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Challenges and sources of divergence in cross-border merger review – Background Note

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Mme Aura GARCÍA PABÓN
E-mail : aura.garciapabon@oecd.org

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Foreword

1. The paper highlights the significant rise in cross-border mergers and illustrates the current state of cross-border merger enforcement. It identifies key sources of divergence in the outcomes of cross-border mergers reviews, including different competitive conditions, legal frameworks, and analysis methods across jurisdictions.

2. The paper discusses the challenges faced by competition authorities, such as timing issues, potential strategic behaviour by merging parties, the need for consistent outcomes, particularly remedies, and the unique difficulties faced by smaller jurisdictions. It emphasises the importance of international co-operation and developing best practices to address these challenges, proposing practical strategies like aligning review timelines, using confidentiality waivers, and co-operating on remedy design and implementation.

3. This paper was prepared by Aura García Pabón and Connor Hogg from the OECD Competition Division with research assistance from Ignacio Baz Rullán. The paper benefited from comments by Ori Schwartz, Antonio Capobianco and Despina Pachnou from the OECD Competition Division. It was prepared as a paper for the discussion on “Cross-border Mergers” taking place at the 2024 Global Forum on Competition.

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1 Introduction

4. Cross-border mergers can be defined as those transactions that involve companies established in more than one jurisdiction. They can also include situations where the transaction affects markets in more than one jurisdiction, regardless of the location of the merging firms (OECD, 2011[1]). In both cases, the practical implication is that the mergers are notifiable in multiple competition authorities, according to the applicable merger regimes.

5. Since the 1990s, the review of cross-border mergers has become an increasingly large part of the work of competition authorities. Globalisation and free trade have created far more cross-border merger activity, reflecting the scale of interconnected economic activity between jurisdictions (through worldwide supply chains and large multinational firms). More recently, increasing digitisation and the global reach of multinational digital platforms and technology firms have also created a significant volume of new cross-border merger activity (OECD, 2023[2]). By 2020, the OECD found that cross-border mergers accounted for almost half (47%) of all global mergers in terms of value and 36% in terms of volume (OECD/ICN, 2021, p. 71[3]).

6. Over the same period, there has been enormous increase in the number of jurisdictions with a competition law framework, rising 600% between 1990 and 2020 (OECD/ICN, 2021, p. 69[3]), This means that there are now far more competition authorities with merger control regimes that may be required to review a transaction with cross-border effects. By 2024, all OECD jurisdictions (but Luxembourg) have one in place.[1]

7. This dynamic creates an inherent tension, as although a cross-border merger may raise different competition concerns across the globe, merger control is conducted by competition authorities responsible for enforcing the law only in their jurisdiction. Competition authorities in different jurisdictions may arrive at different decisions based on their domestic law and its objectives, the characteristics of their markets, and the need to protect local consumers.

8. Over the past years, the OECD held roundtables on cross-border merger control: challenges for developing and emerging economies (2011); remedies in cross-border merger cases (2013); and extraterritorial reach of competition remedies (2017). The purpose of this paper is to explore the possible sources of divergence in cross-border mergers; the challenges that competition authorities face when reviewing cross-border mergers, including when they find conflicting divergences in their analyses; and what are the possible solutions or alternatives. A range of recent decisions around the world illustrate the current state of cross-border merger enforcement and the strategies that competition authorities followed when facing some of the challenges discussed.

9. While recent literature on the assessment of cross-border mergers is scarce, articles written in the past couple of years have mainly focused on divergent decisions, and discussing whether co-operation and comity between competition authorities is sufficient to reduce the risk of inconsistent outcomes that may impede the consummation of transactions that would benefit consumers.[2]

10. This paper will examine, in its second chapter, the main sources of divergence including different local market conditions, legal frameworks and enforcement practices as the most frequently discussed aspect of cross-border mergers in recent years. It will show that such differences can be justified and are not inherently problematic, particularly when competition authorities follow strategies to ensure they do not arrive at conflicting outcomes. Conflicting outcomes, in any case, are fairly rare in cross-border mergers

and it is even more infrequent that they represent a challenge to the reviewing authorities. The third chapter of the paper will present the challenges competition authorities most frequently face in relation to the timing of the investigations and guaranteeing consistency, particularly when decisions involve imposing remedies, blocking or challenging the transaction. There will be a particular focus on the challenges impacting smaller jurisdictions. The fourth chapter of the paper will present some guidance on how to overcome these challenges. It will illustrate how efforts to enhance international co-operation have consistently been the most effective way to minimise the risk that outcomes will be incompatible and difficult or impossible to implement together.

2 Sources of divergence

11. When a merger is reviewed across multiple jurisdictions, it may lead to different outcomes. These divergent outcomes have been one of the most discussed matters in the context of cross-border merger assessments. Therefore, it is useful to understand the main sources that lead competition authorities to reach different decisions. This chapter briefly describes the most common sources of divergence in cross-border mergers, broadly dividing them into three categories: (i) different competitive conditions; (ii) different legal frameworks, rules and standards for the evaluation of mergers; and (iii) when competition authorities analyse the transaction differently.

12. Reviewing the same transaction does not necessarily mean reaching the same conclusion. While there is value on convergence, divergence is not necessarily bad. Most of the sources of divergence do not lead to conflicting outcomes and are not inherently problematic. What should matter is not whether the outcomes are different, but whether these differences are incompatible (see section 3.2). As it will be seen, most of the conflicting outcomes may arise from competition authorities analysing transactions differently, while different competitive conditions tend to be the less concerning source of divergence. Therefore, this chapter aims at serving as a tool for competition authorities to identify main reasons why their decisions differ from other reviewing authorities, while considering potential areas and strategies where they could co-operate to avoid inconsistencies.

2.1. Different competitive conditions

13. One of the main sources of divergence in the outcome of cross-border merger reviews are the differences in competitive conditions in the reviewing jurisdictions. Starting from the definition of the relevant market, the substitutability between products is highly affected by consumers' preferences and local aspects. Competition authorities may reach different conclusions on how the relevant market could look like (both in terms of product and geography) depending on these differences. Even when markets are defined similarly, the closeness of competitors and how consumers react to changes in prices, quality and other competitive variables, may differ (see Box 1).

Box 1. smart vacuum cleaners: relevant for consumers in France, Germany, Italy, and Spain, but not in the UK

In January 2024, Amazon announced the termination of iRobot's acquisition agreement as there was "*no path to regulatory approval in the European Union*". The announcement came after the European Commission (EC) conducted an in-depth investigation where they found that Amazon may have had the ability and the incentive to foreclose iRobot's rivals in the market of smart vacuum cleaners. According to the EC, Amazon stood out as the main marketplace for comparing, discovering, and purchasing vacuum robots, especially in France, Germany, Italy, and Spain. The EC argued that after the merger, Amazon would gain more from additional sales of iRobot than what they would lose from the decreased sales of competitors' smart vacuum cleaners. The EC believed these factors meant Amazon would have incentives to foreclose its competitors.

The outcome in the United Kingdom was different. In June 2023, the UK's Competition and Markets Authority (CMA) cleared the deal without remedies. While the CMA considered similar theories of harm that involved potential foreclosure and potential loss of competition, the CMA concluded that Amazon had no incentives to disadvantage iRobot's competitors. The main reason for reaching that conclusion was that the market for smart vacuum cleaners in the UK was small as well as fairly competitive. The CMA noted that there was low penetration of robot vacuum cleaners among UK households and that the market in the UK was very small compared to other European markets, despite the products having been available to consumers for around 20 years. In the analysis, the preferences revealed by British consumers were relevant to assess the market's expected growth, as well as to conclude on Amazon's incentives to disadvantage its rivals.

Sources: EC Merger Case No. M.10920 Amazon/iRobot; CMA Decision No. ME/7012/22 on the Anticipated acquisition by Amazon.com, Inc of iRobot Corporation.

14. Different structures of domestic markets can lead to different decisions by the jurisdictions reviewing a cross-border merger. Among others, there could be differences in the levels of market concentration, in barriers to entry and expansion and in active and potential competition (see Box 2 for an example). If in one jurisdiction a transaction represents a merger-to-monopoly situation while in another there are more players in the market, the former is more likely to raise more competitive concerns than the latter. The same logic applies to differences in other characteristics of the structure of markets impacted by the merger.

