the world being reduced to one geographic market. One essential outcome of this phenomenon was competition from companies located beyond the national borders. Globalisation also opened up new markets in those areas of the world where certain products and technology were yet to be adopted. While such markets could be served through exports, the competitive pressure from local companies imitating production of similar or competing products rendered this option unviable. Thus, it has led to companies seeking establishment of their operations in all strategic markets around the world.

This could be done through two channels; greenfield investment² or merger/acquisition with companies already present in these countries. Greenfield investments are time consuming, given the need to construct infrastructure and obtaining operational licences, a process which could also take time. One way of reducing the time between decisions to enter a market and setting operations which found a lot of takers was through cross border mergers and acquisitions (M&A), which facilitated faster entrance into the market. Big companies preferred the latter course and the world market has been witnessing a deluge of cross border M&As.

It is estimated that total M&A transactions completed worldwide grew at an average annual rate of 42% since 1980, to reach \$2.3 trillion in 1999 (Desai M, 2005). The M&A activities took place mostly in two waves during this period: during the late 1980s (1988-1990) and from 1995 onwards, the periods both characterised by relatively high economic growth and industrial restructuring (Desai M, 2005). It is also estimated that M&A activities also surpassed greenfield investment and other forms of foreign direct investment (FDI); it is estimated that around 80% of investment in the developed countries consists of cross-border M&A (Lall S, 2002). M&A reached a peak in 1998 at about \$70 billion in the developing world, which represented about 40% of total FDI inflows., with the highest share (nearly 90% of FDI) being in Latin America, with Africa at 31% and Asia at about 19% (Lall S, 2002). It was also observed further that after a short period of decline following the 1999 peak, the volume of M&A activity gradually went up from about \$1.1 trillion, in 2002, to more than \$5.5 trillion in 2007 (Onal B, 2009).

Cross border M&A activity has had an impact in developing countries and economies in transition after facilitating the expansion of trans-national corporations (TNC) into these economies. They have also

¹ This document was written by Mr. Pradeep S Mehta, Secretary General of CUTS International (psm@cuts.org). Cornelius Dube and Vikas Kathuria of CUTS contributed to this paper.

² A Greenfield Investment is the investment in a manufacturing, office, or other physical company-related structure or group of structures in an area where no previous facilities exist. The name comes from the idea of building a facility literally on a "green" field, such as farmland or a forest. Greenfield Investing is usually offered as an alternative to another form of investment, such as mergers and acquisitions, joint ventures, or licensing agreements. Greenfield Investing is often mentioned in the context of Foreign Direct Investment.

given rise to serious concerns, the key one being the observation that competition in these economies was adversely affected by the entry of TNCs, (see section 2). It is normally observed that local companies have neither the capital nor the know-how to effectively compete with TNCs. Another concern, which is more serious, is that the TNCs would not in most cases be obliged to notify their acquisition of companies in the developing countries in their home countries, which implies that they would have escaped from the jurisdiction of the more experienced and better resourced competition enforcement institutions in their home countries. Thus they would feel less restrained to engage in anti-competitive behaviour in the countries with lesser resourced and experienced competition watchdogs. TNCs would find it easier to do so either because the competition authorities in developing countries would lack the necessary effective legislative framework, experience and resources to handle concerns at this level, or simply because competition regimes in the countries are not yet established. Clarke and Evenett (2002), found evidence that after the formation of the vitamins cartel in 1990, exports from countries where the cartel conspirators were located to those nations in Africa, Europe, and Latin America that did not have anti-cartel laws tended to grow faster than to those nations that did have such laws.

Many transnational companies have also adopted clever strategies to enter into developing and emerging economies markets through cross border mergers. A Lafarge representative for example was quoted in the press in 2002 agreeing that the group had given high priority to emerging markets, because in 2001 more than 40 percent of Lafarge's profits were realized in emerging markets. The strategy had also given very good results in South Africa, Jordan, Morocco, Honduras, Venezuela, Brazil, Chile (Jenny, F 2008).

In the Indian pharma sector, in recent times, there was a wave of TNCs acquisition of local entities. Examples include Abbot Labs (which purchased Piral Healthcare), Sanofi-Aventis (which purchased Shantha Biotech), Fresenius Kabi (through Dabur Pharma) and Daiichi Sankyo (which bought Ranbaxy). The hold of TNCs on the Indian pharmaceutical market is increasing; the top four firms now include only one local company (Cipla), a complete contrast to the situation in 2008 when GSK (now ranked fourth in terms of market share) was the only TNC in the top 10. Collectively, TNCs have now cornered about 25 percent share of the Indian market. What is worrying is that none of these mergers were analysed in terms of possible competition concerns as because, the enforcement provisions relating to regulation of mergers and other forms of combinations under the Indian Competition Act, 2002, as amended in 2007, have not yet been notified.

In the COMESA region, the merger between Coca Cola Company and Cadbury-Schweppes affected almost all countries, although the merger was only analysed in two countries, namely Zambia and Zimbabwe, both of which approved the international merger with conditions³ after noticing a lot of competition concerns. The transaction took place in 2000, when the competition authorities in both Zambia and Zimbabwe had just been made operational and most countries in the region were yet to embrace competition laws. Such concerns were not taken care of in other countries where such mergers were examined.

It is therefore worrying that developing and emerging economies are finding it difficult to establish fully effective merger control competition regimes to deal with cross border issues. These challenges also

³ (i) The Coca Cola Company, in addition to acquiring the Cadbury-Schweppes beverages brands, undertook to purchase Schweppes Zimbabwe Limited as a going concern and to establish an appropriate shareholding structure (to include indigenous shareholders) to oversee the operations of the new company to be formed; (ii) that The Coca Cola Company undertook to maintain the local Mazoe and Calypso brands on the Zimbabwean market and develop them into regional brands with wider circulation; and (iii) that the Coca Cola Company undertook to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.

include social and political reasons in addition to economic ones. This paper takes a look at some of the challenges faced by developing and emerging economy competition enforcement agencies in dealing with cross border mergers and acquisitions as well as possible measures that can be taken to deal with them.

The rest of the paper is organised as follows. Section 2 discusses the major challenges imposed by cross border mergers in the markets. Section 3 explains why it is necessary for competition authorities to find a common approach for dealing with cross border mergers, with possible approaches given in section 4. Section 5 then concludes.

2. Major competition concerns imposed by cross border mergers

Cross border mergers, especially those involving big transnationals are always treated with suspicion. The fear being that they might cause competition distortions in the market by facilitating anticompetitive behaviour. One area of concern for transnationals coming into local market is the ease at which they can easily out-compete their locally owned counterparts. In addition, mergers involving big TNCs also create dominant institutions which can easily influence competitors.

A good example is the cement market in Egypt where many transnational companies bought Egyptian companies and entered the market. Between 2000 and 2002 there was a spate of merger activities in the Egyptian cement market. Suez Cement Company, a local company bought Tourah Cement Co and managed to account for 31 percent of Egyptian cement production. Lafarge, a French company, which owned Beny Sueif Co, bought Blue Circle Co which produced 75.6 percent of the cement in Alexandria, which mounted to 25 percent share of the total Egyptian cement production. Cemex, a Mexican company bought 90 percent shares of Assyut Cement and accounted for 14 percent of the Egyptian cement market. Simbura Company, a Portuguese firm, also followed suit by buying El Amreya Company.

A fierce race to secure a place in the market ensued, and the newly established firms began lowering the price of their goods, sometimes selling them at the break-even point to ensure a market share. When the Egyptian Cement Company started exporting its production to the Spanish Canary Islands at much lower prices than that offered by Cemex, the Mexican cement producer, Cemex and other foreign companies are alleged to have retaliated by pushing prices to their lowest levels to prevent local companies from exporting by burdening them with losses (an allegation Cemex denied). Local players complained, pointing out that they could not influence the practices of foreign companies since they are affiliates of international cement heavyweights; hence they could afford losses for one or two years till they achieve their aims in the market (Jenny, F 2008).

TNCs are also known to use cross border mergers as tools for manipulating supplies in the region so as to influence prices. This was a concern noted when Portland Holdings Limited (Porthold), the holding company of Zimbabwe's largest cement manufacturers, was acquired by the Pretoria Portland Cement Company Limited (PCC) of South Africa. There was a strong likelihood of PCC, after acquiring Porthold, closing down the cement plant in Zimbabwe to supply from its operations in South Africa as a way of influencing prices. The merger was therefore approved on condition that PCC gave the competition authority an undertaking to honour its commitment to maintain Porthold's cement plant and to continue producing cement in Zimbabwe⁴.

Similar concerns were raised by the Zambia Competition Commission when Pan African Cement registered its intention to sell its 50.1 percent shareholding in the Chilanga Cement PLC, the sole producer

⁴ A J Kububa (2008), 'Anti-Competitive Practices And Their Adverse Effects On Consumer Welfare: The Zimbabwean Experience' in 'The effects of anti-competitive business practices on developing countries and their development prospects', UNCTAD, 2008

of cement in Zambia, to Lafarge SA. Information gathered by the Commission pointed to the fact that Lafarge also owned plants in neighbouring countries of Tanzania, Malawi and Zimbabwe, at a time when Chilanga Cement appeared to be engaged in production and pricing strategies that made Zambian export cement less competitive compared to cement from the plant in Mbeya, Tanzania. Lafarge could therefore divide the regional market (through market allocation and territorial restrictions) whereby Zambian exports would be targeted to the DR Congo, while the Burundi and Rwandese markets were to be supplied from its Tanzanian plant rather than the Zambian plant. Such conduct was likely to make the Zambian plant less competitive by restricting its production capacity (Jenny, F 2008).

The merger of Tanzania Breweries Limited (TBL) and Kenya Breweries Limited (KBL) is also a good example of cross border mergers creating distortions in the market. In the merger, the holding companies of TBL and KBL, which are respectively South African Breweries International (SABI) and East African Breweries Ltd (EABL), reached an arrangement on beer business in Kenya and Tanzania. Under the arrangement, TBL acquired KBL based in Moshi. In exchange, KBL acquired SABI Castle Breweries, Kenya in Thika. By the merger, TBL was to be able to command 98 percent share of the beer market in the country. Although the merger is reported to have been rejected by the Fair Competition Commission of Tanzania, it is alleged that the firms submitted a request to the Ministry to allow the acquisition, which subsequently complied by overruling the competition authority's decision and allowed the merger to go ahead.⁵

A race by TNCs in the same business in one country is also likely to result in cartelisation, particularly in a country with a very weak competition regulatory environment. An increase in foreign shareholding in the Indian cement companies occurred in India during the post 1991 period, including the taking over of Tisco's cement plant/s by Lafarge during 1997-99. Swiss cement company Holcim also entered into the picture, through buying a stake in Gujarat Ambuja Cement, before the two companies took up a 50 percent stake in Associated Cement Companies (ACC). While consumers could have been happy that international players were entering into the market to give more competition and hopefully price reductions, the opposite occurred. In March 2008, the media was awash with news that cement companies ACC, Lafarge Cement and four other top cement producers were found guilty of cartelisation by the MRTP Commission, having acted in concert to raise prices in the market through the Cement Manufacturers Association.

Again in India, the tyre industry has also seen remarkable involvement of transnational companies over the previous years. JK Tyres for example has a technical tie-up with Continental AG of Germany. In 1993 Goodyear formed a 50-50 joint venture with South-Asian Tyres Ltd (SATL) and in 1998 SATL became a fully owned Goodyear Company. Apollo Tyres bought South Africa registered Dunlop Tyres International in 2006, which it later renamed Apollo Tyres SA. With consumers expecting to fully benefit through stable prices as a result of competition, in May 2008 media reports indicated that the MRTP Commission had issued notices to half-a-dozen leading tyre makers including JK Tyres, Ceat Tyres, Goodyear India, MRF Tyres and Apollo Tyres, accusing them of indulging in price fixing cartelisation. In a recent case in South Africa, Apollo Tyres were hauled up for participating in a cartel along with Goodyear and Continental Tyre, and their association: South African Tyre Manufacturers Conference Ltd. Bridgestone escaped any penalty because it cooperated with the authority under a leniency policy.

There are also other examples from India to show the extent to which the absence of merger regulations which saw TNCs entering without any control facilitated anticompetitive behaviour. There were many allegations brought to the MRTP Commission involving abuse of dominance against firms that became dominant through acquisitions. Examples include Hindustan Lever Limited, a subsidiary of Anglo-

⁵ "Advocacy and Cross Border Competition Concerns: A Country Report on Tanzania", ESRF, Tanzania, CUTS, Jaipur, 2002.

Dutch multinational company, Unilever, which appeared at the MRTPC to answer allegation of abuse of dominance, following a series of acquisitions in the Indian market. The most significant was its take over of Tata Oils Mills Company. Examples also include Coca Cola India which has faced some allegations of abuse of dominance, including two complaints to the MRTP Commission against Coca Cola's Indian subsidiaries Hindustan Coca Cola Beverages in Hyderabad and Hindustan Coca Cola Beverages, New Delhi. Some deals also went unchecked in the Indian market such as merger of Lipton & Brooke Bond into Unilever. While in Pakistan, the competition authority succeeded in getting Unilever to withdraw one of its brands and reduce its shareholding in Brook Bond Pakistan.

3. Need for a rationalization of approach

Cross border mergers, particularly those involving two players with a multi-country presence often result in simultaneous investigation by different competition authorities. However, given that each competition agency would be applying its own law, it is likely that the resulting decisions would be different. This becomes a matter of grave concern, given that those relatively young competition authorities lacking the necessary experience, resources and skills might allow potentially harmful mergers which have been stopped or conditionally approved in fairly experienced regimes to go ahead. Even those competition authorities at the same stage in terms of experience could also come up with different decision, depending on the factors considered. For example the competition authorities of Zimbabwe and Zambia both handled a global merger of Rothmans of Pall Mall and British American Tobacco, which had regional effects. The competition authority of Zimbabwe approved the merger with stringent conditions, some of which went on to bring immense benefit to the economy, while in Zambia the transaction was unconditionally approved. Apparently, they did not talk to each other on this merger to enable them to take a coordinated approach. They did speak to each other at a later stage on cement mergers and that really helped (see below).

Global mergers also call upon competition authorities to be more careful in their analysis as some competition authorities may end up simply rubber stamping some mergers, on the fear that rejecting a merger that has been approved in other more advanced jurisdictions would result in their competences being questioned. Merging parties are also quick to remind competition authorities that the merger, they are dealing with, has been approved elsewhere, as a way of putting pressure on the competition authorities. The challenges brought about by these global mergers can be understood more by focusing on some few examples.

One international merger that was hardly handled in any developing country, although it also had impacts in those countries, is the Gillette/Wilkinson merger, which was conditionally approved by the European Commission and United States in 1990. This involved the acquisition of the consumer product division of Stora AB by Gillette through a company called Eemland Holdings NV. Wilkinson Sword had manufacturing facilities in UK, Germany, Zimbabwe and Brazil. The parties were also found to have been very careful in their approach; they structured the transaction differently in EU and non-EU jurisdictions in line with perceived competition authority strength; in the EU, Eemland acquired the Wilkinson Sword business but Gillette ensured that its minority holding in Eemland was composed of non-voting equity shares and debt while outside the EU, Gillette purchased the entire Wilkinson Sword business by an outright acquisition.

Interestingly, although the merger was found to be giving rise to competition concerns in EU and US warranting imposition of conditions, the competition authority in Brazil approved it unconditionally (Sarah George, 2008). In Zimbabwe there was no competition law as yet so there was no need for the parties to notify the competition authority and consumers were not cushioned against possible competition harm. This shows the extent to which aspects of investigations between competition authorities differ.