Box 2. Walmart's failed acquisition of Cornershop

In September 2018, Walmart announced its intention to acquire Cornershop, an online marketplace for on-demand delivery from supermarkets, pharmacies and specialty food retailers in Chile and Mexico. The different approach in the analysis of the structure of the markets led the Mexican (COFECE) and Chilean (FNE) competition authorities to adopt divergent decisions.

The FNE cleared the merger without remedies. It left the definition of the relevant market open and highlighted the low amount of shopping done through e-commerce in Chile (around 1%), the high degree of dynamism, the low barriers to entry, as well as Walmart's competitors' plans to implement similar delivery channels. For the FNE, the transaction did not raise concerns.

In contrast, COFECE prohibited the merger. A narrow definition of the relevant market positioned Cornershop as the only company operating in certain regions of Mexico. COFECE argued that the services offered by online retail stores were not substitutes of those offered by platforms like Cornershop due to some differences such as the immediacy of delivery or the presence of products from different stores. Given the structure of the relevant market in Mexico, COFECE concluded that there was a risk that Walmart could foreclose its rivals, self-preference in the app, and unfairly use the information of Walmart's competitors collected by Cornershop. Particularly, unlike the Chilean competition authority, COFECE considered that the market had high barriers to entry, which included the economic investment needed to start operating and the complexity of attracting users to digital platforms, given the widespread distrust of these online services in Mexico.

Sources: FNE Decision No. F161-2018. Available at: https://www.fne.gob.cl/wp-content/uploads/2019/01/Informe-de-aprobaci%C3%B3n-F-161-2018-censurado.pdf; COFECE Decision No. CNT-161-2018. Available at: https://www.cofece.mx/CFCResoluciones/docs/Concentraciones/V6008/9/4845885.pdf

15. The same transaction may affect different levels of the supply chain in each jurisdiction. The outcome of the review may change significantly if, for instance, the transaction impacts production and

distribution in one jurisdiction (i.e. most of the assets are located there), while it only impacts the end of the supply chain in the other (e.g. commercialisation of imported goods). This may also impact the theory of harm chosen as the same transaction can raise horizontal concerns in a jurisdiction and vertical concerns in another. The Veolia/Suez merger is an example of how a transaction raised concerns for vertical integration in certain jurisdictions while cleared in others given the unsignificant overlap of the merging parties (See Box 3).

Box 3. Veolia/Suez merger: vertically integrated in some jurisdictions, small overlap in others

Between 2021 and 2022 several competition authorities reviewed the merger between Veolia and Suez, two global firms operating in the waste management and water treatment markets.

Some competition authorities such as the ACCC (Australia), the EC (European Union), and the CMA were concerned that the transaction could lead to a significant decrease in competition, particularly leading to higher prices or lower quality services. According to these competition authorities, although Veolia and Suez faced competition in certain markets, they were the only two firms competing in some stages of the waste management services chain. Therefore, the three authorities cleared the merger subject to different structural remedies, which included the divestment of assets in the three jurisdictions.

In contrast, the FNE (Chile) and SCPM (Ecuador) did not find significant risks to competition and decided to clear the merger unconditionally. In both jurisdictions, Veolia's and Suez's overlapping activities were limited to certain specific services and no concerns on vertical integration were raised. The analysis in Chile was confined to assessing the effects of the merger in 4 submarkets of the water treatment market and, in Ecuador, to the dangerous waste management market. Moreover, the FNE noted that, in Chile, the merging parties did not usually compete in the same bidding processes as the main reasons to clear the merger. Similarly, the SCPM concluded that the merger would not harm competition due to the low participation of both undertakings in Ecuadorian markets.

Sources: ACCC Public Competition Assessment Veolia – proposed acquisition of Suez. Available at: https://www.accc.gov.au/system/files/public-registers/documents/Veolia%20Suez%20-%20PCA%20-%2029%20November%202023.pdf?ref=0&download=y; European Commission Case No. M.9969 Veolia/Suez. Available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_9969; CMA Final Report on the Acquisition by Veolia Environment S.A. of Suez S.A. Available at: https://assets.publishing.service.gov.uk/media/6308ea72e90e0729e5d5bd77/Veolia_Suez_final_report_2.pdf; FNE, Informe de aprobación F267-2021. Available at: https://www.fne.gob.cl/wp-content/uploads/2022/02/FNE-F267-2021-Informe-de-Aprobacion-16-12-2021.pdf; SCPM Case No. SCPM-CRPI-009-2021.

16. Regulations like trade or intellectual property rules may affect the relevant market in one jurisdiction (for example, by limiting substitution) but not in the other. Divergent outcomes may also originate in industrial policies that impact the interpretation of the effects of the transaction in the market or wider policy considerations or economic policies that competition authorities are required to consider in some jurisdictions but not in others.

17. In some jurisdictions, for example, competition authorities are required to ensure that a merger does not pose a threat to other legally protected interests.[3] For instance, in the People's Republic of China (China), Article 33 of the Anti-Monopoly Law states that the competition authority should take into account the effect of the merger in the development of the national economy.[4] In 2013, China's competition authority at the time (MOFCOM) cleared with remedies a transaction in the copper, zinc and lead markets based on these considerations (see Box 4).

Box 4. Glencore/Xstrata merger in China

In 2012, Glencore International plc notified the acquisition of Xstrata to China's MOFCOM and the European Commission, among other competition authorities. Both parties were producers and traders of a wide range of metals and minerals, mainly zinc, copper, and lead, with Glencore being the world's leader.

In Europe, the main concern related to horizontal unilateral effects due to the concentration of the zinc market in the European Economic Area. The European Commission found the transaction would significantly increase Glencore's control over the volumes of zinc metal available in Europe. The merger was approved with remedies aimed at encouraging the entry of an agent into the market (Nyrstar), which was previously under the control of one of the parties and with significant restrictions to compete specifically in the zinc market.

Despite the conditional approval of the merger in Europe, the transaction was of most importance to China, as the biggest consumer of metals in the world. Due to this strong domestic demand, China is a net importer of many metal commodities. In China, the concerns raised by MOFCOM included significant horizontal concentration in the markets of copper, zinc and lead, as well as vertical effects and relevant buyer power. On top of competition concerns, MOFCOM took into account the transaction's impact on national economic development, such as the need to increase access to strategic resources and the goals to preserve long-term contract systems. These considerations had a legal basis in the goals of China's Anti-Monopoly Law.

After several rounds of remedies' negotiation, the remedies imposed by MOFCOM included the divestiture of Glencore's copper project in Peru and the guarantee of a specific supply of copper to China with long-term contracts.

Sources: European Commission, Case No. COMP/M.6551 GLENCORE/XSTRATA; Clifford Chance (2013). Briefing Note on the Implications of China's conditional competition approval of Glencore/Xstrata, https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2013/04/implications-of-chinas-conditional-competition-approval-of-glencorexstrata.pdf; Whilmer Hale (2013). China Clears Glencore's Acquisition of Xstrata Subject to Remedies, https://www.wilmerhale.com/insights/publications/china-clears-glencores-acquisition-of-xstrata-subject-to-remedies.

18. In sum, while competition laws have specific objectives, it is sometimes the case that broader economic policies or regulations play a role in merger analysis. Overall, different competitive conditions justify competition authorities arriving at different conclusions and are not inherently problematic.

2.2. Different legal frameworks, rules and standards

19. When the reviewing competition authorities have different legal frameworks, or they apply different rules and standards for the substantive analysis of the transaction, they may also reach divergent decisions. In other words, substantive differences might arise directly from the law in aspects such as the welfare standard to be used, the goals of the merger regimes, legal tests to review a merger, and even differences in powers to impose remedies.

20. Sometimes, competition laws might require authorities to use different criteria to assess the competitive effects of a merger. Competition authorities use three main tests to assess whether a merger has anti-competitive effects: the dominance test,[5] the substantial lessening of competition (SLC) test,[6] or a hybrid between both (such as the Significant Impediment to Effective Competition or SIEC test).[7] While in the past 20 years competition authorities have been moving away from solely relying on the dominance test and have either adopted the SLC or the SIEC tests, there are still differences across jurisdictions in the way they assess whether a merger has anticompetitive effects.

21. As an example, Switzerland uses a dominance test, where structural characteristics of the market pre and post-merger remain to be the most relevant and the creation or strengthening of a dominant position is the key element to determine whether the merger is anticompetitive. This differs from the analysis under an SLC or SIEC test, where there is focus on the effects of the transaction in the market, regardless of whether there is dominance. In a study that reviews some merger decisions in Switzerland and what the outcome could have been if the authority had applied an SLC or SIEC test instead of the dominance test, the authors found that changing the test would have implied different outcomes in cases where there were competition concerns that did not directly relate with the existence of a dominant position (e.g. where there were coordinated effects) (Botteron, 2021[4]).

22. Outcomes may also vary according to the standards that the competition authorities use for the review of the merger. A merger could increase total welfare but reduce consumer welfare. Thus, a jurisdiction under a total welfare standard may not perceive it as concerning, while a competition authority using consumers' welfare may decide to condition, block or challenge it.[8] Considerations of buyer power, which could be part of the merger review standard, may also impact the review outcome. This is because stronger unilateral purchasing power may increase the potential for abuses and anticompetitive effects of mergers that impact sellers and consumers.[9]

23. Moreover, if a certain regime has established structural presumptions on whether certain levels of market shares and concentration presumptively harm competition and consumers, they may decide differently than others that don't have the presumption. This is because the burden of proof is shifted to the merging parties to rebut those presumptions and, therefore, the assessment process changes significantly. Also, differences on which standard of proof is used in the jurisdiction may affect the outcome of a merger review.[10]

24. In June 2024, for example, Canada's Competition Act was significantly amended with the aim of increasing the effectiveness of merger control, among other objectives. The amendments included creating a presumption that a merger is anti-competitive if it increases concentration or market share over pre-defined levels and require merging parties to rebut this presumption if they consider that the merger will not substantially prevent or lessen competition. This change of approach reverses the burden of proof on merging parties and shifts from a previous requirement of proving that the conclusion regarding a potential lessening of competition that would result was not based on an increase in concentration or market share alone.[11]

25. Similarly, divergences may happen due to the different criteria for analysing (or not) efficiencies that may outweigh the anti-competitive effects. The criteria to assess efficiency claims changes across jurisdictions. In some jurisdictions like Australia and New Zealand, the competition authorities may consider efficiencies even if they do not necessarily affect consumers directly. In the EU, the European Commission considers efficiencies only if there is a pass-on effect to final consumers. Some jurisdictions, like Canada, cannot assess efficiencies at all. Before 2023, the Canadian Competition Bureau had the possibility to review efficiencies arising from mergers. Canada had used a total welfare standard that compared any efficiencies (e.g. cost savings) with the possible anti-competitive effects of a merger. In 2023, the Competition Act was amended, and the efficiency defence removed. Since then, the Canadian Competition Bureau no longer has the obligation to review efficiency gains and whether they outweigh the anti-competitive effects. This would mean that potentially some of the mergers that would have been approved before the amendment could now be either approved with remedies or challenged.

26. A similar situation of divergence may arise when competition authorities have different powers with respect to the design, approval and/or imposition of remedies. When competition authorities are bound by the proposals made by the parties and do not have powers to impose remedies themselves or when their legal framework impose obligations on the type of remedies that can be accepted, divergent decisions are more common (see 3.2 for more detail).

27. In the described situations, merger review outcomes diverged due to differences in legal frameworks that led competition authorities to analyse the same transaction with different criteria. While

greater convergence in the analysis of mergers is always desirable, the problem really lies on when lack of it leads to outcomes that contradict each other. Chapter 3 will describe the situations in which contradicting outcomes become a challenge.

2.3. Different analysis and interpretation

28. Differences in the evidence collected or its interpretation, which has some degree of subjectivity, may arise even if the facts of the case and the legal framework are highly similar. Even within competition authorities with collegiate decision bodies, dissenting opinions happen. This shows how common it can be for merger outcomes to be influenced by differences in the interpretation of the same facts.

29. Competition authorities have different requirements in their notification forms. This could result in each of them receiving different sets of information from the merging parties on aspects such as characteristics of their businesses, customers' profiles, business perspectives, functioning of other geographical markets where the merging parties are active, among others (challenges related to submission of asymmetric information are further described in 3.1). While competition authorities require merging parties to submit all relevant information related to the potential effects of the transaction in their jurisdiction, key facts impacting other jurisdictions may scape this obligation. Moreover, powers to gather information in merger reviews as well as the level and scope of engagement from third parties could differ. This leaves competition authorities with different sets of evidence collected, which then could result in different understanding of the markets, thus, possible different outcomes. For instance, being unable to accurately capture innovation efforts and capabilities of merging companies or growth perspectives in other jurisdictions different from the reviewing one, could affect the assessment of the authority on the impact of the transaction on potential competition and innovation.

30. Divergent outcomes may also be the consequence of considering different theories of harm for similar facts. For example, if an authority focuses on horizontal overlaps, it may review how the structure of individual markets will change after the merger and on whether the transaction would create or strengthen a dominant position. If the authority focuses on portfolio or conglomerate effects of the same transaction, it may assess the position of the companies in the different markets combined, instead of looking at them separately. The views on market dominance would also move from a single market to leveraging the company's position in one market to the others. This was one of the main differences in the assessments of the US DOJ and the EC of the GE/Honeywell merger where the EC blocked the transaction based on portfolio effects that were considered not to be relevant in the DOJ's assessment (see Box 5).

Box 5. GE/Honeywell and the use of different theories of harm

In October 2000, GE, manufacturer of aircraft engines among many other industrial products, announced its proposed acquisition of Honeywell, a manufacturer of multiple products in the aerospace industry. In May 2001, the DOJ announced its decision not to challenge the transaction after it reached an agreement with the parties to divest Honeywell's helicopter engine business and to license a new competitor to maintain and repair certain engines. The path was not as clear in Europe. After multiple rounds of dialogue with the parties, and co-operation between the competition authorities, the EC issued a prohibition decision in July 2001.

While this merger may be used to illustrate many of the sources of divergence, including which elements to consider for the calculation of market shares, the main one was the choice of theory of harm. In the US, the DOJ reviewed horizontal and vertical overlaps; while in Europe, the EC focused on portfolio effects.

The DOJ's assessment

The DOJ identified that GE and Honeywell overlapped in the manufacturing of US military helicopter engines and in the provision of repair and overhaul services for certain Honeywell aircraft engines. Moreover, the authority found some vertical linkages related to GE's production of jet engines for large commercial aircraft and regional jets; and Honeywell's production of avionics and non-avionics systems, including landing gear and auxiliary power units. The DOJ also took into account Honeywell's production of engines for small regional and corporate jets, which the authority identified as a separate product market that the one in which GE was active.

One key argument for the DOJ not to challenge the transaction was that its investigation revealed that GE and Honeywell operated in intensely competitive markets with rivals that had strong financial capacities, growing revenues and heavy investments in product development and innovation. Moreover, the DOJ identified that the merging parties' customers identified fierce competition that translated into deeply discounted engine prices. With respect to vertical effects, the DOJ found that GE's share of aircraft purchases through a subsidiary was sufficiently small to eliminate any concern on potential foreclosure. In general, the DOJ found that the transaction, if anything, would bring efficiencies to the market, as competition between strong competitors end up bringing benefits to consumers.

The EC's assessment

The EC relied on two main arguments to conclude that the transaction had anti-competitive effects of the transaction. The first one related to unilateral, horizontal effects, as the merger would strengthen GE's dominant position in the market for large jet engines. The second related to the merger enabling Honeywell to gain a dominant position in the small engine, avionics and non-avionics markets. According to the EC, the dominance would have been created as a result of vertical and conglomerate integration of the companies, including using GE's financial power and the possibility to leverage market power from one market to another.

The EC assessed the possibility of Honeywell pursuing an integration strategy by bundling its different products. The EC concluded that the merged company would be able to offer product packages to airframe manufacturers and that no other competitor was independently able to replicate the extensive range of products that Honeywell offered in the market. For the EC, the effects of these packaged deals included leading competitors to exit the market in the short-term as well as foreclosing them also in the long-term.