Another interesting global merger, which involved two global pharmaceutical companies, was between Glaxo Wellcome and Smithkline Beecham (SKB). These companies merged to become Glaxo-Smithkline Beecham (GSK), with headquarters in the UK, supplying about 140 markets in the world. The merger was conditionally approved by the EC while the South Africa competition authority had initially prohibited the merger but subsequently approved it conditionally, after some consultations had been made with the EC. In India, the case was never investigated due to lack of merger provisions in the MRTP Act, while in Pakistan; investigations into the merger were reported to have been abandoned due to lack of resources. In Sri Lanka, after investigations had been initiated based on the effects doctrine, the Board of the competition authority felt otherwise and ordered the investigations stopped, although it later turned out that the two companies actually had a commercial presence in the country. (Sarah George, 2008). Thus it is quite possible that consumers in India, Sri Lanka and Pakistan were not shielded from the potential competition harm that was avoided in other countries.

4. Possible rationalisation in cross-border mergers

As observed, cross border mergers involve different competition authorities with different expertise, experience and resources dealing with cases simultaneously. It therefore follows, as has been seen from the discussion, that consumers in those countries where competition authorities are more advanced gain a lot compared to those in countries with young competition authorities. Unless young competition regimes benefit from the expertise of advanced competition regimes, the scenario will continue, with different decisions being undertaken. This form of assistance can happen in a number of ways, which can extend even beyond cross border mergers but just ordinary mergers and other anticompetitive practices such as cartels and abuse of dominance.

Firstly, the sharing of information between agencies is suggested and it has also been found to yield results. As has been discussed, the exchange of information between the South Africa Competition Commission and the EC helped the competition authority in coming up with a better position than originally adopted. The competition authorities of Zambia and Zimbabwe have also exchanged information which have helped them make informed decisions with notable impact on the ground, for example on mergers in the cement industry involving *Lafarge* of France, *Blue Circle* of the United Kingdom and *Pretoria Portland Cement* of South Africa, which ensured continuation of cement production in their territories. This is particularly in the context of *Lafarge* having closed some of its cement plants in other COMESA countries not protected by national competition laws, ostensibly for ‘viability’ reasons but more likely for market sharing purposes (Kububa, A 2008).

Cooperation mechanisms can also be done by having competition authorities affected by the cross border merger teaming up with a more advanced competition authority and giving it a leading role in designing the *modus operandi* for the whole process and refer to it any unclear issues. This approach is known as the ‘lead jurisdiction approach’. The competition agencies can also adopt a ‘co-coordinating agency model’, where a lead jurisdiction can co-ordinate a review of the merger for all affected countries and reach on a decision with respect to its own jurisdiction and merely make findings and recommendations for all other countries (Sarah George, 2008).

However, one challenge is the confidentiality clause in most competition laws, which limits the amount of information provided by the parties that can be disclosed. In most cases, such information which is considered confidential is the information through which hidden intentions of the merging parties would be camouflaged.

An alternative model, which has already been successfully tested in Europe and is already at advanced stages of being replicated in other regions, is the creation of regional competition authorities with both investigative and adjudicative functions. This would also help other countries in the region which are yet to

benefit from competition reforms due to inertia on the part of their countries. In Sub-Saharan Africa for example the BAT/Rothmans and the Total/Mobil cross border mergers were not investigated in the bulk of the countries.

The need for a regional competition law was recognized and appreciated in COMESA for example after some problems had been noticed. It was found that national competition laws lacked the adequacy and the necessary jurisdiction of dealing with anti-competitive practices of foreign companies. For example some COMESA member States had been threatened by multinational corporations with relocations to other member States if they (states) challenged the corporations' anti-competitive practices (Kububa, A 2008). ECOWAS and the East African Community have also embraced the aspect of a regional competition authority and the operationalisation of these is now at an advanced stage. The WAEMU already has an operation regional competition body but this is being hampered by several challenges, including the lack of clear separation of mandates between the regional body and national competition authorities.

Lastly, competition authorities can just be subjected to the necessary training to empower them to make use of the extra-territorial provisions in their national competition laws to take action on cross border mergers having an impact on their jurisdiction. If competition authorities get enough expertise and confidence in dealing with competition cases, there is nothing for example to stop the Competition and Tariff Commission of Zimbabwe from investigating a merger that is being effected in Europe but whose effects could be felt in Zimbabwe.

However it is worrying that not all competition authorities, particularly in developing countries have extra-territorial provisions that are water tight in giving mandates to review cross border mergers outside their boundaries. In a CUTS study under the 7Up project, it was found that Sri Lanka's Fair Trading Commission Act was silent on whether the law has extra-territorial reach, although the wording of the Act's provisions could allow the competition authority to apply the 'effects' doctrine. This was also true for competition laws of Kenya, Pakistan and Tanzania⁶ (CUTS, 2003).

5. Conclusion

With closely knitted markets, as an outshot of globalisation, physical boundaries of nation-states have been rendered porous by the economic forces. In theory, free trade among the nations has the potential to achieve scintillating results for the economies. However, there are factors which have to be guarded against to fully realise the benefits of free trade. Cross border mergers and acquisitions have been acknowledged as a challenge for a long time now. Ruefully, it appears as if nothing much has been done to ensure that proper paradigms are put in place to control them. While this problem is not serious in developed countries, developing countries continue to be hamstrung by several challenges.

Considering the impacts of cross border M&As and the behemoth investigations thereto, competition authorities in developed countries can therefore do more to ensure that they carry their counterparts with them in their progress towards effective competition enforcement. A holistic enforcement of all tenets of competition law world over only, will make the professed growth of free trade equitable and inclusive.

⁶ Kenya and Tanzania have since changed their competition laws.

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UNCTAD

1. Introduction

Over the last 30 years, countries have liberalised and reduced policy impediments on foreign direct investment (FDI) and trade, speeding up the rate of globalization. This has resulted in the increased propagation of cross-border mergers, acquisitions and concentrations that impact multiple markets around the world.

FDI in developing countries has largely taken the form of M&A activity and is closely linked to efforts by developing states to privatize industry and create viable and competitive market economies. Unfortunately, in most developing nations this liberalization has not necessarily been coupled with appropriate and complementary regulatory measures to curb potential anticompetitive and other activities that harm markets. As the primary tool available to mitigate potential anticompetitive effects of mergers on both domestic and cross-border levels, competition law and policy (including merger control) is more important than ever before.

The domestic nature of merger control presents significant challenges for enforcement on cross-border transactions, particularly for developing countries and emerging economies. Increased cooperation between competition authorities in different jurisdictions has proved useful to tackle these challenges and further such cooperation should be encouraged, both among competition authorities in developing countries and between competition authorities in developed and developing countries.

2. Challenges arising from cross-border mergers

Merger control regimes of developing countries and economies in transition should have the capacity to deal with the following two kinds of cross-border mergers:

- Mergers directly involving local firms; and
- Mergers between major foreign Transnational Companies (TNCs) that have a bearing on the domestic market of a third country.

2.1 *Cross-border mergers involving local firms*

Cross-border mergers involving local firms may have a positive effect on competition if, for example, the target domestic firm is ailing and would otherwise exit the market; a very welcome state of affairs for developing countries particularly during or in the wake of a recession. Furthermore, they may challenge established domestic oligopolies by strengthening smaller domestic firms, thereby introducing more effective rivals to the market. Cross-border mergers may also increase competitive pressure on domestic firms leading to an increase in product quality, variety and innovation in host economies (UNCTAD, 2000).

On the other hand, cross-border mergers of this sort may reduce competition and increase market concentration and have an adverse social impact. Such circumstances include, inter alia:

- Where the acquiring firm was exporting substantially to a market before it acquires a competing firm in that market, thus reducing import competition;
- Where a foreign firm with an affiliate already in the market acquires another, thereby acquiring a dominant market position;
- Where an investing foreign firm acquires a market leader with which it has previously competed;
- Where the acquisition is intended to suppress rather than develop the competitive potential of the acquired firm; and
- Where parent firms of foreign affiliates located in a host country merge, increasing concentration and reducing local competition (UNCTAD, 2000).

Analytically, this type of cross-border merger should not present competition authorities of developing countries with any further challenges than those posed for the regulation of domestic mergers. This is because in relation to such mergers national laws apply as there is a clear nexus between the transaction's effects and the domestic jurisdiction. However, various other considerations unique to developing countries make the regulation of mergers challenging in this context.

In the first instance, merger control regimes do not always exist in developing and transitioning countries, even where there are laws regulating other forms of anticompetitive behaviors. This clearly makes regulation of anticompetitive effects of cross-border and any other mergers nearly impossible. Mergers affect market composition and structure and thus have a significant impact on policy areas beyond competition. As mentioned above, cross-border mergers make up a large proportion of FDI and are often encouraged by governments, particularly in developing countries seeking growth and stability. As such, merger control is often not prioritised despite the potential long-term detriments arising from anticompetitive mergers to growth and development.

The challenge for developing countries is to examine and reform their broader regulatory frameworks in such a way that complements the principles of competition and merger control. This involves the creation of a competition culture, whereby the benefits of competition are well known and accepted in government and policy making circles and the perils of excessive State intervention are understood. This is particularly pertinent in the context of mergers which have a long term effect on market structure and are difficult to reverse. Increased consciousness of potential anticompetitive effects of a merger in political and government circles will ensure that long-term and permanent positions are not applied to short-term problems in a manner that limits future options.

That being said, it is important to recognize the valid and unique needs of developing countries in relation to mergers. It may be appropriate for developing countries in relation to specific sectors for example, to tailor merger rules in such a way that they are able to co-exist with other policy objectives without compromising fundamental competition principles. Public interest exceptions resorted to in relation to the banking sector during the recent financial crisis such as the UK's Lloyd's TSB/HBOS merger, present useful examples of limited and sector specific exceptions to merger rules. The open and transparent manner in which the Lloyds'/HBOS exception was carried out should not go unnoticed (See UNCTAD, 2010).

Where merger control regimes do exist in developing countries and economies in transition, there are often difficulties with effective enforcement of the merger rules. This is due in part to substantial power asymmetries existent between small economies and large TNCs. Developing economies, which usually present a small part of foreign TNCs' total world operations, cannot always make a credible threat to prohibit such mergers. Attempts by competition authorities of developing economies to place significant restrictions on the mergers of TNCs could result in their exit from the market altogether potentially causing significant detrimental effects to the developing country's welfare (UNCTAD, 2007). Such considerations

only compound the existing comparatively weak internal systems of protection of competition in many developing countries and transitioning economies usually due to social, political and financial restraints. Furthermore, it should be noted that most of these challenges are not unique to the issue of merger regulation but are faced in relation to almost all other governmental regulation particularly in developing countries.

2.2 *Foreign-to-foreign mergers*

In today's globalized world, mergers involving TNCs (typically from developed nations) may impact competition in numerous jurisdictions. For example, where two foreign suppliers merge, this may result in oligopsony or even monopsony situation in a third country's market whose firms were previously reliant on both suppliers.¹

In order to deal with such cross-border anticompetitive effects, competition law agencies (primarily in the developed world) reach beyond their borders and apply national merger control laws to concentrations between companies based abroad. This position is justified by the "effects doctrine" under public international law, which allows such extraterritorial application of domestic rules when it is foreseeable that a proposed concentration will have a substantial effect in a given State's territory.²

A recent example of unilateral merger control enforcement on a foreign-to-foreign cross-border merger can be found in Brazil. In its ordinary session of 4 October 2006, CADE (Conselho Administrativo de Defesa Economica) approved with restrictions a merger in pharmaceutical sector between two European companies, Axalto Holding (Netherlands) and Gemplus International (Luxembourg). The companies produce plastic security cards and commercialized software, hardware and related services and the analysis was mainly based on the impact of the dominance of technological resources on competition. CADE imposed commitments upon the companies obliging them to license their patents related to subscriber identity module (SIM) cards that are deposited in Brazil to any interested parties operating in the Brazilian market in a fair, reasonable and non-discriminatory manner (UNCTAD, 2008)(2).

However, this seemingly tidy solution to the potential anticompetitive effects of cross-border mergers does not always play out so easily in practice. Competition law agencies of developing countries in particular, struggle to unilaterally enforce their domestic laws on an international scale again owing to their limitations in relation to financial and human resource scarcity, a lack of competition culture, and political economy constraints, amongst other reasons. In fact competition authorities in the developing world are often impotent in the face of global mergers and acquisitions for fear of retaliatory action by some large firms' home country, political interference, and again fear of frightening way FDI (UNCTAD, 2001). This is particularly problematic in light of the often vulnerable status of the markets of developing countries. Given their comparatively small size and limited market diversity, markets in developing countries are more keenly affected by large cross-border mergers; be they positive or negative. Any negative impact, including anti-competitive effects, is therefore compounded by low levels of effective regulation.

3. **Possible Solutions**

As a first priority, developing countries and economies in transition must strive to establish well-functioning competition law and policy regimes as well as credible enforcement institutions, in order to effectively regulate cross-border mergers.

Three activities that can contribute to this end are as follows.

¹ The Cocoa industry presents a useful example of this, see UNCTAD 2008 (1).

² See Judgment of the Court of First Instance of 25.3.1999 in case T-102/96, *Gencor Ltd v Commission*, (1999) E.C.R., page II-0753, at paras. 89-92

- **Implementation of competition laws and policies and creation of competition institutions**

There are now over 112 countries with competition laws around the world, many of which are developing countries and economies in transition. However, although fundamental, this is just the first step. Developing countries and countries in transition are at varied levels of actual implementation and effective application of competition rules and merger regulations. This is fundamentally because establishing and maintaining an effective competition authority is not easy. Considerable political, human resources and financial investments are required as well as mechanisms of monitoring and enforcement. In addition, it is essential that competition laws and institutions of developing countries are independent and command the respect of both market and political players at home and abroad if they are to be effective in their enforcement activities. Again, this is not easily achieved.

Developing countries must therefore be proactive and seek financial and technical assistance wherever available. Robust domestic advocacy campaigning is also essential in this respect (see point 3 below).

- **Engage in cooperative activities on bilateral, regional and international levels to achieve greater convergence on application of merger rules, share experiences and exchange information**

As merger control is implemented at the domestic level, different jurisdictions conduct independent analyses simultaneously leaving room for discrepancies in the quality and standards of merger control enforcement among different jurisdictions in relation to the same cross-border merger. In addition, such duplication of regulatory effort increases costs for both competition authorities and businesses and creates uncertainty for businesses.

In the absence of a binding multilaterally agreed framework for competition law and policy, national competition authorities have chosen instead to enter into regional and bilateral cooperation agreements in a bid to achieve convergence on merger control rules. Such agreements often incorporate provisions on the exchange of information and a requirement to consider any anticompetitive impact of a given merger on another jurisdiction. For example, under the Cooperation Protocol for Merger Review between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, the agencies agree to inform each other of proposed merger transactions that may involve trans-Tasman operations or impact the other country's market.

Although a number of regional groups in the developing world, such as Caribbean Community (CARICOM) and East African Community (EAC), have developed regional competition law regimes, they continue to struggle with effective enforcement (Stewart, 2005). On the bilateral level, few bilateral agreements exist either among competition authorities in the developing world or between competition authorities of developed countries and developing countries (Stewart, 2005). In relation to the latter, this is partly due to the focus of developed countries on cooperation with authorities from other developed economies, whose anticompetitive activities have greater potential to cause harm on their domestic markets. A combination of limited resources, low levels of confidence and conflicting political objectives between countries and competition agencies also dampens incentive to enter cooperation agreements, which require authorities to relinquish a degree of power and autonomy, particularly in the exchange of (sometimes confidential) information.

Nonetheless, increased cooperation among competition authorities reduces inefficiencies and inconsistencies, raises the bar on the quality of merger analysis and improves merger control enforcement. Such cooperation should not be limited to official agreements but should include informal interactions and relationships which competition authorities have found to be equally or even more valuable than official

agreements (UNCTAD, 2007). Developing countries should also seek capacity building and technical assistance from competition authorities of developed countries and international organizations in order to assess the likely impact of individual mergers on the market structure in their countries.

It is also in the interests of developed countries to make efforts to cooperate with competition authorities in developing countries and countries in transition given the changing dynamics of cross-border merger activities. There are an increasing number of mergers originating from larger developing countries and targeting businesses and markets in the developed world. The recently announced joint venture between China's oil and gas producer, PetroChina and INEOS, a leading British chemical company in relation to trading and refining activities at INEOS's refineries in Scotland and France is one example of this.