While the parties offered multiple remedy packages, the EC concluded that none of them adequately addressed the identified competition concerns.

Sources: DOJ (2021) Press Release : "Justice Department Requires Divestitures in Merger Between General Electric and Honeywell", https://www.justice.gov/archive/atr/public/press_releases/2001/8140.pdf; DOJ (2021). GE-Honeywell: The U.S. Decision, Remarks of Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, https://www.justice.gov/atr/speech/ge-honeywell-us-decision; EC (2001) Case No. M.2220 General Electric/Honeywell, https://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf.

31. Differences may arise from the use of theories that look at non-price considerations, like innovation or quality, which are still uncommon. Dow/DuPont is a clear example on how non-price considerations may impact the outcome of a merger review (Box 6).

Box 6. Innovation considerations in Dow/DuPont

The merger between Dow Chemical and DuPont in 2017 was reviewed by more than 20 competition authorities. The outcomes of the reviews varied between unconditional clearances, clearances with behavioural remedies and clearances with structural ones. One of the elements that was key for the difference in outcomes was whether the competition authorities considered theories of harm that looked at non-price effects, mainly innovation, or not.

Authorities such as the European Commission, the Canadian Competition Bureau, and Ministry of Commerce (MOFCOM) in China were concerned that the merger would reduce innovation, considering explicitly an innovation-specific theory of harm. In those cases, the authorities required the parties to divest almost all of DuPont's global R&D business.[1]

Other competition authorities such as the US DoJ, CADE in Brazil and the Colombian Competition Authority neither considered innovation theories of harm nor imposed remedies aimed at addressing a potential reduction in innovation competition.[2]

In Chile, the Fiscalía Nacional Económica did not assess the impact on innovation, as it highlighted that the merging parties did not make decisions on innovation in its jurisdiction, but cleared the merger subject to the same commitments submitted to the EC, including the divestment of R&D business.[3] Similarly the ACCC decided not to oppose the merger, as they believed that global divestments were sufficient to address competition and innovation concerns from the transaction.[4]

Sources:
[1] DuPont Press Release: "*Dow and DuPont Receive Conditional Approval from China's Ministry of Commerce for Proposed Merger of Equals*", https://www.dupont.com/news/dow-dupont-receive-conditional-approval-china-ministry-commerce-merger-of-equals.html; Competition Bureau Canada, Press Release: "*Competition and innovation are preserved following major agricultural merger*" https://www.canada.ca/en/competition-bureau/news/2017/06/competition_and_innovationarepreservedfollowingmajoragricultural.html.
[2] EC Case No. M. 7932 Dow/DuPont; United States District Court for the District of Columbia, Case 1:17-cv-0117; Superintendencia de Industria y Comercio, Resolución No. 60037 de 2017; CADE Merger nº 08700.005937/2016-61.
[3] FNE Case No. F-8-2017.
[4] ACCC Release Number MR 85/17.

32. Finally, there may be differences in the outcome even when authorities reach the same conclusion on competitive concerns arising from the transaction. Divergences may occur when the reviewing jurisdictions agree on the nature of the competitive concerns for instance, because the competitive conditions in each jurisdiction imply that the same remedy needs to be implemented differently. Challenges in the design and review of remedies, including their implementation, are discussed in the following chapter.

33. In sum, differences in the evidence collected or how it is analysed also drive divergence in merger reviews. Among the three sources of divergence outline in the paper, these evidentiary differences are the most common source of conflicting outcomes. Again, if divergence does not lead to conflict for the consummation of the transaction, it is not an issue and therefore, should not be a concern for the reviewing authorities.

2.4. Conclusions

34. This chapter has identified the various sources of divergence in cross-border mergers. The three primary sources are (i) differences in local competitive conditions; (ii) differences in the local laws, rules and standards for evaluating mergers; and (iii) differences in analysing and interpreting the facts.

35. Different competitive conditions, such as the relevant markets and industry dynamics, impact merger assessments. Moreover, industrial policies or wider policy considerations may also impact the outcome of a cross-border merger review.

36. Divergences may also come directly from the law. Merger regimes consider different criteria that competition authorities should evaluate when analysing the effects of a merger, including the goals to pursue, the legal tests to use and the powers to use when deciding whether to approve, prohibit or challenge a transaction.

37. Finally, competition authorities may also reach different conclusions on a transaction even if the facts of the case and the legal framework are highly similar. Differences in the evidence collected or its interpretation, which has some degree of subjectivity, may arise.

38. The chapter showed that while convergence in cross-border merger reviews may be desirable by the merging parties, divergence is not necessarily an issue. All the sources of divergence described above are legitimate. It is normal that different jurisdictions can arrive at different conclusions in merger reviews. For competition authorities, focus should be on the challenges that arise when reviewing cross-border mergers and strategies to employ that may reduce their impact (see chapters 3 and 4 of this paper). While there is value added on converge, divergence is only a concern when the different outcomes may not be jointly implementable and end up in the transaction not being able to consummate.

3 Challenges faced by competition authorities in the review of cross-border mergers

39. In the review of a cross-border merger, competition authorities may face multiple challenges. Some of them relate to the merger being notified to multiple jurisdictions with different timelines or the reviews taking place simultaneously. Others relate to the design of remedies in a cross-border context, particularly if authorities aim at their different outcomes not becoming conflicting solutions. Specific challenges arise for competition authorities in small jurisdictions. This chapter aims at reviewing the most common and important challenges, while chapter 4 aims at presenting some possible solutions and approaches to them.

3.1. Timing issues and potential strategic behaviour

40. Competition authorities from all relevant jurisdictions do not necessarily get notified of cross-border mergers at the same time. This may be challenging as depending on how early or late a competition authority is notified could raise different concerns.

41. On one hand, being the first to be notified could mean having less time/scope to discuss with other competition authorities, as time frames could imply that the authority also has to be the first (or one of the first) to reach a decision. On the other hand, being the last to be notified could also mean arriving late to the discussion, potentially having less flexibility in the design of remedies, or being constrained to accept remedies that were negotiated already in other jurisdictions. There are also advantages in each situation. Usually, there is more room to negotiate the first remedy packages that are being put on the table as decisions from the first authorities act as a reference in other authorities' decision-making. Still, being notified later could allow benefitting from the knowledge acquired by the other authorities and that could mean there is already a solid ground for making a decision.

42. Simultaneous notifications are not always easy to achieve. For example, there are different statutory deadlines for filing. In some jurisdictions, parties have the obligation to notify the merger within a specific time after reaching an agreement. In others, parties have more flexibility. Parties may delay filings to collect documentation and information required by each competition authority. Other delays can be caused by the resources used by the merging parties to handle parallel notifications. Finally, misalignments in the timing of notification could also be the deliberate result of a strategic decision of the merging parties.

43. Competition authorities face the risk of merging parties selecting where to notify the transaction first, deciding what type of information to submit to each authority and using this asymmetric information, as well as information on the status of the review in other jurisdictions to their advantage. They can decide to leverage their negotiations and agreements with other competition authorities.

44. Merging parties may find it advantageous to notify first in key jurisdictions either when they expect them to lead with favourable and fast outcomes (which could serve as a signal to other reviewing authorities) or when they expect significant delays or more difficult discussions and less favourable outcomes (Harkrider and O'Mara, 2023[5]). Often, this translates in early notifications in jurisdictions like the United States and EU, as competition authorities in these jurisdictions are often seen to be the ones with the most established regimes and those who usually seek for remedies in cross-border mergers that raise competition concerns.[12]

45. Timing is also a sensitive issue in the design, assessment and negotiation of remedies and may be a challenge in certain jurisdictions that tend to have shorter timelines. Flexibility and early contacts (with merging parties and with other competition authorities) remain to be the key here, as will be discussed in chapter 4.

46. Making sure that the review comes in a timely manner may be particularly challenging in voluntary and ex-post-merger regimes. While competition authorities in voluntary regimes constantly monitor transactions and merging parties may still notify in a voluntary basis, those notifications could come at later stages than desired.[13] The situation is similar in ex-post regimes, where notifications usually are done after the consummation of the transaction, once remedies have been negotiated and approved in other jurisdictions and approval decisions have been issued. In both cases, late notifications have an impact on the effectiveness of co-operation, for instance, as timing misalignments are more probable and there may be more pressure on the jurisdictions, given that the merger may have already been approved by the competition authorities under mandatory ex-ante review systems.