However, it should be noted that cooperation will be most likely and beneficial where national perspectives coincide and where cooperation is well managed. For developing countries therefore, it would be beneficial to focus merger control on shared issues with nearby and like-minded countries.

- **Develop a competition culture by engaging in advocacy (domestically and internationally) and participating in international forums on competition such as the OECD Global Forum, UNCTAD and the ICN to raise awareness and seek technical assistance**

The role of advocacy cannot be overemphasised for the effective regulation of cross-border mergers. On the national level, policy makers should be made aware of the potential long term adverse effects on domestic markets if anticompetitive cross-border mergers are not prevented. On the international scale, developing countries should endeavour to apprise more advanced agencies of the effects of cross-border mergers on developing countries' markets and express a need for more cooperation. This will also require greater openness from competition authorities of developed countries. International forums such as UNCTAD, the ICN and the OECD Global Forum present ideal opportunities to facilitate such interaction and dialogue and also allow for exchange of best and relevant practice, encouraging convergence and cooperation even without bilateral or regional agreements.

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SUMMARY OF DISCUSSION

1. Introduction

The Roundtable on “*Cross-Border Merger Control: Challenges for Developing and Emerging Economies*” was chaired by Mr. Felipe Irazabal, the National Economic Prosecutor at FNE (Fiscalía Nacional Económica), the Chilean Competition Authority. To open the roundtable discussion, the Chair noted that participants showed considerable interest in this topic, as demonstrated by the high number of written contributions received by the Secretariat. The Chair also remarked that the importance of the topic is due to three main reasons. First, mergers themselves are complex business operations. Second, the number of cross-border mergers has increased considerably as a result of globalization and an increasing number of transactions are subject to multi-jurisdictional merger review. Third, when considering cross-border merger control from the perspective of Developing and Emerging Economics (DEEs), it is important to assess how much of the experience of developed economies in this area can be transplanted into DEEs.

The Chair first introduced the six panellists: Mr. Maher Dabbah, professor at the University of London and author of the background paper for this session; Mr. Akira Goto, member of the Bureau of the Competition Committee of the Japanese Fair Trade Commission; Dr. Joseph Wilson from the Competition Commission of Pakistan; Mr. Han Li Toh from the Competition Commission of Singapore; Mr. Marcello Calliari, a private practitioner and Chair of IBRAC, the Brazilian Institute for the study of Competition, Consumers and International Commerce; and Mr. John Taladay a private practice lawyer in the US.

The Chair then set out the structure of the roundtable which would include discussion on: (1) an overview of the challenges facing DEEs; (2) a more detailed discussion of the challenges related to international co-operation; (3) a discussion of the challenges faced by DEEs when deciding on merger remedies; and (4) a review of the challenges raised by cross-border transactions from the perspective of the merging firms.

2. Overview of the challenges facing DEEs

The Chair introduced the first speaker, Mr. Maher Dabbah and thanked him for his comprehensive and informative background paper.

Mr. Dabbah noted that large multinational firms increasingly have to notify mergers in both developed and developing countries and that these mergers can also be subjected to close scrutiny in DEEs. The prohibition decision by the Chinese competition authority MOFCOM in the *Coca-Cola/Huiyuan Juice Group* merger is an example. A radical shift has taken place in the area of merger control with many DEEs adopting a more formal process in their merger notifications. However, many of these economies still lack merger control rules and competition rules more generally. Some DEEs have adopted merger laws but do not have a proper merger review mechanism in place. This state of affairs is far from satisfactory, and undermines the interests of DEEs.

Considerable work remains to be done for many DEEs. However, reaching the stage where such economies have effective merger control necessitates overcoming many challenges and constraints. At least some of the challenges are common to both developing and developed economies. Caution is

necessary when identifying these challenges and discussing them. In particular, generalisations should be avoided and some of the challenges are relevant to the field of competition law as a whole and not just the area of merger control.

These challenges, as set out in the background paper, include the absence of a proper competition culture; the difficult transition towards a market-based economy; the dominance of industrial policy; lack of resources including both human and financial; the inadequacy or absence of a legal framework; problems of implementation; the desire to attract foreign direct investment (FDI) and to accommodate foreign interests; the increased bargaining power of large businesses when dealing with competition authorities, and the inability to take specific enforcement actions in merger cases (whether unilaterally or through bilateral co-operation) such as gathering information to ensure compliance by the firms involved in cross-border merger operations etc. Mr. Dabbah noted that this list of challenges was not exclusive.

Mr. Dabbah commented that the way to address such challenges is through building and strengthening merger control in DEEs. However, a number of commercial, legal, economic, social and political factors are at play. These include the unique nature of markets in these economies; the adverse effect some cross-border mergers may have; and the role of merger control in improving the structures of different sectors of the economy, resulting in stronger economic performance, and better outcomes for businesses.

The starting point for overcoming these challenges must be building a suitable legal framework for merger regulation. This includes independent and capable competition bodies with the necessary expertise and adequate merger rules. As a first step, however, this requires that the economic, social and political conditions in the country are sufficiently developed. Second, overcoming the challenges requires a comprehensive approach and simultaneous actions on a number of fronts. Mr. Dabbah referred to the three themes discussed in the background paper, namely those of jurisdiction, co-operation and merger remedies. The multi-faceted nature of cross-border mergers also needs to be considered, with interaction between: competition policy and other public policy considerations most notably social and industrial policy; jurisdictional, procedural and substantive issues; legal regimes and business interest; and of course global, regional and domestic interests and considerations.

The interaction between competition policy and social and industrial policy is particularly interesting. Competition policy and industrial policy are no longer seen as forces pulling in different directions and competition authorities have come to acknowledge the existence of complementarities between the two. DEEs attach particular importance to industrial policy, and industrial policy considerations dominate the economic decision-making and policy-formulation processes in these countries. This has the potential of marginalizing competition policy considerations, including in merger control. However, the importance given to industrial policy is understandable. Issues such as economic development, promoting the international competitiveness of an economy and employment rank high on the agendas of many governments in DEEs and have particular political sensitivity. However, there may be conflicts between the benefits of industrial policy and the harm this approach may cause. Mr. Dabbah provided the example of the favourable treatment given to the Hyundai group in Korea, which enabled the Korean conglomerate to become more efficient vis-à-vis international rivals but led to distortions of competition in Korea during the 1970s and 1980s.

The Chair thanked Mr. Dabbah for his contribution and turned to Mr. Akira Goto to provide the forum with an insight into Japan's recent experience in the area. Mr. Goto explained that regulating cross-border mergers posed a new challenge to the Japan Fair Trade Commission (JFTC) and provided two case studies by way of illustration. In the *Agilent/Varian* case the proposed merger was notified to the JFTC, who engaged in extensive information-sharing with the US Federal Trade Commission. The JFTC cleared the merger conditionally, accepting the remedies proposed by the parties in both the US and the EU. The *BHP/Rio Tinto* merger concerned a joint-venture for production in Western Australia. The merger was

notified to the JFTC and during the investigation, the JFTC exchanged information with competition agencies of Australia, the EU, Germany and Korea. The transaction was ultimately abandoned by the parties because of the concerns raised by various authorities.

Three key points emerged from the JFTC's experience with cross-border mergers. First, it is important to have a proper legal environment in a given jurisdiction to deal with cross-border transactions. Japan has amended its Anti-monopoly Act several times in order to investigate cross-border mergers effectively. Second, co-operation with other agencies is extremely important. In particular, bilateral agreements and multilateral fora such as the OECD and the International Competition Network (ICN) facilitate international co-operation. Mutual trust between agencies is also important, and knowing someone at the other agency involved in investigating the same cross-border merger can be a great help. Trust can be built through face-to-face meetings between competition officials of different jurisdictions. Bilateral and multilateral agreements and meetings provide opportunities for people to get to know each other and create so-called "pick-up-the-phone" relationships. Third, co-operation between agencies is important for the industry too. Multi-jurisdictional merger review can be very costly for the companies planning to merge. It is therefore important to limit the regulatory burdens on businesses, as mergers can often bring efficiency. In many cross-border mergers, it can take a long time to gain approval from some agencies. Translation fees and legal fees can be very high. Mr. Goto referred to the merger between Panasonic and Sanyo which had to be notified in eleven countries and four competition agencies imposed remedies on the parties as part of the merger approval. The process was lengthy and cost the two companies more than 10 billion Yen. Inter-agencies collaboration can reduce this problem.

Mr. Goto commented that the competition law community is behind the intellectual property community, which benefits from the Paris Convention, the Patent Co-operation Treaty and the World Intellectual Property Organisation. Nonetheless, it should be acknowledged that the issue of co-operation is very difficult. Many proposals have been made and many meetings have been held to improve the situation in the past but with little success. Mr. Goto concluded that it was a major challenge for the competition law community to find effective mechanisms to reduce business costs and uncertainty associated with merger review while at the same time protecting consumers in countries that are affected by mergers.

The Chair thanked Mr. Goto for his intervention and turned to Morocco for a reaction to what was said so far and invited it to share its experience with cross-border mergers. The Moroccan delegation stated that the Moroccan competition authority's experience in dealing with cross-border merger cases was quite limited. It had recently dealt with one merger case involving Cadbury, but the authority faced a number of challenges in assessing the merger. These included: the inadequacy of the legal framework; the absence of extensive international co-operation; the absence of international rules in the area; and the government's interest in attracting FDI. In relation to the latter, the delegation noted that multinational firms are in a strong bargaining position vis-à-vis DEEs, and there is a conflict between protecting competition and the desire to attract FDI.

The Chair invited the delegation of Senegal to offer its reaction. The Senegalese delegation emphasised that the existence of an effective legal framework is crucial and added that human resources and adequate skills are also important in order to effectively assess cross-border mergers. Political factors must also be taken into account, such as the influence and power which multinational firms enjoy. The delegation gave an account of the law in Senegal and explained that while there was no mechanism for merger control in the country, the Treaty of the West Africa Economic and Monetary Union (WAEMU) provides a definition of what constitutes a merger. Senegal emphasised that the absence of a legal framework and of international co-operation were the main challenges facing DEEs in regulating cross-border mergers.

The Chair turned to the delegation of Tunisia to comment specifically on the tension between policies to make domestic markets attractive to businesses and effective merger control. The delegation from Tunisia gave an overview of merger control in Tunisia, and stated that Tunisia always encourages FDI. Mergers were important for the purposes of contributing to the welfare of the country. The delegation explained that the conditions for a merger to be permitted are set out clearly; the merger must be in the interests of the consumer, or must bring technological or social policy benefits. The competition authority can issue an opinion simply stating that the merger should be allowed to pass, or attaching conditions. The Minister for Trade is not obliged to follow the authority's opinion, but has done so for the last sixteen years.

The next contribution came from Uzbekistan on the challenges faced by the competition authority in achieving effective merger control. The delegation noted that merger regulation in Uzbekistan was quite weak. Effective merger control in relation to cross-border merger transactions depends on one country having a competition law and policy in force or the efforts of a single competition authority and on close co-operation and co-ordination between competition authorities at the international level. The delegation of Uzbekistan noted that effective merger control in DEEs requires harmonisation of trade and trade-related rules which impact on the movement of goods and services between countries. Small jurisdictions, such as Uzbekistan, do not engage in significant merger control work as they believe that mergers can be good for domestic firms to compete more effectively in international markets. Nevertheless, a weak merger control mechanism can lead to problems in relation to the structure and concentration of markets which can translate into competition concerns. The experience of Uzbekistan identified a number of ways in which to address the challenges raised by cross-border mergers. These include (i) mandatory notification and expanding the scope of the rules to cover a broader range of transactions; (ii) increasing the notification thresholds in order to use resources efficiently; (iii) having the right to review mergers which are below the notification thresholds but which raise serious competition concerns; and (iv) enhancing flexibility in the merger review process.

The Chair then turned to the Bulgarian delegation who gave an account of legislative changes introduced in the area of merger control. These include increasing the turnover threshold for notification from 15 to 25 million BGN. A local nexus criterion has also been adopted so that only those mergers with "actual effects" in Bulgaria need to be notified. These changes were introduced in line with the ICN's recommendations. The delegation commented that the latter change was likely to have a significant effect, as it would reduce the number of mergers to be notified, and the subsequent burden on firms involved in these mergers.

The Mongolian delegation then explained that the Mongolian competition authority had recently prepared a draft merger regulation, which was currently at consultation stage. A specific merger regulation was deemed necessary to remedy the inadequacy of the current competition rules to deal effectively with mergers. The draft regulation proposed an "exemption" mechanism for cases where the benefits to the national economy would override any possible harm likely to be caused to competition as a result of the relevant merger. The decision to introduce a merger control regime in the country would also assist in strengthening the regulatory environment.

The discussion then focussed on the relationship between merger control and FDI. The delegation from Mauritius noted that there was not necessarily a dichotomy between the two. Determining this relationship depends on the overall objectives of the relevant economy and an assessment should be carried out on a case-by-case basis, taking into account the experience and special circumstances of the relevant country. The delegation from Brazil commented that the relationship between competition policy and FDI was positive, and an effective merger control regime should encourage rather than discourage FDI. The Senegalese delegation commented that it did not believe that effective competition policy is an obstacle to FDI. However, a time-consuming merger review process can prove unattractive to prospective providers of

FDI. The delegation from South Africa agreed with the views of Brazil and Mauritius, and added two remarks. First, the fear that effective merger control would discourage FDI is over-estimated, and second, it is important to take into account the special circumstances of individual countries when assessing this relationship. The delegation then offered an example of a merger in the satellite equipment market which was cleared unconditionally in the US, but found likely to create a monopoly in South Africa. However, given the small size of the market concerned, the merger was approved with conditions to facilitate market entry. The Chair then gave the floor to Mr. John Taladay who commented that firms usually consider the relationship between FDI and competition enforcement by balancing costs against risks. If competition authorities wish to promote both FDI and effective competition enforcement, this cost/risk assessment is then taken into consideration.

The Chair invited the delegation from the United States (US) to comment on the discussion so far, from the perspective of a developed economy. The US emphasised what was said by Mr. Dabbah and Mr. Goto on the importance of having an effective domestic merger control regime. Without it, international co-operation in this area is not possible. Experience building is crucial. This is a long-term process which cannot be accomplished in one or two years. The US delegation referred to the Brazilian and South African experiences in the area of merger control as the best examples to illustrate this point. As a “second” step it is important to learn about other regimes and also to inform these other regimes about the practices in more experienced regimes. This was vital for the US to build meaningful international relationships. Joint efforts through training and other advocacy initiatives within international and regional fora were particularly recommended. Building trust between different competition authorities can be achieved very effectively through facilitating personal contacts between the officials of various competition authorities. Academia also has an important role to play in the educational process and in helping build trust. The US concluded that co-operation and personal contacts between officials of different competition authorities is fundamental. Formal bilateral co-operation agreements are not always needed to facilitate actual co-operation via email and over the telephone, for example. Many competition authorities are open to the idea of co-operating through the exchange of non-confidential information with other authorities involved in reviewing the same merger case. Finally, the US delegation urged less experienced competition authorities to come forward and seek co-operation with other more experienced competition authorities.

The Chair offered the floor to the delegation from Zambia which referred to the comment made by the US delegation that local experience is a required first step in building effective merger control. Zambia commented that sometimes competition authorities from developing countries might feel under pressure to reach converging decisions in a cross-border merger case which is also under review by a competition authority of a more developed country. In practice, however, this may not be possible as each country has its own special circumstances and the local competition authority will need to adhere to these when reaching its decisions.

The next contribution came from Poland. The Polish delegation highlighted the possible conflict between competition policy and other policies. As an example, the delegations mentioned the Polish competition law which allows the competition authority to take into account public interest considerations when approving a merger. However, even if the public interest exemption is used sparingly, it can result in the competition authority facing significant political pressure.

The delegation from Costa Rica referred to the absence of mandatory merger notification in the country and to the difficulties that this can create when it comes to aligning the timeframe of review by different jurisdictions, making international co-operation harder. The merger between Kimberley Clark and Scott Paper in the 1990s was used as an example. By the time the Costa Rican competition authority had finalised its review of the merger, the companies had already merged. This prompted the competition authority to push for changes in the merger control regime in order to ensure that these types of situations

would not arise in the future. The proposed changes were welcomed by the business community as they will undoubtedly increase certainty in the merger review process.