47. In any case, differences in the timing of the reviews may be used by competition authorities as an advantage to co-ordinate and learn from each other's experience and analysis. The use of confidentiality waivers, which will be discussed in chapter 4, has proven to be a primary way, first, to ensure that this advantage is used and, second, to guarantee that merging parties are aware of communication between competition authorities. This reduces the advantage for merging parties to transmit information to reviewing authorities asymmetrically.

3.2. Conflicting outcomes and the design of remedies

48. This subsection focuses on the different challenges that competition authorities face in the design and implementation of remedies in cross-border cases.

49. The design of remedies in mergers is a major challenge in itself and their design in cross-border cases is not an exception. While competition authorities aim primarily at resolving the identified concerns in their jurisdictions, they also seek to strike the right balance as to guarantee that they are not impeding the consummation of welfare-enhancing mergers. In a cross-border merger context, there is the additional concern on guaranteeing that the final outcome is consistent across all reviewing jurisdictions, so that at least remedies could be implementable or there is clarity on whether the transaction can be consummated.

50. Different remedies are not the same as inconsistent ones. While an ideal situation may be for competition authorities to approve a transaction with the same remedy package as others, there are cases where they need to come up with different remedy packages that are effective to solve their local competition concerns. When those remedies do not contradict each other and do not defeat the purpose of the transaction or affect the efficiencies it generated, they allow the merger to proceed in all jurisdictions. In those cases divergences are not concerning and reaching different outcomes should not be understood as a challenge for competition authorities.

51. The concern lies in the complexity of implementing a remedy package that pushes the parties to abandon a deal which could have been potentially pro-competitive. This is particularly relevant if there was

a scenario in which the merging parties could have been able to implement a remedy package that was sufficient to solve concerns across the different jurisdictions.

52. There are instances in which the most effective remedy available in one jurisdiction has impact in another. This is the case of structural remedies that impact production or international distribution when said processes are concentrated in a small number of jurisdictions. In these cases, for jurisdictions where the assets are located, finding suitable remedies may be more evident and may generate positive externalities on jurisdictions where structural remedies, at least, are not necessarily available. For the other jurisdiction(s), it is common to rely on said remedies and require the merging parties to comply with the remedy accepted by another competition authority In these cases, the decision that one competition authority makes will have an impact in the other jurisdictions, despite the authority only making its decision based on the impact in its own jurisdiction rather than taking into account the externalities caused by it.

53. Regardless of the size of the jurisdiction, one scenario that a competition authority may find itself in is when there have been remedies accepted by another authority that have a supra-national effect. The best case is when these remedies are sufficient to solve the concerns that both authorities identified.

54. Deferring to another jurisdiction's remedies is relatively common. This was the case in Dow/DuPont where multiple competition authorities, such as the FNE in Chile and the ACCC in Australia, cleared or decided not to challenge the transaction because global remedies accepted by the EC would address all their concerns (see Box 6).

55. However, it is important to note that if a decision from a competition authority involves remedies, even when those were tailored to solve concerns in other jurisdictions, the authority would benefit from having some room to adjust the remedies to account for local concerns (Licker and Balbach, 2010[6]).

56. Conflicting outcomes are not as common as one may think. As an example, in a recent study of 20 decisions reviewed in parallel by the European Commission (EC) and the UK Competition and Markets Authority (CMA) since February 2021, half of the cases were unconditionally cleared in both jurisdictions, one quarter were cleared with remedy packages that covered both jurisdictions and only in four cases there were divergent, but non-conflicting outcomes (Ford and Egerton-Doyle, 2023[7]). This could happen, for instance, due to different approaches towards the use of remedies, and preferences over certain types, could easily generate differences in outcomes.

57. Most competition authorities are of the view that structural remedies, such as divestitures of stand-alone businesses, are preferred to behavioural remedies to preserve competition (OECD, 2018[8]). In some cases, this preference is stronger than in others, raising the bar on how and when to accept behavioural remedies and even when to accept remedies at all. The recent Microsoft/Activision merger was a perfect example of how remedies that are deemed to be sufficient and appropriate in some jurisdictions are insufficient in others, even when the assessment reveals somewhat similar concerns. After the in-depth review of the transaction in the United Kingdom and Europe, both the CMA and the EC concluded that the merger would harm competition in the nascent cloud gaming market.[14] In both cases, the authorities had concerns on potential foreclosure of rivals by limiting their access to Activision's video games. The divergence concerned the authorities' approach to remedies. The EC accepted remedies related to the licensing of Activision's royalty fees for a period of ten years. On the contrary, the CMA rejected the same remedy proposal and blocked the transaction.[15]

58. Other issues that competition authorities may face when imposing remedies, particularly in cases where they adopt another authority's remedies or decide to co-operate in the design of the remedies, mainly structural ones, are (i) the definition of specific purchaser criteria, (ii) whether to require a single purchaser, (iii) the viability of the joint assets to be divested, (iv) the duration of the divestiture period, (v) the use of trustees, and (vi) other implementation matters.

59. Competition authorities may, for instance, get different results in their review of suitable buyers for the implementation of a divestiture type of remedy. It could be the case that there are different suitable

buyers in different jurisdictions, or even none in some of them. It could be the case that a suitable buyer in one jurisdiction raises concerns in the other and vice versa, and therefore, that the competition authorities are unable to find a single purchaser and need to impose divergent conditions on who the buyer could be. This was the case in Zimmer Holding Inc's acquisition of Biomet Inc in 2015. While the US Federal Trade Commission (FTC), the Japan Fair Trade Commission and the European Union generally agreed on the effects of the transaction, they could not find a single buyer for the assets to be divested that suited all the authorities and, therefore, made decisions that resulted in separate agreements for the divestiture of the assets in each jurisdiction (Harkrider and O'Mara, 2023[5]).

60. Having different powers may be a challenge as well. Not being able to impose remedies may leave authorities with only one possibility: prohibiting or challenging the merger. Therefore, prohibitions and challenges could be more common in jurisdictions where the authorities do not have powers to impose remedies. Box 7 illustrates the Reckitt Benckiser/K-Y brand merger where the competition authorities in the United Kingdom and New Zealand had similar findings but ended their reviews differently due to differences in legal powers related to remedies.

Box 7. The Reckitt Benckiser / K-Y brand merger: a prohibition in New Zealand

Reckitt Benckiser Group plc's acquisition of the global rights to the K-Y brand was subject to review in more than 10 jurisdictions between 2014 and 2015.[1] While the merger received the unconditional approval in the majority of jurisdictions, the reviews in New Zealand and the United Kingdom are worth discussion.

Both jurisdictions operate with voluntary notification merger regimes, and the parties applied for clearance. The CMA and the New Zealand Commerce Commission (NZCC) both reached the same conclusions with respect to the relevant markets and the effect on competition, following the significant lessening of competition (SLC) test. Despite both analyses being very similar, the final outcomes differed. In the **United Kingdom**, the CMA's final report proposed remedies to the parties that it deemed appropriate to solve its concerns. The remedies consisted in the licensing of the K-Y business in the United Kingdom to a third party for a period of eight years. The merging parties agreed to offer the remedies proposed by the CMA and the latter approved the merger together with the terms of the license.

In **New Zealand**, however, under Section 2(1) of the Commerce Act 1986, the NZCC may only accept structural remedies, which were neither proposed nor available in this case. Therefore, the authority declined to give clearance to the transaction.

Note: [1] Such as Australia, Brazil, Canada, Colombia, and the United States.
Sources: CMA, Reckitt Benckiser / K-Y brand merger inquiry, https://www.gov.uk/cma-cases/-reckitt-benckiser-johnson-johnson; NZCC, case No. [2015] NZCC 12, https://comcom.govt.nz/case-register/case-register-entries/reckitt-benckiser-group-plc

3.3. A specific challenge for small jurisdictions

61. There is one particular challenge in the review of cross-border mergers that competition authorities from small jurisdictions face. The challenge is how to ensure effective merger control without unintentionally affecting competition. This could happen in cases where merging parties present the possibility of them leaving the jurisdiction during the review process if there is no clear path for the consummation transaction. The probability of this threat to become a reality depends on many factors, to

be assessed by the competition authority, including if the transaction has received the green light in larger jurisdictions.