The Chair then turned to the Korean delegation, which emphasized the importance for a competition authority to have the necessary human resources with the relevant skills (including knowledge of foreign languages, notably English) to conduct effective cross-border merger review. The Korean delegation also emphasized the importance of international co-operation, and in particular the need to have staff able to work in an international context. The Korean Fair Trade Commission (KFTC) has improved its institutional capacity by reviewing the regulation on merger review and clarifying the notification system in order to separate the process which applies to mergers of foreign enterprises. The KFTC also laid the foundations for meaningful international co-operation with other competition authorities, through numerous bilateral co-operation agreements and active participation in multilateral discussions within the ICN and the OECD.

3. Challenges related to international co-operation

The Chair invited Mr. Joseph Wilson from Pakistan to discuss the challenges for international co-operation between competition authorities in DEEs and competition authorities in more developed countries.

Mr. Wilson emphasised the importance of international co-operation in a time when liberalisation of international trade transformed national markets into one global market. Mr. Wilson referred to the importance of the 1995 OECD recommendation on international co-operation as an instrument to facilitate effective co-operation and co-ordination of merger reviews. Mr. Wilson then moved to discuss the ICN recommended practices for merger notification and review adopted in 2004.

According to Mr. Wilson, agencies should encourage harmonisation not only in procedural terms (as the ICN and the OECD have done) but also on substantive terms and they should consider adopting a multilateral co-operation framework based on the “lead jurisdiction” model. This was first suggested by the International Competition Policy Advisory Committee of the US DOJ in its final report of 2000. A lead jurisdiction may be identified as the jurisdiction that meets a number of criteria: (i) it is likely to be most adversely affected by the proposed merger; (ii) it is in a position to commit resources to the investigation; (iii) it is the principal place of business of the merging parties; (iv) it has expertise in merger appraisal involving the specific industry and issue at hand; and (v) it can co-ordinate effectively with other jurisdictions concerned by the merger. According to Mr. Wilson, this model would have many merits and would be preferable to the current situation of multi-jurisdictional merger reviews. Mr. Wilson concluded by inviting the OECD and the ICN to consider revising their recommendations and consider advocating and adopting multilateral co-ordination and a global consumer welfare standard in their recommendations.

The Chair thanked Mr. Wilson for his intervention and turned to the delegation of the European Union (EU). The EU’s experience shows that the effectiveness of co-operation and consultation between jurisdictions does not depend necessarily on the existence of underlying “contractual” arrangements. While formal agreements provide a framework for co-operation, there are instances in which informal co-operation can be advantageous. It was noted, however, that there is a very important constraint in relation to formal and informal co-operation: the ability to exchange confidential information. Nonetheless, this does not prevent two competition authorities from discussing and exchanging views on issues of common interest such as market definition, theories of harm and possible remedies. Even in exceptional cases when it may be necessary to exchange confidential information, the parties could be asked to waive their right to confidentiality. The EU delegation explained that co-operation is most effective when the timing of the investigations by the different authorities is more or less at a similar stage and therefore the same issues could be addressed by multiple agencies. The *BHP-Billiton* merger is a good example where the EU

Commission co-operated extensively (including exchanging confidential information) with a number of authorities around the world with whom it had no formal co-operation agreements.

The Chair next turned to the delegation from the United Kingdom and asked it to comment on the approach adopted by the UK on international co-operation, given that it has no formal bilateral co-operation agreements in the field of competition. The UK delegation responded that it takes a pragmatic approach, and formal bilateral co-operation was not always regarded as necessary to ensure successful international co-operation. The UK competition authorities co-operate fully both within the multilateral arrangements of the EU, and on an informal basis in cross-border merger cases. Both the OFT and the Competition Commission frequently ask and answer questions about market background and experience in similar mergers. The UK delegation referred to the NewFarm case discussed in its written contribution. The merger concerned an Australian agricultural pesticides group with a significant export business which acquired a large factory of a UK group with substantial exports. There were clear international effects in this case. The UK authorities liaised with several other authorities, including the competition authorities of Australia, the US and Canada, and those in Europe where the parties had overlapping operations. The discussions concerned the timing of the investigations, the competition issues involved and the remedies. The purpose was to achieve a similar approach. For example, the UK authorities explored detailed remedies to open up the pesticides authorization rights to allow for new entry in the market, and discussed this issue in detail with the US and Canadian authorities. The lack of formal bilateral co-operation agreements was not an impediment to this fruitful co-operation.

The Chair asked both the EU and UK delegations whether they had any advice for other competition authorities on how best to approach them, and whether this should be done through phone calls or face-to-face meetings etc. The EU delegation replied that the international unit was the best point of contact within the EU. Co-operation was not necessarily only at the “top-level” and both conference calls and, when appropriate, face-to-face meetings can be helpful. The UK delegation responded that it supported the idea of establishing personal relationships among competition officials as a very helpful and useful method for building effective channels of communication.

The Chair turned next to the Croatian delegation and asked it to comment on the practice of publishing requests for information on its website. The delegation explained that the published requests elicit information from interested parties on issues such as the business activities of the merging parties and on the markets that might be affected by the transaction. Interested parties are usually given eight to fifteen days to respond, although this timeframe is flexible and can be extended.

The next delegation to speak was the Slovak Republic. The delegation provided details on the Marchfeld competition forum, an informal forum established upon the initiative of Austria, with other countries including the Slovak Republic, the Czech Republic, Bulgaria and Switzerland. The forum seeks to facilitate co-operation among the relevant competition authorities, although co-operation on cross-border mergers is still in its infancy. The forum established a database to store information exchanged between the different authorities. The database allows this information to be made available to all members. Information regarding merger control usually includes details on date of notification, names of parties, relevant sector, status of investigations and contact details of the main case handler. According to the experience of the Slovak Republic, the forum has a real potential to facilitate meaningful co-operation among the participating authorities.

The discussion then moved to the issue of exchange of information and the limitations resulting from concerns related to the possibility that exchange involved confidential information. The Chair invited the Russian delegation to offer its view on this matter. The delegation noted that the Russian Federal Anti-monopoly Service (FAS) is able to engage in international co-operation with foreign competition authorities and that it has entered into a number of bilateral agreements. Confidentiality waivers are an

important tool, and FAS has started to see their practical benefits, despite the fact these waivers have been used only in a limited number of cases. The delegation then gave an example of a useful waiver in the case of the merger between Sun Microsystems and Oracle. This case saw close co-operation and exchange of information (including confidential information) between FAS and the European Commission. The delegation noted, however, that it is not always necessary to have waiver of confidentiality when assessing merger cases. Two recent cases of co-operation between FAS and another competition authority in which waivers were not used include *Danone/Unimilk* and *Pepsi Co./Wimm-Bill-Dann*.

The Swiss delegation also commented on the use of confidentiality waivers. The Swiss competition authority reported that the use of waivers can be extremely fruitful for three reasons. First, merging parties know that if they grant a waiver, they will receive, in principle, simultaneous (or so) decisions from the Swiss competition authority and by other competition authorities. Second, Swiss attorneys have gained confidence that the Swiss competition authority will not use the waiver for the purposes of over-enforcement. Third, waivers facilitate consistency in the design and implementation of merger remedies which benefits merging parties.

4. Challenges faced by DEEs when deciding on merger remedies

The Chair introduced the next speaker, Mr. Han Li Toh, who discussed challenges posed by merger remedies in cross-border mergers seen from the perspective of a small economy.

Mr. Toh opened his presentation by noting that in the four years since entry into force of the merger control regime in Singapore approximately twenty mergers have been notified to the competition authority and seventeen of these notifications concerned cross-border mergers. According to Mr. Toh, small economies face very specific challenges in the regulation of cross-border mergers. One practical enforcement problems is that small jurisdictions can rarely make a credible threat to stop a merger involving a foreign firm. Trade in a small country may constitute only a tiny part of the firm's total worldwide operations and the gains from trade within the small economy may be limited. If the small jurisdiction places significant restrictions on the foreign firm and the costs of compliance are high, the firm is likely to exit the country and trade only in other jurisdictions. The negative welfare effects on a small economy from the exit of the foreign firm may well be greater than any potential anticompetitive effects from its continued operation there.

Small and developing jurisdictions also face difficulties in obtaining information from foreign firms. Mr. Toh referred to the Secretariat background paper which describes the challenges related to the lack of adequate resources. Mr. Toh commented that this was one of the reasons why Singapore opted for a voluntary notification system which allows an optimal use of available resources. Having a voluntary regime allows the Singaporean competition authority to focus on mergers that are most likely to raise competition issues. As part of the voluntary regime, the authority encourages merger parties to notify transactions where (i) the merged entity will have a market share of 40% or more and, (ii) the merged entity will have a market share of between 20% and 40% but the combined market share of the three largest firms is 70% or more.

Mr. Toh then moved to consider the issue of substantive appraisal of mergers. The substantive test in Singapore is the SLC (substantial lessening of competition) test, which is in line with international practice. He discussed two recent cross-border mergers handled by the authority. The *Thompson/Reuters Group* merger was reviewed and approved by the EU and by the US, subject to commitments. The assessment by the Singaporean authority indicated that the merger might have resulted in substantial lessening of competition also in Singapore. However, the authority considered that the commitments offered by the merging parties to the US and the EU authorities would sufficiently address the competition concerns in the Singaporean market. In the *Prudential/AIA* merger, Prudential would have improved its

strategic position in Asia and the merged entities would have acquired a dominant position. However, the assessment conducted by the Singaporean competition authority showed that the competition concerns arising from the merger were specific to Singapore as the relevant product (life insurance) was tailored to each country's specific need. In the end, the merger was withdrawn, not due to the competition concerns raised by the competition authority but because the prudential shareholders voted against it.

According to Mr. Toh, the experience in Singapore illustrates the point that reliance on foreign action is not always appropriate. However, in some cases achieving success in enforcement actions by one competition authority in cross-border mergers does require the assistance of foreign competition authorities also involved in the transaction. Singapore therefore has ongoing co-operation with overseas competition authorities as well as international organisations such as the OECD and with the ICN. Singapore is also active in terms of regional co-operation and chairs the AEGC (Asian Expert Group on Competition) in addition to the Working Group on Regional Guidelines. Although no official ASEAN supranational competition authority has been established yet, Singapore continues to work with other ASEAN member states to develop a regional platform to facilitate co-operation between competition authorities.

The Chair invited the Chinese delegation to comment on the issue of merger remedies. China noted that there have been cases of informal discussions between the Chinese authorities and foreign competition authorities concerning the issue of remedies in a number of cross-border merger cases. However, the absence of bilateral co-operation agreements between China and other countries has limited the possibility to exchange confidential information. On the other hand, Chinese authorities may rely on merger remedies accepted by foreign competition authorities as a point of reference. Nonetheless, direct co-operation between competition authorities can be very important in the design of merger remedies in order to avoid divergent outcomes.

The next contribution came from Mexico. The Mexican delegation highlighted an important change of approach by the Mexican Competition Commission ("the Commission") in relation to remedies. The Commission acknowledged that insisting on the implementation of remedies prior to closing a merger can unnecessarily delay the merger approval process and compliance with merger remedies can now take place following the completion of the merger. On the general issue of international co-operation, the Commission engages in closer co-operation with a number of competition authorities around the world and it attaches particular importance to this co-operation. Mexico has good relations with its NAFTA (North American Trade Agreement) partners, the US and Canada, and also with the EU. Mexico also emphasised the importance of personal relationships between competition officials of different jurisdictions. Such relationships can be particularly effective because they are informal and pragmatic.

The discussion then moved to the question of behavioural remedies and specifically to the challenges in enforcing these types of remedies. A first contribution on this issue came from the delegation of Chinese Taipei which noted that behavioural remedies are the most commonly used type of remedy in Chinese Taipei, while structural remedies are used more rarely. However, monitoring behavioural remedies requires significant resources, in terms of both expertise and human capabilities. The delegation referred to the *Microsoft/Yahoo* merger which was approved subject to behavioural remedies, including an obligation on the merging parties to supply to the competition authority certain information on an annual basis for a period of three years.

The next contribution came from the Lithuanian delegation, which discussed the trustee "process" following the imposition of remedies in a merger case. Lithuania explained that a remedies trustee had been used in only two cross-border merger cases so far. The key requirements in the appointment of a trustee include the independence of the appointed trustee and the fact that the trustee holds the appropriate qualifications and expertise. In Lithuania there is a fixed timeframe within which a trustee must be appointed. In some cases, sector regulators may perform the role of a trustee.

The delegate from the Czech Republic commented that interaction and trust between competition authorities is particularly important in the design of remedies in cross-border merger cases. The delegate also emphasised the need for co-operation as a means to ensure the effectiveness of merger remedies.

The Chair then invited the South African delegation to comment on the risk of conflicting decisions when several competition authorities seek to impose remedies in cross-border mergers. The South African delegation mentioned the *Unilever/Sara Lee* merger where the EU requested the divestiture of one brand while the South African competition authority requested the divestiture of a different brand, leading to an unfortunate situation for the merging parties. The delegation commented that this situation was the consequence of the different timetables for the review in the two jurisdictions. Had the EU been the first authority to impose divestiture, the South African competition authority might have adopted the same approach to remedies.

5. Challenges raised by cross-border transactions from the perspective of the merging firms

Mr. Taladay opened this part of the roundtable discussion and noted that competition agencies in both developed and developing countries have a unique responsibility to police domestic mergers and their effects. Firms merge in order to grow, to innovate and to gain synergies as well as to save on costs. From the moment when the merger is publically announced to the moment it is closed, the seller and the buyer are exposed to significant commercial risks, including regulatory and antitrust risks. Since the 1990s, there has been a sharp increase in the number of competition law regimes around the world and at the same time a significant increase in merger activity. This had serious consequences for multi-jurisdictional merger review, and highlights the importance of competition authorities in different jurisdictions working together to strive for a common approach.

One of the main challenges facing businesses is the uncertainty regarding the legal requirements applicable under different merger regimes. Businesses would be better equipped to comply if clearer guidance was provided by competition authorities on the merger regimes in that jurisdiction. The lack of proper procedures can increase the amount of time, effort and expense it takes for companies to deal with the relevant jurisdictions. Another challenge facing the business community is the lack of precedents guiding legal certainty. Providing transparent guidelines is crucial in helping firms to understand what the risks related to the merger are. Legal counsel can then advise on these risks. However, one should also note the challenges faced by competition authorities, for example with respect to limited capacity and resources which are required to ensure that proper procedures are in place and to provide effective guidance.

Mr. Taladay commented on ways in which competition authorities can ensure the existence of more efficient merger control regimes. Reducing the burden of notifications is very important, and requiring the notification process to be in English can greatly assist the merging parties. Where a non-English speaking regime changes its merger rules, it would also be helpful to have a summary of these changes published in English. Greater effectiveness in merger control can also be achieved through ensuring a sufficient jurisdictional nexus. Unduly burdensome pre-merger notification requirements can also increase the costs incurred by merging parties. A number of practical steps can be taken to streamline the merger review process, including the implementation of relevant ICN recommended practices on merger notification. The primary focus of competition authorities should be on local mergers as these are most likely to raise local concerns. Free-riding by smaller competition authorities on the efforts of larger competition authorities in regulating cross-border mergers is not necessarily undesirable and in fact is to be recommended in certain circumstances.

The Chair thanked Mr. Taladay for his intervention and turned to Mr. Marcello Calliari to present his experiences from the perspective of a private practitioner in Brazil. Mr. Calliari said that his presentation would focus on three issues: notification, mandatory waiting times, and merger remedies.

The notification process can cause difficulties for companies, especially when it comes to the gathering of information. This can create delays when firms operate in different parts of the world. For example, notification requirements in different countries vary depending on the turnover thresholds used. In some regimes it is the turnover of the particular merging firms involved in the transaction but in other regimes it is the turnover of the whole group to which these firms belong. Furthermore, in some regimes it is the turnover obtained in the relevant market(s) whereas in other regimes it is the turnover generated from all of the activities of the firms.

Mr. Calliari remarked that competition authorities are not always clear in their practice regarding the information required and the criteria used to determine turnover. He gave examples in the area of joint ventures and pension funds or private equity funds. A unified approach to notification may not be possible, but steps should be taken to ensure that rules are clear and, where possible, that a common approach is adopted. Following ICN Recommendations (such as employing a turnover as opposed to a market share criterion for notification thresholds) can be highly beneficial, and can reduce the costs and burdens on the merging parties.

The different timeframes adopted in different jurisdictions are also a major issue for firms. It can be very difficult for competition authorities to co-operate with each other effectively if they are at different stages of their investigations of the same operation. There is room for harmonisation and, if achieved, this would benefit merging parties and assist competition authorities realise greater co-operation and co-ordination in their investigations.

The last issue discussed by Mr. Calliari was that of remedies. Failing to perform this task properly can be problematic for the merging parties, for the economy as a whole as well as for consumers. It is important for competition authorities to discuss among themselves what should be the appropriate remedies. This, however, does not happen in the majority of cases. Free-riding by some authorities over the remedies designed by other authorities is a practical way to address common competition issues. This has happened in a number of cases in Brazil. Nonetheless, competition authorities should be encouraged to talk to each other when dealing with remedies, rather than the merging parties just engaging in multiple bilateral discussions. This would reduce costs significantly. For example in the *Novartis/Alcon* case, the parties had to deal with twelve different jurisdictions and this was unsurprisingly very costly for them.

The Chair thanked Mr. Calliari for his presentation and opened the floor for the general discussion.

6. General discussion

The Finnish delegation provided details on a case in which the Finnish Competition Authority (FCA) was involved along with another foreign competition authority. The merging parties had claimed that the case gave rise to similar issues in both jurisdictions as the competitive conditions in both countries were the same. The two authorities discussed the competitive conditions in their respective jurisdictions and these discussions revealed that in one jurisdiction the relevant product markets consisted of different segments and that the parties' products were more or less complementary rather than substitutes. In Finland, on the contrary, the products were considered to belong to the same market. The parties were also the most important players in the market and each other's closest competitor. Differences in competitive conditions therefore resulted in different outcomes in the two jurisdictions. In Finland the merger was cleared with conditions whereas in the other jurisdiction it was cleared without conditions.

The next contribution came from Colombia. The Colombian delegation referred to the 2007 *Linde AG/Boc Group* merger which was blocked by the Superintendencia de Industria y Comercio (SIC), although cleared in the rest of the world. The merging firms controlled more than 80% of the industrial gases industry in Colombia, with only one other firm in the market. The SIC conducted a study of the barriers-to-entry in the relevant market, and found that there were significant switching costs that would have made it difficult for a new firm to enter the market. Having regard to all these restrictions, the SIC decided to block the merger. The parties offered remedies, but SIC did not consider them to be sufficient. The Colombian delegation also referred to the *Colgate/Procter & Gamble* merger in which Colgate sold most of its brands to Procter and Gamble. Despite the fact that the transaction was approved in most jurisdictions around the world, the structural conditions of the market in Colombia were different and led the SIC to block it.

The delegate from Australia commented that parties in cross-border mergers often focus their efforts not on regimes with voluntary notification but on those with mandatory notification. Australia has a system of voluntary notification and one of its shortcomings is that this can lead to late notifications. A great deal of pressure is therefore put on a small regime, such as Australia, when the cross-border merger is approved by large competition authorities. However, these shortcomings need to be balanced against the reduced administrative and regulatory burdens of a mandatory notification regime. The delegation then discussed three important aspects of merger review in cross-border cases from the Australian perspective. First, intelligence-gathering and market-monitoring in order to maximise the detection of mergers likely to raise competition concerns is an intensive task. Second, the Australian Competition and Consumer Commission (ACCC) attaches particular importance to international co-operation with other competition authorities. The protocol on co-operation between Australia and New Zealand plays an important role. Third, confidentiality waivers can be important to enable competition authorities to communicate freely.

The Chair then turned to the CUTS and UNCTAD delegations for their contributions.

The delegate from CUTS commented on the importance of market definition in merger cases. If the relevant market is defined as the whole world, then there is a greater need for co-operation between countries. CUTS also referred to the situation in India in the pharmaceutical sector where a very large number of foreign pharmaceuticals companies are acquiring Indian pharmaceutical companies. The investment policy of India allows 100% foreign investment in the pharmaceutical sector without any restraint. However, the merger rules in India have not yet been implemented for political economy reasons. The government is therefore considering changing the FDI policy in India to ensure greater control over such transactions. There are concerns that when a foreign pharmaceutical company takes over an Indian pharmaceutical company, the former will stop the production of the generic range of medicines, which are much cheaper than the patented range of medicine. CUTS concluded that in the developing world competition authorities are not in a particularly strong position to regulate cross-border mergers effectively.

The delegate from UNCTAD emphasised the importance for developing countries to have competition law and policy in place. It is encouraging that many of these countries have been adopting competition laws in recent years. According to UNCTAD, competition authorities in DEEs should aspire to make competition law and policy a priority within the broader domestic regulatory framework so as to encourage the appropriate allocation of resources and ensure that policies, which are potentially conflicting, are not wrongly prioritised. At the international level, competition authorities should also make efforts to ensure that competition authorities from developed economies are aware of the potential effects of proposed cross-border mergers in DEEs and be really pro-active in expressing the need for co-operation and technical assistance. The OECD, UNCTAD and the ICN are good fora for engaging in such advocacy. Finally, UNCTAD emphasised the need for co-operation, and that establishing trust, personal relationships and informal contacts were important for this purpose.

7. Conclusions

Mr. Irarrazabal concluded the session with four comments:

- first, mergers are very complex and an additional cross-border element adds significantly to this complexity;
- second, there is no magic formula for conducting merger review;
- third, it is important to learn from others' experiences and to build good practices in the area which take into account the interests of merging firms and maintain legal certainty; and
- finally, conducting merger review is a "lonely" business and competition authorities should be fully aware of this.

In his conclusions, the Chair also referred to the recommendations adopted by the OECD in 2005. He mentioned in particular the following points made in the 2005 Recommendation:

- merger review should be effective, efficient and timely;
- competition authorities should avoid imposing unnecessary costs and burdens on merging parties;
- competition authorities should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;
- competition authorities should use clear and objective criteria, try to be transparent, public, set reasonable information requirement, provide procedures and try to be consistent with the procedures they have been using;
- competition authorities should try to be in some degree flexible especially when they are dealing with a cross-border merger;
- competition authorities should be reasonable and have a timeframe for the process they are conducting;
- merger laws should treat foreign firms no less favourable than domestic firms in similar circumstances; and
- competition authorities should not discriminate and be aware of confidentiality constraints.

Mr. Frederic Jenny, the Chair of the OECD Global Forum on Competition, thanked Mr. Irarrazabal for his conclusions and added some final remarks based on the discussion. First, it was striking that nobody questioned the wisdom of merger control and that throughout the discussions there was consensus that merger review is a useful instrument. Second, all delegations agreed that building trust is a very important element of international co-operation. Third, merger control seems to be accepted as a normal part of competition policy in all jurisdictions. Clarity and predictability are very important, but also a pragmatic approach with regard to co-operation should be adopted. It was clear that there were no strong views in favour of formal co-operation agreements and that a formal framework may not really add much to effective co-operation. However, informal exchanges between competition officials across jurisdictions are considered as useful by most delegations. Finally, it was important to reflect on the fact that behavioural

remedies can lead to over-regulation, and that co-operation between competition authorities is key when designing cross-border remedies.

COMPTE-RENDU DE LA DISCUSSION

Document préparé par le Secrétariat

1. Introduction

La table ronde intitulée « *Contrôle des fusions transnationales : défis à relever par les pays en développement et les économies émergentes* » est présidée par M. Felipe Irarrazabal, procureur de l'État pour les affaires économiques de la FNE (Fiscalía Nacional Económica), l'autorité chilienne de la concurrence. Lors de son allocution d'ouverture de cette table ronde, le Président souligne que les participants portent un grand intérêt à ce sujet, comme en témoigne le grand nombre de contributions écrites reçues par le Secrétariat. Il note également que trois principales raisons expliquent cette attention. Tout d'abord, les fusions elles-mêmes sont des opérations complexes. Par ailleurs, le nombre de fusions transnationales a considérablement augmenté avec la mondialisation et un nombre croissant de transactions font l'objet de contrôle des fusions multi-juridictionnel. Enfin, lorsque l'on aborde le contrôle des fusions transnationales du point de vue des pays en développement et des économies émergentes (PDEE), il est important d'évaluer dans quelle mesure l'expérience acquise dans ce domaine par les économies développées peut être transmise aux PDEE.

Le Président présente tout d'abord les six membres du panel : M. Maher Dabbah, professeur à l'Université de Londres et auteur du document de référence de cette session ; M. Akira Goto, membre du Bureau du Comité de la concurrence de la Commission japonaise de la concurrence ; M. Joseph Wilson, de la Commission de la concurrence du Pakistan ; M. Han Li Toh, de la Commission de la concurrence de Singapour ; M. Marcello Calliari, professionnel libéral et président de l'IBRAC, l'Institut brésilien pour l'étude de la concurrence, de la consommation et du commerce international ; et M. John Taladay, avocat privé aux États-Unis.

Le Président présente ensuite l'organisation de la table ronde, laquelle va aborder les questions suivantes : (1) aperçu des défis auxquels sont confrontés les PDEE ; (2) discussion plus pointue sur les difficultés liées à la coopération internationale ; (3) discussion sur les difficultés rencontrées par les PDEE pour décider de mesures correctives dans les affaires de fusion ; et (4) examen des défis posés par les transactions transnationales du point de vue des sociétés candidates à la fusion.

2. Aperçu des défis auxquels sont confrontés les pays en développement et les économies émergentes

Le Président présente le premier orateur, M. Maher Dabbah et le remercie pour son document de référence complet et instructif.

M. Dabbah note que les grandes multinationales doivent notifier un nombre croissant de fusions à la fois dans des pays développés et dans des pays en développement et que ces opérations peuvent aussi être soumises à des examens approfondis dans les PDEE. La décision d'interdiction rendue par l'autorité de la concurrence chinoise, le MOFCOM, dans la fusion *Coca-Cola/Huiyuan Juice Group* en est une illustration. Le contrôle des fusions a connu un changement radical avec l'adoption, par bon nombre de pays en développement et économies émergentes (PDEE), d'une procédure de notification de fusions plus formelle. Toutefois, un grand nombre de ces économies manquent encore de règles permettant de contrôler

les fusions ou de règles de concurrence plus généralement. Certains PDEE ont adopté des lois sur les fusions, sans pour autant disposer d'un véritable mécanisme de contrôle des fusions. Cette situation est loin d'être satisfaisante et va à l'encontre des intérêts des pays en développement et économies émergentes.

Un travail considérable reste à faire dans bon nombre de PDEE. Cependant, avant que ces économies ne puissent se doter d'un contrôle efficace des fusions, il est nécessaire de surmonter de nombreuses difficultés et contraintes. Certaines de ces difficultés, au moins, sont communes aux pays en développement et aux économies développées. Il convient d'être prudent pour déterminer lesquelles et en discuter. Il faut en particulier éviter de généraliser. De plus, certaines relèvent du droit de la concurrence dans son ensemble et pas seulement du contrôle des fusions.

Ces difficultés, exposées dans le document de référence, sont multiples : absence de véritable culture de la concurrence ; transition difficile vers une économie de marché ; dominance de la politique industrielle ; manque de ressources à la fois humaines et financières ; cadre juridique inadéquat ou absent ; problèmes de mise en œuvre ; désir d'attirer les investissements directs étrangers (IDE) et de servir les intérêts étrangers ; pouvoir de négociation croissant des grandes entreprises dans les relations avec les autorités de la concurrence ; et incapacité à prendre des mesures d'exécution spécifiques dans les affaires de fusion (unilatéralement ou par le biais d'une coopération bilatérale), telles que la collecte d'informations destinées à garantir le respect des règles par les entreprises impliquées dans des fusions transnationales, etc. M. Dabbah ajoute que cette liste n'est pas exhaustive.

C'est par la mise en place et le renforcement du contrôle des fusions dans les PDEE que ces défis pourront être relevés, indique M. Dabbah. Un certain nombre de facteurs commerciaux, juridiques, économiques, sociaux et politiques sont toutefois en jeu : la nature singulière des marchés dans ces économies ; l'effet néfaste que certaines fusions transnationales peuvent avoir ; et le rôle du contrôle des fusions dans l'amélioration structurelle de divers secteurs économiques, qui entraîne une meilleure performance économique et de meilleurs résultats pour les entreprises.

Pour relever ces défis, il convient avant tout de mettre sur pied un cadre juridique adéquat pour la réglementation des fusions. Ce cadre passe par des institutions chargées de la concurrence indépendantes et compétentes, disposant du savoir-faire nécessaire et adoptant des règles sur les fusions adéquates. Avant toute chose, il faut toutefois que le pays soit suffisamment développé en termes économiques, sociaux et politiques. Ensuite, une approche globale et des mesures simultanées sur un certain nombre de fronts sont nécessaires. M. Dabbah fait allusion aux trois thèmes abordés dans le document de référence, à savoir la juridiction, la coopération et les mesures correctives. Par ailleurs, il ne faut pas oublier que les fusions transnationales sont un sujet à multiples facettes au sein duquel interagissent notamment : la politique de la concurrence et les autres considérations relevant des pouvoirs publics, notamment la politique sociale et industrielle ; les questions de compétence, de procédure et de fond ; les régimes juridiques et intérêts commerciaux ; et, bien entendu, les préoccupations et intérêts nationaux, régionaux et mondiaux.

L'interaction entre la politique de la concurrence et la politique sociale et industrielle est particulièrement intéressante. La politique de la concurrence et la politique industrielle ne sont plus considérées comme exerçant des forces opposées, et les autorités de la concurrence reconnaissent désormais qu'elles sont toutes deux complémentaires. Les PDEE accordent une place prédominante à la politique industrielle, qui sous-tend chacun des processus de prise de décision et d'élaboration des politiques dans le domaine économique dans ces pays. Cela peut entraîner une marginalisation des questions de concurrence, y compris dans le domaine du contrôle des fusions. Néanmoins, l'importance accordée à la politique industrielle est compréhensible. Le développement économique, l'accroissement de la compétitivité internationale et l'emploi, entre autres, sont des priorités de premier plan pour bon nombre de gouvernements des PDEE et sont des sujets particulièrement sensibles en politique. Il peut toutefois y avoir des contradictions entre les avantages de la politique industrielle et le préjudice que cette approche

peut causer. M. Dabbah cite en exemple le traitement de faveur accordé au groupe Hyundai en Corée. S'il a permis au conglomérat coréen d'accroître son efficacité par rapport à ses concurrents internationaux, il a entraîné des distorsions de la concurrence en Corée dans les années 1970 et 1980.

Le Président remercie M. Dabbah pour sa contribution et s'adresse à M. Akira Goto pour que ce dernier partage avec le Forum l'expérience récente du Japon dans ce domaine. M. Goto explique que la réglementation des fusions transnationales représente un nouveau défi pour la Commission japonaise de la concurrence (JFTC) et illustre son propos avec deux études de cas. Dans l'affaire *Agilent/Varian*, la fusion envisagée a été notifiée à la JFTC, qui a œuvré dans le cadre d'un large partage d'informations avec la Commission fédérale américaine du commerce. La JFTC a donné le feu vert à la fusion sous conditions, en acceptant les mesures correctives proposées par les parties aux États-Unis et dans l'Union européenne. La fusion *BHP/Rio Tinto*, quant à elle, portait sur une coentreprise de production dans l'ouest de l'Australie. La fusion a été notifiée à la JFTC et, durant l'enquête, cette dernière a échangé des informations avec les agences chargées de la concurrence en Australie, dans l'UE, en Allemagne et en Corée. La transaction a finalement été abandonnée par les parties devant les inquiétudes soulevées par les diverses autorités.