62. While competition authorities usually prefer to be notified early, and if possible, at the same time as their peers, this is not always the case, particularly for authorities in smaller jurisdictions. Sometimes, staggering the notifications, which can be seen as strategic behaviour from the merging parties, also ends up being convenient for the competition authority. In certain cases, authorities in smaller jurisdictions prefer to be notified after, so that they can reach their decision once the big ones have done so. This happens because it is often the case that the solution in a big jurisdiction may fix the concerns in a small one.

63. This is particularly important when the decision involves the imposition of a remedy or a prohibition, as competition authorities from small jurisdictions could be led by merging parties to believe that if they push the merging parties too far, they might withdraw from the local market.

64. While usually this perception is in part affected by the size of the jurisdiction in terms of absolute size of its economy, it has more to do with the relative size of the jurisdiction with respect to all the jurisdictions where the merging firms are active in. This means that mergers with a narrow geographic scope could still be highly impacted by the outcome of the review of smaller authorities, particularly when their jurisdiction represent a relevant share of the global sales of the merging parties.

65. In practice, authorities in small jurisdictions assess these mergers using their standard merger control rules, while including, as part of the analysis, a review on whether the threat of leaving the market may materialised and what the effects of it could be. Generally, the outcome ends up being the same as if the threat did not exist in the first place. Possible strategies that competition authorities have resorted to when they identify that the risk exists include (i) free ride on remedies negotiated in larger jurisdictions, if they are sufficient to solve their concerns; (ii) get involved or co-operate in the design of cross-border mergers; or (iii) use local structural or behavioural remedies to ensure that consumers will not be worse off after the consummation of a transaction. One alternative that is also used by competition authorities is to approve the transaction subject to structural remedies that lead to the exclusion of said jurisdiction from the merger agreement. This allows the merger to proceed in other jurisdictions, while reducing the risk of the merging parties exiting the local markets. If none of these remedies are sufficient or enforceable, explicitly prohibiting a merger, even if the decision comes from the smallest of all reviewing authorities, could result in the parties abandoning the transaction. It could be the case that the generalised outcome corresponds to the most conservative of all individual decisions and that the prohibition was the alternative that reduced competition the least.

3.4. Conclusions

66. Multiple merger reviews entail different approaches, respond to different objectives and protect different interests. They can also diverge and arrive at conflicting outcomes.

67. There are challenges related to timing. Competition authorities may not necessarily be notified simultaneously, and staggered reviews bring challenges. Being notified first may mean less time to discuss with other reviewing authorities, but it also means more room for negotiating remedies and conditions. Being notified last, on the other hand, could create less room for negotiation but also being able to benefit from the knowledge acquired by other authorities and being able to engage earlier in co-operation. One particular situation that may raise concerns is when the timing of notification in the different jurisdictions respond to strategic behaviour from the companies. This also includes the type of information they submit and the use of asymmetries in the information to their advantage, aiming at leveraging negotiations and agreements in such asymmetries.

68. Timing is also a relevant factor to consider at the final stage of review, when the decision has to be made. Deferring to another jurisdiction’s remedies is relatively common if they resolve the concerns

that both authorities identified. It is also often the case that authorities used remedies offered to other jurisdictions as a starting point but adjust them to account for local concerns. This is possible if competition authorities use timing misalignments to their advantage and engage in communication with other reviewing authorities and the merging parties as early as possible.

69. Timing issues are particularly relevant for competition authorities in voluntary and ex-post merger regimes as the notifications could come at later stages. In both cases, timing misalignments are more probable, and authorities may face more limitations given approval decisions by competition authorities in mandatory ex-ante regimes.

70. Challenges arise when divergences in the assessment result in conflicting outcomes. The design of remedies is a major challenge in itself. In a cross-border merger context, the challenge is bigger as competition authorities face the possibility that the final outcome is not implementable or creates unclarity on whether the transaction can be consummated at all. Co-ordinating in the design of remedies, while desirable, is not always possible. Competition authorities may get different results in their review of suitable buyers or may be simply unable to find a single purchaser as they may consider different criteria on who the buyer could be.

71. Competition authorities in small jurisdictions face an additional challenge. They must strike the right balance between ensuring effective merger control and unintentionally impacting competition if merging parties pose a threat to exit the market. While this is often related to the size of the jurisdiction, in practice, it has more to do with the relative presence of the companies in the geographic market. In these cases, competition authorities should still review the merger as usual, but assess how probable it is that the exit occurs if the expected outcome is to prohibit or challenge the merger. In order to overcome such a challenge if the risk is identified as high, competition authorities in small jurisdictions have, in practice, decided to rely on remedies negotiated in larger jurisdictions, co-operate in the design of global remedy packages, use local remedies to account for local particularities, approve the transaction subject to structural remedies that lead to the exclusion of the jurisdiction from the agreement, or prohibit the transaction. It is important to note that, usually, the generalised outcome of a cross-border merger corresponds to the most conservative of all individual decisions.

4 Addressing the challenges in cross-border mergers

72. As earlier chapters of this paper have discussed, cross-border merger activity has become a significant part of the work of competition authorities. The paper has explored the sources of divergence and challenges for authorities in cross-border mergers. This final substantive chapter of the paper will begin by discussing earlier attempts to design a *sui generis* legal framework for cross-border merger reviews, before turning to the tools that have emerged as the best practices to address the challenges competition authorities face when reviewing cross-border mergers, mostly related to international co-operation.

73. This chapter aims to provide a tour de table of strategies competition authorities can use to enhance the effectiveness of their review across the lifecycle of a cross-border merger.

4.1. Earlier proposals for *sui generis* cross-border review framework

74. Since the boom in cross-border mergers starting in the 1990s and for more than two decades, there was a groundswell of interest from stakeholders to consider creating a bespoke, supranational approach to undertaking cross-border merger reviews. This was driven by a number of factors, including:

- The growth in globalisation (see introduction), particularly the trend of production concentrated in a small number of locations, but with multinational firms operating the world. Thus, (particularly structural) remedies imposed in one jurisdiction are increasingly likely to have effects in more jurisdictions (Budzinski, 2008[9]).
- High-profile divergent outcomes in cases (e.g., Boeing/McDonnell Douglas and GE/Honeywell) (Budzinski, 2008[9]). Research at the time estimated that between 2000 and 2014, the "*value of merger deals receiving treatment that is in some way inconsistent is probably around USD 100 billion*" (Capobianco, Davies and Ennis, 2014, p. 38[10]).
- Worries that an insufficient number of authorities had experience or capacity to co-operate in merger transactions. A primary concern was that the largest jurisdictions were often able to act as a global arbiter of a merger outcome (Louis and O'Daly, 2024[11]), or that asymmetries in bargaining power meant that small authorities could not meaningfully scrutinise a transaction (Budzinski, 2008[9]).
- The administrative costs from cross-border mergers were too high for the parties to the transaction and authorities (i.e., taxpayers) (Capobianco, Davies and Ennis, 2014, p. 5[10]) and (Budzinski, 2008, p. 5[9]).
- Local reviews of mergers where relevant markets are supra-national may miss the most relevant effects on competition.

75. Against this backdrop, proposals from academics and policymakers called for new supranational methods of merger review to attempt alleviate these challenges.