L'expérience de la JFTC en matière de fusions transnationales fait ressortir trois points clés. Premièrement, pour traiter les affaires d'opérations transnationales, il est important de disposer d'un véritable cadre juridique dans une juridiction donnée. Le Japon a modifié sa loi antimonopoles à maintes reprises afin de pouvoir enquêter efficacement dans le cadre de fusions transnationales. Deuxièmement, la coopération avec les autres agences est primordiale. À cet égard, les accords bilatéraux et les forums multilatéraux comme l'OCDE et le Réseau international de la concurrence (RIC) facilitent tout particulièrement la coopération internationale. La confiance entre agences est également importante, et connaître quelqu'un au sein de l'autre agence qui enquête sur la même fusion transnationale peut être très utile. La confiance peut se forger au fil de réunions entre responsables de la concurrence des diverses juridictions. Les accords et réunions bilatéraux et multilatéraux permettent aux personnes d'apprendre à se connaître et de tisser des liens qui leur donneront le réflexe de se contacter facilement. Troisièmement, la co-opération entre les agences est également importante pour l'industrie. Le contrôle des fusions multi-juridictionnel peut être très coûteux pour les sociétés qui envisagent de fusionner. Il est donc primordial de limiter le poids réglementaire que supportent les entreprises, car les fusions apportent souvent un gain d'efficacité. Dans de nombreuses fusions transnationales, de longs délais peuvent s'écouler avant de recevoir l'aval de certaines agences. Les frais de traduction et juridiques peuvent se révéler très élevés. M. Goto fait allusion à la fusion entre Panasonic et Sanyo qu'il a fallu notifier à onze pays et dans le cadre de laquelle quatre agences de la concurrence ont soumis leur accord à des mesures correctives. La procédure a été longue et a coûté plus de 10 milliards de yens aux deux sociétés. La collaboration entre les agences peut réduire ce problème.

M. Goto indique que les milieux du droit de la concurrence accusent un retard sur la communauté du droit de la propriété intellectuelle, laquelle bénéficie de la Convention de Paris pour la protection de la propriété industrielle, du Traité de coopération en matière de brevets et de l'Organisation mondiale de la propriété intellectuelle. Néanmoins, il faut reconnaître que la question de la coopération est délicate. De nombreuses propositions ont été faites et de nombreuses réunions se sont tenues dans le but d'améliorer la situation par le passé, avec un succès toutefois très limité. En conclusion, M. Goto déclare que, pour la communauté du droit de la concurrence, c'est un défi majeur que de trouver des mécanismes efficaces permettant de réduire les coûts et l'incertitude associés au contrôle des fusions, tout en protégeant les consommateurs dans les pays touchés par les fusions.

Le Président remercie M. Goto pour son intervention et s'adresse au Maroc pour obtenir sa réaction à ce qui a été dit jusqu'alors, l'invitant à partager son expérience des fusions transnationales. La délégation marocaine déclare que l'autorité marocaine de la concurrence n'a qu'une expérience très limitée des affaires de fusion transnationale. Elle a récemment traité une affaire impliquant la société Cadbury mais a

été confrontée à un certain nombre de difficultés dans l'évaluation de l'opération, notamment : un cadre juridique inadéquat ; l'absence de coopération internationale poussée ; l'absence de règles internationales dans ce domaine ; et l'intérêt du gouvernement à attirer les IDE. Sur ce dernier point, la délégation ajoute que les multinationales sont en position de force vis-à-vis des PDEE et qu'il existe un conflit entre l'objectif de protection de la concurrence et celui d'attirer les IDE.

Le Président invite la délégation du Sénégal à exprimer son opinion. Celle-ci insiste sur le fait que l'existence d'un cadre juridique efficace est cruciale et ajoute que les ressources humaines et les compétences adéquates sont également importantes pour évaluer efficacement les fusions transnationales. Il convient également de tenir compte des facteurs politiques tels que l'influence et le pouvoir dont les multinationales peuvent jouir. La délégation présente le cadre juridique en vigueur au Sénégal et explique que, malgré l'absence de mécanisme de contrôle des fusions dans le pays, le Traité de l'Union économique et monétaire ouest-africaine (UEMOA) définit ce qui constitue une fusion. Le Sénégal a souligné que l'absence de cadre juridique et de coopération internationale était la principale difficulté rencontrée par les PDEE dans la réglementation des fusions transnationales.

Le Président se tourne vers la délégation de Tunisie pour qu'elle fasse spécifiquement part des tensions qui peuvent exister entre les politiques destinées à rendre les marchés nationaux attrayants pour les entreprises et un contrôle efficace des fusions. La délégation tunisienne présente un aperçu du contrôle des fusions en Tunisie et indique que le pays encourageait sans cesse les IDE. Les fusions jouent un rôle important dans le bien-être du pays. La délégation a expliqué que les conditions à remplir pour obtenir l'autorisation de fusionner sont clairement établies : la fusion doit être dans l'intérêt du consommateur ou procurer un avantage technologique ou en matière de politique sociale. L'autorité de la concurrence peut émettre un avis en donnant un simple agrément à la fusion ou soumettre son agrément à des conditions. Le Ministre du commerce n'est pas tenu de suivre l'avis de l'autorité mais il l'a fait ces seize dernières années.

La contribution suivante, celle de l'Ouzbékistan, traite des difficultés rencontrées par l'autorité de la concurrence pour obtenir un contrôle efficace des fusions. La délégation note que la réglementation des fusions en Ouzbékistan est très ténue. Pour qu'il existe un contrôle efficace des fusions transnationales, il faut d'une part que l'un des pays soit doté d'une politique et d'un droit de la concurrence ou qu'une seule autorité de la concurrence déploie ses efforts, et d'autre part que les autorités de la concurrence coopèrent et se coordonnent étroitement au niveau international. La délégation d'Ouzbékistan relève qu'un contrôle efficace des fusions dans les PDEE exige l'harmonisation des règles commerciales et liées au commerce sur la circulation des biens et services entre les pays. Les petits pays tels que l'Ouzbékistan n'instaurent pas de contrôle poussé des fusions, estimant que les fusions peuvent aider les entreprises nationales à renforcer leur compétitivité sur les marchés internationaux. Néanmoins, un faible mécanisme de contrôle des fusions peut entraîner des problèmes de structure et de concentration des marchés, qui peuvent à leur tour déboucher sur des problèmes de concurrence. En s'appuyant sur son expérience, l'Ouzbékistan identifie plusieurs moyens de surmonter les difficultés que posent les fusions transnationales : (i) notification obligatoire et extension du champ réglementaire pour couvrir un plus vaste éventail de transactions ; (ii) réhaussement des seuils de notification afin d'utiliser les ressources efficacement ; (iii) octroi du droit de contrôler les fusions n'atteignant pas les seuils de notification mais qui soulèvent de sérieuses préoccupations en matière de concurrence ; et (iv) assouplissement dans le processus de contrôle des fusions.

Le Président s'adresse ensuite à la délégation bulgare, qui informe les participants des changements législatifs introduits dans le domaine du contrôle des fusions. Parmi eux, le relèvement du seuil de chiffre d'affaires entraînant la notification de 15 à 25 millions BGN. Un critère de lien local a également été adopté afin que l'obligation de notification n'incombe qu'aux fusions ayant une « incidence effective » en Bulgarie. Ces modifications sont conformes aux recommandations du RIC. La délégation précise que ce

dernier changement aura vraisemblablement un effet considérable en réduisant le nombre de fusions à notifier, et la charge qui pèsera sur les entreprises impliquées dans ces fusions.

La délégation mongole explique ensuite que l'autorité de la concurrence mongole a récemment préparé un projet de réglementation des fusions, actuellement en phase de consultation. Le pays a jugé nécessaire de se doter d'une réglementation spécifique aux fusions, les règles de concurrence actuelles étant inadéquates pour traiter efficacement les affaires de fusion. Le projet de réglementation propose un mécanisme d'« exemption » applicable lorsque les avantages tirés par l'économie nationale dépasseraient l'éventuel préjudice pouvant être causé à la concurrence en raison de la fusion concernée. La décision de mettre en place un régime de contrôle des fusions dans le pays aiderait par ailleurs à renforcer l'environnement réglementaire.

La discussion porte ensuite sur le lien entre le contrôle des fusions et les IDE. La délégation mauricienne relève qu'il n'y a pas forcément de dichotomie entre les deux. C'est selon les objectifs généraux de l'économie concernée que doit être déterminée cette relation, et toute évaluation doit être menée au cas par cas en tenant compte de l'expérience et de la situation particulière du pays concerné. La délégation brésilienne ajoute que la relation entre la politique de la concurrence et les IDE est positive et qu'un régime de contrôle des fusions efficace devrait encourager les IDE plutôt que les brider. La délégation sénégalaise déclare qu'une politique de la concurrence efficace n'est pas à ses yeux un obstacle aux IDE. Néanmoins, s'il exige beaucoup de temps, le processus de contrôle des fusions peut rebuter les fournisseurs d'IDE. La délégation sud-africaine adhère à l'opinion du Brésil et de la République de Maurice et ajoute deux remarques. Premièrement, elle estime que la crainte de voir un contrôle efficace des fusions décourager les IDE est surestimée et, deuxièmement, il est important de prendre en considération la situation particulière de chaque pays lorsque l'on évalue cette relation. La délégation illustre ensuite son propos à l'aide d'une affaire de fusion sur le marché des équipements satellites. Bien que cette fusion ait reçu un agrément sans réserves aux États-Unis, elle va vraisemblablement créer un monopole en Afrique du Sud. Cependant, au vu de la taille modeste du marché concerné, la fusion a été approuvée, assortie de conditions permettant de faciliter l'entrée sur le marché. Le Président donne ensuite la parole à M. John Taladay, lequel a indiqué que les entreprises évaluent généralement le rapport entre les IDE et l'application du droit de la concurrence en comparant les coûts aux risques. Si les autorités de la concurrence souhaitent promouvoir à la fois les IDE et une application efficace du droit de la concurrence, il est donc nécessaire de tenir compte de ce rapport coûts/risques.

Le Président invite la délégation des États-Unis à donner son avis sur les propos tenus jusqu'alors en donnant le point de vue d'une économie développée. Les États-Unis insistent, en écho à MM. Dabbah et Goto, sur l'importance de disposer, sur le plan national, d'un régime de contrôle des fusions efficace, faute de quoi la coopération internationale est impossible dans ce domaine. Il est crucial de se forger une expérience. C'est un processus à long terme qui ne saurait être achevé en l'espace d'un an ou deux. La délégation américaine a présenté les expériences brésilienne et sud-africaine dans le domaine du contrôle des fusions comme les meilleurs exemples en la matière. Dans un « deuxième » temps, il est important de se familiariser avec les autres régimes et d'informer ces derniers des pratiques ayant cours dans des régimes plus expérimentés. Cette démarche a été primordiale pour permettre aux États-Unis de nouer de véritables relations internationales. La délégation américaine a tout particulièrement recommandé une collaboration par le biais de formations et autres initiatives de promotion de la concurrence au sein de forums internationaux et régionaux. Il est possible d'accroître la confiance entre les différentes autorités de la concurrence en facilitant les contacts personnels entre les responsables de ces diverses autorités. L'université a également un rôle important à jouer dans le processus éducatif et pour aider à renforcer la confiance. En conclusion, les États-Unis ont déclaré que la coopération et les contacts personnels entre les responsables des autorités de la concurrence étaient fondamentaux. Des accords bilatéraux officiels ne sont pas toujours nécessaires pour faciliter la coopération effective par courrier électronique ou par téléphone, par exemple. De nombreuses autorités de la concurrence sont ouvertes à l'idée de coopérer en échangeant

des informations non confidentielles, etc. avec d'autres autorités impliquées dans l'examen de la même affaire de fusion. Enfin, la délégation américaine appelle les autorités de la concurrence moins expérimentées à se manifester et à rechercher la coopération avec d'autres autorités plus expérimentées.

La Président laisse la parole à la délégation de Zambie. Cette dernière revient sur l'opinion de la délégation américaine, selon laquelle une expérience locale est nécessaire avant de pouvoir mettre en place un contrôle efficace des fusions. Selon la Zambie, dans les cas de fusions transnationales impliquant une autorité de la concurrence d'un pays plus développé, les autorités de la concurrence des pays en développement peuvent parfois se sentir obligées de prendre des décisions coïncidant avec celles de leur homologue. En pratique, toutefois, cela n'est pas nécessairement possible puisque chaque pays a une situation bien particulière et c'est en fonction de cette situation que l'autorité de la concurrence locale doit prendre sa décision.

La contribution suivante est apportée par la Pologne. La délégation polonaise souligne le conflit possible entre la politique de la concurrence et d'autres politiques. Elle illustre son propos en expliquant que le droit polonais de la concurrence permet à l'autorité de la concurrence de tenir compte de l'intérêt public pour donner son agrément à une fusion. Néanmoins, même si l'exemption motivée par l'intérêt public est employée avec parcimonie, l'autorité de la concurrence peut subir d'intenses pressions politiques en raison de son existence.

1. La délégation du **Costa Rica** mentionne l'absence de notification obligatoire des fusions dans son pays, ce qui peut créer des difficultés lorsqu'il s'agit d'accorder les calendriers de contrôle des divers pays, et ce qui rend la coopération internationale plus délicate. La fusion entre Kimberley Clark et Scott Paper dans les années 1990 a été citée en exemple. Au moment où l'autorité de la concurrence costaricaine terminait son contrôle de la fusion, les sociétés avaient déjà fusionné. L'autorité de la concurrence a donc appelé à modifier le régime de contrôle afin de s'assurer que ce type de situation ne se reproduise pas. Les modifications proposées ont été saluées par les milieux d'affaires car elles accroîtront sans nul doute le degré de certitude dans le processus de contrôle des fusions.

Le Président s'adresse ensuite à la délégation coréenne, qui souligne l'importance, pour une autorité de la concurrence, de disposer de ressources humaines suffisantes et aux compétences nécessaires (y compris la maîtrise des langues, notamment de l'anglais) pour contrôler efficacement les fusions transnationales. La délégation coréenne met également en relief l'importance de la coopération internationale – notamment la nécessité de disposer de personnel capable de travailler dans un contexte international. La Commission coréenne de la concurrence (KFTC) a amélioré sa capacité institutionnelle en révisant la réglementation du contrôle des fusions et en clarifiant le système de notification afin de distinguer la procédure applicable aux fusions d'entreprises étrangères. La KFTC a également posé les jalons d'une véritable coopération internationale avec d'autres autorités de la concurrence par le biais de nombreux accords de coopération bilatéraux et d'une participation active à des discussions multilatérales au sein du RIC et de l'OCDE.

3. Difficultés liées à la coopération internationale

Le Président invite M. Joseph Wilson à discuter des difficultés qui peuvent surgir dans la coopération internationale entre des autorités de la concurrence de PDEE et celles de pays plus développés.

M. Wilson souligne l'importance de la coopération internationale à une époque où la libéralisation des échanges internationaux a transformé les marchés nationaux en un seul et unique marché mondial. Il rappelle combien la recommandation de l'OCDE de 1995 sur la coopération internationale contribue à faciliter une coopération et une coordination efficaces dans le contrôle des fusions. Il aborde ensuite les pratiques recommandées par le RIC en matière de notification et de contrôle des fusions, adoptées en 2004.