76. The first and more ambitious proposal was for a supranational *one stop shop* agency to be established with the responsibility to assess cross-border mergers (Singh, 2011[12]). This new cross-border merger review body was proposed so as to ensure no single jurisdiction's national interests were favoured in a merger review. Given its role in arbitrating international trade issues, housing an existing dispute settlement body, and being guided by a principle of non-discrimination between states, the World Trade Organisation (WTO) was the body most often proposed as the host. Additionally, the WTO already had mechanism in place to negotiate and facilitate transfer payments between jurisdictions. Such proposals of a cross-border merger review body were critiqued at the time as politically implausible outside the context of the EU and that the proposals ignored the fact the WTO's role in trade policy does not equip it for a regulatory function in competition policy and enforcement.[16]

77. The second proposal was to introduce the concept of a lead jurisdiction into a cross-border merger, with either a voluntary or mandatory scheme. If a *voluntary lead jurisdiction approach* was pursued, this would entail one of the competition authorities reviewing a cross-border to take on a co-ordinating role between the agencies, facilitating co-operation and perhaps drafting a non-binding recommendation after considering the interests of all jurisdictions. Authorities would be free to opt in or out as they saw fit. In contract, the *mandatory lead jurisdiction approach* empowered one authority with specific competences and responsibilities, including deciding the case based on an overall global geographic market. Authorities would not be free to op-out once they had committed to joining a lead jurisdiction approach in a case (Budzinski, 2008[9]).

78. A worldwide lead jurisdiction model was critiqued as being susceptible to lead jurisdictions unduly preferencing their interests, that the approach would likely lead to an oligopoly led by the largest economies with the most experienced competition authorities, and that jurisdictions may pay insufficient attention to the local effects of mergers if they were able to free ride and save costs by relying on a lead jurisdiction (Budzinski, 2008, p. 17[9]).

79. Comparatively, the last decade since 2014 has seen a dearth of new ambitious proposals for reform of cross-border merger review. Further, these already existing proposals have not advanced in the past ten years. This is likely the product of multiple factors. The earlier era of turbulence in cross-border mergers in part inspired the creation of the International Competition Network (ICN), with a mandate to facilitate high-quality international co-operation and consensus building in competition enforcement.17 It also catalysed the formation of over 200 co-operation agreements between jurisdictions on competition enforcement issues. Continued focus on the topic at the OECD Competition Committee lead to the OECD Council adopting the Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408], with its major focus on cross-border mergers. Additionally, new digital communication tools rapidly reduced the operational costs of quickly engaging in co-operation in a cross-border merger. Although these developments in recent years have not entirely remedied the concerns that inspired policy proposals such as the WTO supranational body or the lead jurisdiction model, these developments do seem to have reduced the interest in major global reform to the cross-border enforcement landscape.

4.2. International co-operation – the cornerstone of effective cross-border merger review

80. International co-operation has been recognised as a foundational aspect of competition policy for decades. It is the topic of recommendations from the OECD and other organisations such as the ICN.18 In 2021, the OECD and the ICN published a report on the current state of international enforcement co-operation between competition authorities. Built from an extensive survey conducted across OECD Competition Committee Members and Participants and those only members of the ICN, the report explored challenges and opportunities relating to cross-border mergers (OECD/ICN, 2021[3]).

81. The OECD/ICN Report found that the number of merger cases involving international co-operation are increasing, and it has consistently been the area of competition enforcement most frequently involving international co-operation. The Report also found that in cross-border mergers, all types of enforcement co-operation were continuing to increase over time. The three most frequent types of co-operation in merger cases identified were:

- sharing information on the status of an investigation,
- sharing substantive theories of harm,
- sharing publicly available information (OECD/ICN, 2021, p. 95[3]).

82. In comparison, "*obtaining waivers as appropriate to share information*" and "*sanction/remedy co-ordination*" occurred far less frequently in merger co-operation, with a notable jump in the number of authorities that reported never engaging in this form of co-operation (33% and 40% of respondents respectively) (OECD/ICN, 2021, p. 95[3]). This reflects the fact that respondents identified the existence of legal limitations on co-operation as being the most common and most important factor that was hindering international co-operation in competition authorities (OECD/ICN, 2021, p. 131[3]).

83. Ultimately the OECD/ICN Report recommends that there should be stronger mechanisms to enable greater co-operation through increasing transparency and trust between authorities and removing existing legal barriers. In the merger context, these recommendations included considering:

- whether merger parties should be universally required to notify if they have engaged with another competition authority on the same matter or establishing a global notification protocol,
- possible models to resolve key legal obstacles to improve the ability to cooperate on certain types of enforcement cooperation activities, such as sharing confidential information, enhanced cooperation, and investigative assistance (OECD/ICN, 2021, p. 200[3]).

84. Co-operation does not need to begin only when a merger matter arises that has cross-border characteristics. Indeed, there are a number of proactive tools now available to aid competition authorities in creating an environment conducive to closer international co-operation. This includes the use of databases produced by the OECD[19] and the ICN[20] that contain information on competition authorities in a jurisdiction, its current co-operation framework, and contact points within the authority.

85. Active participation in broader international co-operation activities is also a key component of effective cross-border merger work. This enables authorities to build trust with one another, enable understanding of foreign legal frameworks, and perhaps be able to rely on existing agreements or MOUs to facilitate co-operation.[21] Jurisdictions can also benefit from the ICN Merger Notification and Procedures templates to better understand what is needed to facilitate co-operation in a cross-border merger.[22]

86. Korea, for example, has responded to these trends by establishing a new International M&A division within their competition authority.[23] There have also been recent regional efforts in approaching cross-border mergers that take the form of a forum for consultation and experience sharing between jurisdictions, with scope for technical assistance or capacity building. This is the case of the Association of Southeast Asian Nations (ASEAN) aimed as an exchange forum for authorities in the region that include general discussions and training.[24]

4.3. Timelines and authority alignment

87. In any cross-border merger, it is of paramount importance that competition authorities are aware of other reviews taking place. This can take place through the inclusion of a question on the merger notification form about other jurisdictions that will or are likely to review the merger, or through conversations with the parties to the transaction.[25]

88. Making contact as early as possible is crucial for competition authorities. Failure to engage all relevant authorities can create delays and incur significant additional time and resource costs for all stakeholders. This preliminary contact can build rapport and trust among review teams, and enable them to:[26]

- determine how much co-operation is likely to be necessary for the transaction,
- establish contact points and a timetable for regular communication, and
- where possible, align review timetables so that key milestones in the merger review take place in a way that facilitates co-operation.

89. In many jurisdictions, the deadlines for merger review stages are set out in legislation and regulations. These timeframes can vary widely, meaning that even simultaneous notifications across jurisdictions will not mean reviews are automatically aligned. While ensuring other competition authorities are aware of these timetables is the minimum level of co-operation, greater efficiencies can be gained through more proactive efforts to align timelines. For authorities, this can also limit the opportunity for merging parties using an already successful outcome in another jurisdiction to place pressure on another (usually smaller or newer) authority to clear the transaction (Louis and O'Daly, 2024[11]).

90. This process requires engagement between the competition authorities and the merging parties. While the benefits may be clear to competition authorities, ensuring parties understand and recognise the benefits of international co-operation for their transaction is also crucial.

91. High quality international co-operation on timelines can include ensuring all jurisdictions are aware of the transaction at the same time, creating a common period time for issuing and responding to information requests, using mechanisms agreed with the merging parties such as extensions, or agreeing to *stop-the-clock* on the review to maintain a common pace of merger review across jurisdictions. While this does not guarantee simultaneous reviews, it makes it easier for authorities to be aware of other reviews and act accordingly.

92. Another relevant strategy may be to adopt procedures to reduce the regulatory costs that merging parties face when notifying a merger in multiple jurisdictions. Notification forms, which competition authorities usually have the power to adjust to fit their needs, could be more harmonised between jurisdictions. This would facilitate their concurrent completion. Reducing language barriers and requirements related to the certification and legalisation could also be part of this strategy. Allowing submissions in English, or at least not requiring translation of all the documents and information into each jurisdiction's language, as well as limiting the requirement to legalise documents under national procedures could also speed up the process.

93. Flexibility in timelines can enhance co-operation and stakeholder outcomes throughout the review process. As noted in Box 10 below, in 2023, Korea's Fair Trade Commission delayed their decision on approving remedies in the merger between Korean Air and Asiana Airlines. The pause has enabled the KFTC to consult with counterparts and ensure the remedies package reflected the other authority's reviews of the transaction.[27]

4.4. Gathering and sharing information

94. Building upon the importance of timeframe alignment mentioned above, international co-operation during the information gathering stage of a cross-border merger can also lead to a more effective and efficient review for both authorities and merging parties.