Selon M. Wilson, les agences doivent encourager l'harmonisation non seulement sur le plan de la procédure (comme l'ont fait le RIC et l'OCDE), mais aussi sur le fond. Elles doivent par ailleurs envisager l'adoption d'un cadre de coopération multilatérale reposant sur le modèle de la « juridiction responsable ». Cette idée a été suggérée tout d'abord par le Comité consultatif des États-Unis sur la politique de la concurrence internationale (International Competition Policy Advisory Committee - ICPAC) du département de la Justice américain dans son rapport final de 2000. Une juridiction responsable peut être identifiée comme la juridiction remplissant un certain nombre de critères : (i) probablement la plus lésée par la fusion proposée ; (ii) en mesure de consacrer des ressources à l'enquête ; (iii) du pays du lieu d'activité principal des parties à la fusion ; (iv) familière de l'évaluation de fusions portant sur le même secteur et les mêmes questions ; et (v) capable d'assurer une coordination efficace avec les autres juridictions touchées par la fusion. Selon M. Wilson, ce modèle aurait bien des avantages et serait préférable aux procédures actuelles de contrôle des fusions multi-juridictionnelles. En conclusion, M. Wilson invite l'OCDE et le RIC à étudier la possibilité de changer leurs recommandations et à envisager la promotion et l'adoption d'une coordination multilatérale et d'une norme mondiale de bien-être des consommateurs dans leurs recommandations.

Le Président remercie M. Wilson pour son intervention et s'adresse à la délégation de l'Union européenne (UE). L'expérience de l'UE montre que l'efficacité de la coopération et de la consultation entre les juridictions ne dépend pas nécessairement de l'existence d'accords « contractuels ». Si les accords officiels offrent un cadre de coopération, dans certains cas, la coopération informelle peut avoir ses avantages. Il a été toutefois noté qu'il existe une contrainte de taille lorsqu'il s'agit de privilégier la coopération officielle ou informelle : la possibilité d'échanger des informations confidentielles. Néanmoins, cette contrainte n'empêche pas deux autorités de la concurrence de discuter et d'échanger leurs points de vue sur des questions d'intérêt commun telles que la définition du marché, les théories du préjudice et les mesures correctives possibles. Même dans des cas exceptionnels dans lesquels il peut être nécessaire d'échanger des informations confidentielles, les parties pourraient être priées de renoncer à leur droit de confidentialité. La délégation de l'UE a expliqué que la coopération est plus efficace lorsque les enquêtes des différentes autorités suivent plus ou moins le même calendrier et lorsque les mêmes questions peuvent être traitées par plusieurs agences. La fusion *BHP-Billiton* est un bon exemple. Durant cette affaire, la Commission de l'UE a coopéré étroitement (y compris en échangeant des informations confidentielles) avec un certain nombre d'autorités de par le monde, sans avoir d'accords de coopération formels avec elles.

La Président se tourne ensuite vers la délégation du Royaume-Uni, la priant de commenter l'approche adoptée par le pays en matière de coopération internationale, sachant que le Royaume-Uni ne dispose pas d'accord de coopération bilatérale formel dans le domaine de la concurrence. La délégation britannique répond que le pays suit une approche pragmatique et qu'une coopération bilatérale formelle n'est pas toujours jugée nécessaire pour assurer une bonne coopération internationale. Les autorités de la concurrence britanniques apportent leur entière coopération dans le cadre d'accords multilatéraux de l'UE ainsi qu'en l'absence de cadre formel dans les affaires de fusion transnationale. Il est fréquent que l'OFT ou la Commission de la concurrence soulèvent des questions ou répondent à des questions sur le contexte de marché et leur expérience de fusions similaires. La délégation britannique a fait allusion à l'affaire *NewFarm*, mentionnée dans sa contribution écrite. La fusion concernait le rachat, par un fabricant de pesticides agricoles australien très présent à l'exportation, d'une grande usine d'un groupe britannique dont les exportations étaient également importantes. Les incidences internationales de cette affaire étaient manifestes. Les autorités britanniques se sont mises en relation avec d'autres, y compris leurs homologues australiennes, américaines et canadiennes, ainsi qu'avec les autorités européennes des pays où les parties exerçaient toutes deux leurs activités. Les discussions ont porté sur le calendrier des enquêtes, les problèmes de concurrence soulevés et les mesures correctives, l'objectif étant d'aboutir à une approche similaire. À titre d'exemple, les autorités britanniques ont étudié des mesures correctives détaillées destinées à ouvrir les droits d'autorisation des pesticides afin de permettre à de nouveaux entrants d'arriver

sur le marché, et a discuté de ce point en détail avec les autorités américaines et canadiennes. L'absence d'accords formels de coopération bilatérale n'a pas été un obstacle à cette coopération fructueuse.

Le Président demande aux délégations de l'UE et du Royaume-Uni si elles ont des conseils à prodiguer aux autres autorités de la concurrence sur le meilleur moyen de les approcher, notamment s'il vaut mieux les contacter par téléphone ou établir le lien par des réunions, etc. La délégation de l'UE répond que l'Unité Internationale à la Commission est le meilleur point de contact au sein de l'UE. La coopération n'est pas nécessaire seulement au « plus haut niveau » et des conférences téléphoniques aussi bien que des réunions, si nécessaire, peuvent être utiles. La délégation britannique répond qu'elle est favorable à l'instauration de relations interpersonnelles entre les responsables de la concurrence, une méthode qui lui paraît utile pour mettre en place des voies de communication efficaces.

Le Président demande ensuite à la délégation croate de commenter la pratique qui consiste à publier des demandes d'informations sur son site Internet. La délégation explique que les demandes publiées permettent d'obtenir des informations de la part des parties intéressées sur des questions telles que les activités commerciales des parties à la fusion et sur les marchés qui pourraient être touchés par la transaction. Les parties intéressées ont généralement huit à quinze jours pour répondre, bien que ce délai soit souple et puisse être prolongé.

La délégation suivante à prendre la parole est celle de la République slovaque. Elle donne des renseignements sur le forum de la concurrence Marchfeld, un forum informel créé à l'initiative de l'Autriche, avec d'autres pays tels que la République slovaque, la République tchèque, la Bulgarie et la Suisse. Ce forum a pour but de faciliter la coopération entre les diverses autorités de la concurrence, bien que la coopération en matière de fusions transnationales soit encore balbutiante. Il a créé une base de données rassemblant les informations échangées entre les différentes autorités. Cette base de données permet à tous les membres d'avoir accès à ces informations. Les renseignements relatifs au contrôle des fusions comportent généralement des informations sur la date de notification, le nom des parties, le secteur concerné, le stade de l'enquête et les coordonnées des principales personnes chargées de l'affaire. D'après l'expérience de la République slovaque, le forum peut grandement faciliter l'émergence d'une véritable coopération entre les autorités impliquées.

Les participants abordent ensuite la question de l'échange d'informations et les limites aux échanges dues à la crainte que ces derniers ne touchent des informations confidentielles. Le Président invite la délégation de la Russie à donner son opinion sur ce sujet. La délégation note que le Service fédéral antimonopole de la Russie (FAS) peut s'engager dans une coopération internationale avec des autorités de la concurrence étrangères et qu'il a conclu un certain nombre d'accords bilatéraux. L'exemption de confidentialité est un outil important et le FAS a commencé à en voir les avantages pratiques bien que ces exemptions n'aient été employées que dans un nombre limité d'affaires. La délégation donne ensuite l'exemple d'une exemption utile dans l'affaire de la fusion entre Sun Microsystems et Oracle. Dans le cadre de cette affaire, le FAS et la Commission européenne ont travaillé en étroite coopération et ont échangé des informations (y compris des informations confidentielles). La délégation a toutefois noté qu'il n'est pas toujours nécessaire d'avoir une exemption de confidentialité pour évaluer des affaires de fusion. Lors de deux affaires récentes notamment, le FAS a coopéré avec une autre autorité de la concurrence sans y avoir recours (*Danone/Unimilk* et *Pepsi Co./Wimm-Bill-Dann*).

La délégation de la Suisse commente également le recours aux exemptions de confidentialité. L'autorité de la concurrence suisse indique que l'emploi d'exemptions peut être extrêmement fructueux pour trois raisons. Tout d'abord, les parties à la fusion savent que, si elles accordent une exemption, elles recevront en principe des décisions simultanées (ou presque) de la part de l'autorité de la concurrence suisse et des autres autorités de la concurrence. Ensuite, les avocats suisses ont toute confiance dans l'autorité de la concurrence suisse pour ne pas utiliser l'exemption à des fins d'intervention excessive.

Enfin, les exemptions permettent une meilleure cohérence de la conception et de la mise en œuvre des mesures correctives, ce qui est favorable aux parties à la fusion.

4. Difficultés rencontrées par les PDEE pour décider de mesures correctives

Le Président présente l'orateur suivant, M. Han Li Toh, qui s'exprime sur les difficultés soulevées par les mesures correctives dans les fusions transnationales, du point de vue d'une économie de petite envergure.

M. Toh débute sa présentation en notant que, depuis l'entrée en vigueur du régime de contrôle des fusions à Singapour il y a quatre ans, environ vingt fusions ont été notifiées à l'autorité de la concurrence, dont dix-sept étaient des opérations transnationales. Selon M. Toh, les petites économies sont confrontées à des difficultés toutes particulières dans la réglementation des fusions transnationales. L'un des problèmes pratiques touchant l'exécution vient du fait que les petits pays peuvent rarement menacer d'empêcher une fusion avec une société étrangère en toute crédibilité. Le commerce dans un petit pays peut ne représenter qu'une part infime des activités mondiales d'une société et les avantages tirés de l'activité dans ce pays peuvent être limités. Si la petite économie impose des restrictions importantes à la société étrangère et si les coûts de mise en conformité sont élevés, la société quittera vraisemblablement le pays et n'exercera que dans d'autres juridictions. Il est très possible que le préjudice causé au bien-être par le départ de la société étrangère soit supérieur à tout effet anticoncurrentiel que pourrait avoir la poursuite de ses activités dans la petite économie.

Les petits pays et les pays en développement ont aussi des difficultés à obtenir des informations de la part des sociétés étrangères. M. Toh fait allusion au document de référence du Secrétariat, qui décrit les défis liés au manque de ressources adéquates. C'est une des raisons pour lesquelles Singapour a opté pour un système de notification basé sur le volontariat, lequel permet d'utiliser au mieux les ressources disponibles. Ce régime basé sur le volontariat permet à l'autorité de la concurrence Singapourienne de se concentrer sur les fusions les plus susceptibles de soulever des problèmes de concurrence. Dans le cadre de ce régime, l'autorité encourage les parties qui envisagent de fusionner à notifier les transactions lorsque : (i) l'entité fusionnée obtiendra une part de marché supérieure ou égale à 40 % ; et lorsque : (ii) l'entité fusionnée disposera d'une part de marché comprise entre 20 % et 40 %, dès lors que la part de marché combinée des trois plus grandes sociétés est supérieure ou égale à 70 %.

M. Toh aborde ensuite la question de l'évaluation de fond des fusions. Le test employé à Singapour à cet effet est le test de diminution significative de la concurrence, ce qui correspond à la pratique observée à l'échelle internationale. M. Toh mentionne deux fusions transnationales récentes dans lesquelles l'autorité a été impliquée. La fusion *Thompson/Reuters Group* a été contrôlée et approuvée par l'UE et par les États-Unis, sous réserve d'engagements. L'évaluation réalisée par l'autorité Singapourienne a révélé que la fusion avait pu entraîner une diminution significative de la concurrence également à Singapour. Néanmoins, l'autorité a jugé que les engagements proposés par les parties à la fusion aux autorités américaine et de l'UE seraient suffisants pour régler les problèmes de concurrence sur le marché de Singapour. Dans la fusion *Prudential/AIA*, Prudential aurait amélioré sa position stratégique en Asie et l'entité fusionnée aurait obtenu une position dominante. Toutefois, l'évaluation menée par l'autorité de la concurrence Singapourienne a montré que les problèmes de concurrence soulevés par la fusion étaient propres à Singapour car le produit concerné – l'assurance-vie – était adapté aux besoins spécifiques de chaque pays. La fusion a finalement été abandonnée, non pas en raison des problèmes liés à la concurrence soulevés par l'autorité de la concurrence, mais parce que les actionnaires de Prudential ont rejeté la proposition.

Selon M. Toh, l'expérience de Singapour illustre le fait qu'il n'est pas toujours approprié de se reposer sur les mesures prises à l'étranger. Dans certains cas, toutefois, le succès des mesures d'exécution

prises par une autorité de la concurrence dans des affaires de fusions transnationales nécessite l'assistance d'autorités de la concurrence étrangères également impliquées dans la transaction. Singapour coopère donc continuellement avec les autorités de la concurrence étrangères ainsi qu'avec des organisations internationales telles que l'OCDE et le RIC. Singapour prend aussi activement part à la coopération régionale et préside le Groupe d'experts asiatique sur la concurrence (Asian Expert Group on Competition – AEGC) ainsi que le Groupe de travail sur les directives régionales. Bien qu'aucune autorité de la concurrence supranationale officielle n'ait encore été créée à l'échelle de l'ANASE, Singapour continue de travailler avec d'autres États-membres de l'ANASE pour mettre sur pied une plateforme régionale permettant de faciliter la coopération entre les autorités de la concurrence.

Le Président a invité la délégation de la Chine à s'exprimer sur la question des mesures correctives dans les affaires de fusion. La Chine note que les autorités chinoises et les autorités de la concurrence étrangères ont tenu des discussions informelles sur la question des mesures correctives dans un certain nombre d'affaires de fusion transnationale. Néanmoins, l'absence d'accords de coopération bilatéraux entre la Chine et d'autres pays a limité les possibilités d'échanger des informations confidentielles. En revanche, les autorités chinoises peuvent utiliser les mesures correctives liées aux fusions acceptées par des autorités de la concurrence étrangères comme point de référence. La coopération directe entre les autorités de la concurrence peut toutefois être très importante pour concevoir des mesures correctives tout en évitant des décisions divergentes.

La contribution suivante est apportée par le Mexique. La délégation mexicaine met en relief un important changement dans la manière d'aborder les mesures correctives par la Commission mexicaine de la concurrence (la « Commission »). La Commission reconnaît qu'insister sur la mise en œuvre de mesures correctives avant d'achever une fusion peut retarder indûment la procédure d'agrément d'une fusion. Par conséquent, les mesures correctives peuvent désormais être mises en œuvre une fois achevée la fusion. Au sujet du thème général de la coopération internationale, la Commission coopère de manière particulièrement étroite avec un certain nombre d'autorités de la concurrence dans le monde et elle attache une importance toute particulière à cette coopération. Le Mexique entretient de bonnes relations avec ses partenaires de l'ALENA (Accord de libre-échange nord-américain), à savoir les États-Unis et le Canada, mais aussi avec l'UE. Le représentant mexicain a par ailleurs souligné l'importance des rapports personnels entre les responsables de la concurrence des diverses juridictions. Ces rapports peuvent être particulièrement efficaces en raison de leur caractère informel et pragmatique.

Les participants abordent ensuite la question des mesures correctives comportementales, et plus précisément des difficultés de mise en application de ces types de mesures. La première contribution sur ce point a été apportée par la délégation du Taipei chinois. Selon cette dernière, les mesures correctives comportementales sont les plus usitées au Taipei chinois, les mesures structurelles étant plus rarement employées. Néanmoins, la surveillance des mesures correctives comportementales mobilise des ressources considérables, que ce soit en savoir-faire ou en ressources humaines. La délégation mentionne la fusion *Microsoft/Yahoo*, approuvée sous réserve de mesures correctives comportementales parmi lesquelles l'obligation, par les parties à la fusion, de fournir certaines informations aux autorités de la concurrence chaque année, pendant une période de trois ans.

La contribution suivante vient de la délégation de la Lituanie, qui s'exprime sur la « procédure » de mandataire après l'imposition de mesures correctives dans une affaire de fusion. La Lituanie explique qu'il n'y a eu de recours jusqu'à présent à un mandataire pour les mesures correctives que dans deux affaires de fusion transnationale. Parmi les principales conditions à remplir dans la désignation d'un mandataire, il est nécessaire que ce dernier soit indépendant et qu'il jouisse des qualifications et du savoir-faire requis. En Lituanie, le mandataire ne peut être désigné que dans un délai fixe. Dans certains cas, certaines autorités de réglementation peuvent jouer le rôle de mandataire.

Le délégué de la République tchèque souligne l'importance toute particulière de l'interaction et de la confiance entre les autorités de la concurrence pour concevoir des mesures correctives dans les affaires de fusions transnationales. Il a également mis en relief la nécessité de coopérer pour assurer l'efficacité des mesures correctives liées aux fusions.

Le Président invite ensuite la délégation de l'Afrique du Sud à donner son opinion sur le risque que des décisions contradictoires soient prises lorsque plusieurs autorités de la concurrence cherchent à imposer des mesures correctives dans les affaires de fusion transnationale. La délégation sud-africaine cite l'exemple de la fusion *Unilever/Sara Lee*, dans le cadre de laquelle l'UE a exigé la vente d'une marque tandis que l'autorité de la concurrence sud-africaine a exigé la vente d'une autre marque, mettant les parties à la fusion dans une situation des plus inconfortables. La délégation indique que cette situation résultait des différences de calendrier dans le contrôle mené par les deux juridictions. Si l'UE avait été la première autorité à imposer la cession, l'autorité de la concurrence sud-africaine aurait peut-être abordé les mesures correctives sous le même angle.

5. Défis posés par les transactions transnationales du point de vue des sociétés candidates à la fusion

M. Taladay ouvre les discussions sur ce sujet et note que les agences de la concurrence des pays développés comme des pays en développement jouent le rôle singulier de gendarmes des fusions nationales et de leurs effets. Les sociétés fusionnent afin de croître, d'innover et de créer des synergies ainsi que pour réduire leurs coûts. Entre l'annonce publique de la fusion et le moment où cette dernière s'achève, le vendeur et l'acheteur sont exposés à des risques commerciaux importants, dont des risques de réglementation et liés au droit de la concurrence. Depuis les années 1990, le nombre de régimes de droit de la concurrence s'est nettement accru dans le monde, tandis que les fusions se sont multipliées. Cette situation a eu de lourdes conséquences pour le contrôle des fusions multi-juridictionnel et montre à quel point il est important que les autorités de la concurrence des diverses juridictions travaillent ensemble pour s'efforcer de convenir d'une approche commune.

L'un des principaux défis auxquels les entreprises sont confrontées est l'incertitude qui entoure les exigences légales des divers régimes de fusion. Les entreprises seraient plus à même de se mettre en conformité si les autorités de la concurrence informaient plus clairement sur les régimes applicables aux fusions dans leur juridiction. L'absence de véritables procédures peut accroître le temps, les efforts et les sommes à consacrer par les entreprises pour traiter avec les juridictions concernées. Le monde des affaires est aussi confronté à une autre difficulté : le manque de précédents susceptibles de créer une certaine sécurité juridique. Il est primordial de fournir des directives transparentes pour aider les sociétés à comprendre les risques liés à la fusion. Les conseillers juridiques peuvent alors prodiguer leurs conseils à la lumière de ces risques. Cependant, il ne faut pas oublier les difficultés rencontrées par les autorités de la concurrence, par exemple en raison des capacités restreintes dont elles disposent et des ressources nécessaires pour s'assurer que des procédures correctes soient en place, ainsi que pour fournir des directives efficaces.

M. Taladay s'exprime sur la manière dont les autorités de la concurrence peuvent garantir l'existence de régimes de contrôle des fusions plus efficaces. Il est très important de réduire le poids des notifications et le fait d'exiger que la procédure de notification se fasse en anglais peut considérablement aider les parties à la fusion. Lorsqu'un régime non anglophone change ses règles de fusion, il serait par ailleurs utile qu'un résumé de ces changements soit publié en anglais. Le contrôle des fusions peut en outre être bien plus efficace si l'on assure un lien juridictionnel suffisant. Lorsqu'elles sont indûment pesantes, les normes de notification préalable à la fusion peuvent également accroître les coûts à la charge des parties à la fusion. Un certain nombre de mesures pratiques peuvent être prises pour rationaliser la procédure de contrôle des fusions, comme la mise en place des recommandations pertinentes du RIC sur la notification

des fusions. Les autorités de la concurrence devraient se concentrer avant tout sur les fusions locales car ce sont elles qui sont les plus susceptibles de poser problème à l'échelon local. Il n'est pas nécessairement indésirable que les petites autorités de la concurrence se reposent entièrement sur les efforts d'autorités de la concurrence de plus grande envergure pour la réglementation des fusions transnationales. C'est même recommandé dans certains cas.

Le Président remercie M. Taladay pour son intervention et s'adresse à M. Marcello Calliari pour qu'il présente son expérience en tant que professionnel libéral au Brésil. M. Calliari déclare que sa présentation se concentrera sur trois points : la notification, les délais d'attente obligatoires et les mesures correctives liées aux fusions.

La procédure de notification peut poser des problèmes aux sociétés, notamment lorsqu'il s'agit de collecter des informations. Cette procédure peut entraîner des retards lorsque les sociétés exercent leurs activités dans diverses parties du monde. Par exemple, les exigences de notification des divers pays varient en fonction des seuils de chiffre d'affaires (CA) retenus. Certains régimes retiennent le CA des entités mêmes qui doivent fusionner, alors que d'autres retiennent le CA du groupe auquel ces sociétés appartiennent. Par ailleurs, dans certains régimes, c'est le CA obtenu dans le ou les marché(s) concerné(s) qui prime, tandis que dans d'autres il s'agit du CA généré par toutes les activités des sociétés.

M. Calliari note que les autorités de la concurrence n'adoptent pas toujours des pratiques claires concernant les informations requises et les critères employés pour déterminer le chiffre d'affaires. Il cite des exemples dans le domaine des co-entreprises et des fonds de pension ainsi que des fonds de capital-investissement. Une approche unifiée des notifications n'est peut-être pas possible, mais il faudrait prendre des mesures pour s'assurer que les règles soient claires et, si possible, qu'une approche commune soit adoptée. Il peut être très bénéfique de suivre les Recommandations du RIC (comme celle d'employer le chiffre d'affaires plutôt que la part de marché comme critère pour établir les seuils de notification). Cela peut en outre permettre de réduire les coûts et charges pesant sur les parties à la fusion.

Les différents calendriers adoptés dans les diverses juridictions constituent également un problème majeur pour les sociétés. Il peut être très difficile, pour les autorités de la concurrence, de coopérer efficacement entre elles si leurs enquêtes en sont à des stades différents sur la même transaction. Il est possible d'accroître l'harmonisation et, le cas échéant, cela serait favorable aux parties à la fusion et aiderait les autorités de la concurrence à mieux coopérer et à mieux coordonner leurs enquêtes.

Le dernier point abordé par M. Calliari porte sur les mesures correctives. Des manquements sur ce front peuvent être problématiques à la fois pour les parties à la fusion, pour l'économie dans son ensemble et pour les consommateurs. Il est important que les autorités de la concurrence discutent entre elles des mesures correctives appropriées. Ce n'est toutefois pas le cas dans la majeure partie des cas. Le fait que certaines autorités se reposent entièrement sur les mesures conçues par d'autres est une manière pratique de résoudre des problèmes de concurrence courants. C'est ce qui s'est passé dans un certain nombre d'affaires au Brésil. Pour autant, les autorités de la concurrence doivent être encouragées à discuter entre elles au sujet des mesures correctives plutôt que de voir les parties à la fusion engager de multiples discussions bilatérales. Les coûts en seraient ainsi considérablement réduits. À titre d'exemple, dans l'affaire *Novartis/Alcon*, les parties ont dû traiter avec douze juridictions différentes et, sans surprise, les coûts ont été exorbitants pour les deux entités.

La Président remercie M. Calliari pour sa présentation et ouvre la discussion générale.

6. Discussion générale

La délégation finlandaise présente une affaire dans laquelle l'Autorité finlandaise de la concurrence a été impliquée aux côtés d'autres autorités de la concurrence étrangères. Les parties à la fusion avaient déclaré que l'affaire soulevait des questions similaires dans les deux juridictions car les conditions de concurrence étaient les mêmes dans l'un et l'autre pays. Les deux autorités ont discuté des conditions de concurrence dans leurs juridictions respectives et ces discussions ont révélé que, dans l'une d'entre elles, les marchés des produits concernés étaient composés de segments distincts et les produits des parties étaient plutôt complémentaires que substitutifs. En Finlande, en revanche, les produits étaient jugés appartenir au même marché. Les parties étaient par ailleurs les acteurs les plus importants du marché et les plus proches concurrents. Au vu des conditions de concurrence différentes dans les deux juridictions, les conclusions ont différé. En Finlande, la fusion a reçu un agrément assorti de conditions, tandis que dans l'autre pays elle a été approuvée sans réserve.

La contribution suivante est apportée par la Colombie. La délégation colombienne évoque la fusion *Linde AG/Boc Group* en 2007, laquelle a été bloquée par la Superintendencia de Industria y Comercio (SIC) alors qu'elle avait été approuvée dans le reste du monde. Les sociétés devant fusionner contrôlaient plus de 80 % du secteur des gaz industriels en Colombie, et seule une autre société était présente sur le marché. La SIC a mené une étude des barrières à l'entrée sur le marché concerné et conclu que des coûts de changement élevés rendraient difficile l'entrée d'un nouvel arrivant sur le marché. Étant donné toutes ces restrictions, la SIC a décidé de bloquer la fusion. Les parties ont proposé des mesures correctives mais la SIC ne les a pas jugées suffisantes. La délégation colombienne a également cité la fusion *Colgate/Procter & Gamble*, dans le cadre de laquelle Colgate vendait la majeure partie de ses marchés à Procter and Gamble. Malgré son approbation dans la majeure partie des juridictions mondiales, la fusion a été bloquée par la SIC en raison des conditions structurelles du marché colombien.

Le délégué de l'Australie indique que les parties à des fusions transnationales concentrent souvent leurs efforts non sur les régimes à notification volontaire, mais sur ceux dans lesquels la notification est obligatoire. En Australie, la notification se fait sur la base du volontariat et l'un des défauts de ce système est qu'il peut entraîner des notifications tardives. C'est ainsi qu'un régime de faible envergure comme celui de l'Australie se trouve sous une intense pression lorsque la fusion transnationale est approuvée par de grandes autorités de la concurrence. Néanmoins, il faut mettre ces défauts en regard de la charge administrative et réglementaire réduite qu'entraîne un régime de notification obligatoire. La délégation a ensuite abordé, du point de vue de l'Australie, trois aspects importants du contrôle des fusions dans les affaires transnationales. Tout d'abord, collecter les informations et surveiller le marché pour déceler au mieux les fusions susceptibles de poser des problèmes de concurrence demande un effort soutenu. Ensuite, la Commission australienne de la concurrence et de la consommation (ACCC) attache une importance toute particulière à la coopération internationale avec d'autres autorités de la concurrence. Le protocole de coopération entre l'Australie et la Nouvelle-Zélande joue un rôle important à cet égard. Enfin, les exemptions de confidentialité peuvent jouer un rôle clé pour permettre aux autorités de la concurrence de communiquer librement.

Le Président s'adresse ensuite aux délégations de CUTS et de la CNUCED afin qu'elles apportent elles aussi leur contribution.

Le délégué de CUTS souligne à quel point la définition du marché est importante dans les affaires de fusion. Si le marché concerné se révèle être le monde entier, une coopération entre les pays est alors davantage nécessaire. CUTS fait également référence à la situation en Inde dans le secteur pharmaceutique, où un grand nombre de laboratoires pharmaceutiques étrangers acquièrent des laboratoires indiens. La politique indienne des investissements autorise les investissements étrangers à 100 % dans le secteur pharmaceutique, sans restriction particulière. Néanmoins, les règles de fusion en Inde n'ont pas encore été

prises en place pour des raisons de politique économique. Le gouvernement envisage donc de modifier la politique des investissements directs étrangers en Inde afin de mieux contrôler ces transactions. Il craint en effet que, lorsqu'une société pharmaceutique étrangère rachète un laboratoire indien, elle n'arrête la production des génériques, bien moins chers que les princeps. Pour conclure, CUTS indique que, dans les pays en développement, les autorités de la concurrence ne sont pas particulièrement en position de force pour réglementer efficacement les fusions transnationales.

Le délégué de la CNUCED souligne l'importance, pour les pays en développement, de disposer d'un droit et d'une politique de la concurrence. Il est encourageant de constater que nombre de ces pays se dotent d'un droit de la concurrence depuis quelques années. Selon la CNUCED, les autorités de la concurrence des PDEE devraient faire du droit et de la politique de la concurrence leur priorité au sein du cadre réglementaire national dans son ensemble. Elles pourraient ainsi encourager une allocation appropriée des ressources et s'assurer qu'un rang de priorité adéquat soit accordé aux différentes politiques, lesquelles peuvent parfois être discordantes. Au niveau international, les autorités de la concurrence devraient par ailleurs déployer des efforts pour s'assurer que les autorités de la concurrence des économies développées soient conscientes des effets potentiels, dans les PDEE, des fusions transnationales proposées, et exprimer de manière véritablement proactive le besoin de coopération et de soutien technique. L'OCDE, la CNUCED et le RIC sont des forums utiles pour s'engager dans de telles initiatives de plaidoyer. Enfin, la CNUCED met en relief le besoin important, à ces fins, de coopérer et d'établir une relation de confiance, des relations personnelles et des contacts informels.

7. Conclusions

M. Irarrazabal conclut la session par quatre commentaires :

- tout d'abord, les fusions sont des opérations très complexes, et surtout lorsqu'on y ajoute un caractère transnational ;
- deuxièmement, il n'existe pas de formule magique pour mener un contrôle des fusions ;
- troisièmement, il est important de tirer des leçons des expériences des autres et d'établir de bonnes pratiques dans ce domaine, en tenant compte des intérêts des entreprises candidates à la fusion et en maintenant la certitude juridique ; et
- enfin, opérer des contrôles de fusions est une tâche « solitaire » et les autorités de la concurrence doivent en être parfaitement conscientes.

Dans ses conclusions, le Président fait également référence aux recommandations adoptées par l'OCDE en 2005. Il mentionne en particulier les points suivants des Recommandations de 2005 :

- le contrôle des fusions doit être efficace, efficace et intervenir en temps opportun ;
- les autorités de la concurrence doivent veiller à ne pas imposer des coûts et des charges inutiles aux parties à la fusion ;
- les autorités de la concurrence doivent n'exercer leur compétence que sur les fusions qui présentent un lien approprié avec leur juridiction ;
- les autorités de la concurrence doivent employer des critères clairs et objectifs, s'efforcer d'être transparentes, publiques, de définir des normes d'information raisonnables, de prévoir des procédures et d'être cohérentes avec les procédures qui sont déjà utilisées ;

- les autorités de la concurrence doivent s'efforcer d'être souples dans une certaine mesure, notamment lorsqu'elles traitent une fusion transnationale ;
- les autorités de la concurrence doivent être raisonnables et fixer un calendrier pour la procédure qu'elles appliquent ;
- les lois relatives aux fusions doivent traiter les entreprises étrangères de façon non moins favorable que les entreprises nationales dans des circonstances analogues ; et
- les autorités de la concurrence ne doivent pas faire de discrimination et doivent être conscientes des contraintes de confidentialité.

M. Frederic Jenny, Président du Forum mondial sur la concurrence de l'OCDE, remercie M. Irarrazabal pour ses conclusions et ajoute quelques remarques finales au vu de la discussion. Tout d'abord, il est frappant de constater que nul n'a remis en question le bien-fondé du contrôle des fusions et que, tout au long des discussions, un consensus était palpable sur le fait que le contrôle des fusions était un instrument utile. Ensuite, pour toutes les délégations, renforcer la confiance est un élément très important de la coopération internationale. Troisièmement, le contrôle des fusions semble être accepté comme faisant naturellement partie de la politique de la concurrence dans toutes les juridictions. Clarté et visibilité sont très importantes. De même, il convient d'adopter également une approche pragmatique de la coopération. Il est apparu clairement que nul n'avait défendu avec ferveur les accords de coopération formels et qu'un cadre formel pouvait ne pas être réellement utile à une coopération efficace. En revanche, les échanges informels entre responsables des autorités de la concurrence des diverses juridictions sont jugés utiles par la plupart des délégations. Enfin, il était important de réfléchir au fait que les mesures correctives comportementales peuvent entraîner une réglementation excessive, et que la coopération entre les autorités de la concurrence est cruciale pour élaborer des mesures correctives transnationales.