95. Firstly, it is more efficient for authorities to align their information gather periods as it enables parties to focus on this aspect of the merger review, rather than being spread across different stages of review at the same time. This also creates efficiencies for parties by reducing transaction costs. A more

enhanced approach to international co-operation includes authorities from multiple jurisdictions meeting together with the parties. In these meetings they can co-ordinate the design of information requests (or perhaps even issue joint information requests) to ensure consistency across jurisdictions. Parties also benefit by reducing the need to do bespoke document review in each jurisdiction to address specific requests not issued elsewhere.

96. Due to the confidential and commercially sensitive nature of merger work, much of the international co-operation in sharing information must be facilitated through a waiver process. Waivers to share information are relevant throughout the lifecycle of a merger review, helping to avoid inconsistent outcomes and enabling more informed co-operation. From the start of a merger review, waivers can enable co-operation by allowing all competition authorities to access relevant documents and information while they may be in an earlier stage of their review process. During a merger review, waiver-based co-operation can allow parties to collaborate on interpreting information from the parties, assessing theories of harm, and designing remedies.

97. Given these benefits to both authorities and the parties to a transaction, competition authorities should take steps to promote their waiver tools and explain their value to stakeholders. The ICN's Model Confidentiality Waiver is a helpful starting point for newer authorities with less experience in the use of waivers.[28] Competition authorities should nonetheless be aware that differences between civil law frameworks may require waivers to not cover all relevant information (for example where they may be differences in the protection of information covered by legal professional privilege) or include limits on what may be publicly disclosed in a merger decision.

98. In 2019, ASEAN established the ASEAN Competition Enforcers' Network, which in the long term is envisaged as a platform for handling cross-border cases, including mergers. In December 2023, a brainstorming meeting took place between ASEAN member states to discuss the creation of a Merger Information Sharing Portal. The Portal is intended to be used as a way for ASEAN member states to share information about the status of investigations, and act as a platform to share confidential information after securing a waiver. As of yet, no further developments on this initiative have been announced,[29] though in August 2024 the heads of authorities in ASEAN member states committed to accelerate their current efforts on co-operation in cross-border enforcement.[30]

4.5. Co-operation on substance

99. While authorities are applying domestic competition laws and ultimately making a decision based on their local markets, there is scope for co-operation on the substantial analysis. This can include:[31]

- **Sharing of best practices and market knowledge –** authorities that have reviewed a similar transaction in the past or that are ahead in their review of the same transaction can assist counterparts by sharing the publicly available versions of past investigations or decisions they have made, as well as any other materials (e.g. market studies).
- **Joint investigation activities –** where possible, competition authorities can consider joining together when undertaking investigation activities. Authorities may agree to conduct interviews with the parties together, or collaborate on designing questionnaires for market participants. Where this is not possible, authorities may nonetheless benefit from sharing (through the use of waivers) key written or oral evidence that is likely to be useful to other authorities' investigation.
- **Sharing analytical materials –** authorities may have scope to share their analytical methods and economic modelling. Although geographic and product markets may differ between jurisdictions, the sharing of material such as market definition, competitive effects analysis, and theories of harm can improve the robustness of the analysis in each authority reviewing the merger. This material

can be particularly useful for newer authorities who may lack experience assessing the relevant markets or have more recently introduced a merger control regime.

100. In their responses to the survey collated for the 2021 OECD/ICN Report on International Co-operation in Competition Enforcement, numerous authorities identified the 2018 Praxair/Linde merger (detailed in Box 8 below) as exemplifying the value of co-operation on matters of substance. The Report notes:

> *Colombia highlighted that, in reviewing the merger Praxair/Linde (2018), it was very useful to share information and analysis with the US FTC, the Chilean FNE and the European Commission, as it allowed for a discussion of issues and a clarification of doubts regarding some specific economic aspects of the assessment, such as relevant geographic markets and the importance of product differentiation, which helped to advance the review of the transaction by the Colombian authority. Korea made similar comments in relation to the same merger that it assessed in close co-operation with the US FTC. In particular, Korea stressed that when mergers involve global companies and innovative technologies, it is not always easy to define relevant markets and assess competitive effects; therefore, international enforcement co-operation is very useful to ensure the credibility and acceptability of remedies. (OECD/ICN, 2021, p. 122[3])*

101. Ultimately, the more co-operation on substantial aspects of the merger review, the greater likelihood that there will not be incompatible divergent outcomes across jurisdictions.

4.6. Remedy design and implementation

102. As noted in chapter 3, avoiding conflicting outcomes in cross-border mergers is of paramount importance. Different factors and competitive effects reviewed in each jurisdictions mean that the remedies might not be identical across jurisdictions. Further, remedies offered or agreed to in a jurisdiction may have implications in others. This means that international co-operation is crucial to ensure remedies avoid wherever possible conflicting or inconsistent outcomes for the merger.

103. Many of the aspects discussed throughout this chapter of the paper are relevant to the remedies context, such as the use of waivers, aligning timelines, and regular engagement between competition authorities. Greater co-operation is crucial to ensure authorities and parties understand the relevant context to any remedies, reduce delays, and increase chances to negotiate or co-ordinate on remedy design and implementation (including joint market testing of proposals).

104. The ICN identifies five areas of remedy design that are most relevant to international co-operation, namely:[32]

1. Communicating the type of remedies that are expected to be required (e.g. divestiture).
2. The anticipated scope of the remedies, including any transitional arrangements.
3. Recognising any challenges relating to the proposed remedy, such as the viability of the divested business unit or a low number of potential purchasers.
4. Establishing the necessary processes to implement the remedy such as identifying potential monitoring trustees or setting criteria for potential purchasers.
5. A timeline for remedy implementation.

105. As remedies in cross-border mergers need to be imposed relatively at the same time in multiple jurisdictions, a common strategy from merging parties is to offer a global remedy package that can then be adjusted to particular concerns in each reviewing jurisdiction. When this is the case, co-operation between the reviewing competition authorities is relevant as competition authorities may aim at accepting remedies that, solving their concerns, also satisfy the concerns in other jurisdictions. The use of confidentiality waivers has proven to be a fundamental tool. The Praxair/Linde merger is one of the most

illustrative cases in this respect, as the remedies proposed by the parties were of global nature and the co-operation and co-ordination proved to be useful (See Box 8).

Box 8. Praxair/Linde America's remedy package

In 2017, Linde AG Group and Praxair Inc announced a merger. The two global firms were present in more than 100 jurisdictions and operated in the manufacture and supply of chemical products (particularly industrial and medicinal gases, among others). The proposed merger would occur through the creation of a new company. The main objective of the transaction, as announced by the merging parties, was to build on complementary positions in key geographic markets to create diverse and balanced portfolios.

The parties notified the merger in more than 20 jurisdictions including regimes with voluntary, mandatory, ex ante and ex post notification systems. Many of these jurisdictions approved the merger subject to structural and behavioural remedies.

The multiple reviews of the merger revealed many aspects of divergence between authorities. One source of divergence was the definition of the relevant markets. Considering the variety of gases for industrial and medicinal use produced by both parties and the modes of transport used to move these products, the defined relevant markets varied depending on the jurisdiction in which they were located, the type of product and particularities of the markets. For example, in **Colombia**, all the relevant markets had a national scope, while in **Canada** and the **United States** some of the markets were defined as local or regional.

Based on the different market definitions, the claimed anticompetitive effects of the transaction were also diverse. While in some jurisdictions the merger turned out to be more complementary because one of the companies produced one type of gas and its competitor others, in markets such as the United States the integration would generate the creation of monopolies in some products, while significantly concentrating others.

These divergences were reflected in the proposal and negotiation of remedies. In the Americas, the parties proposed a divestiture package that included the divestment of assets in **Brazil**, **Canada**, **Chile**, **Colombia** and the **United States**. In some of them, the divestments involved all the assets of one of the companies. Similar packages were proposed in other regions.

In their decisions, **Canada**, **Chile** and the **United States** highlighted the important co-operation between the reviewing authorities in different stages of the process, including the analysis of the remedy package. One key issue in the co-operation was ensuring that the buyer of all America's assets was the same to make sure that the competitor could sufficiently exercise pressure over the merging company. Another strategy that followed from the co-operation was the appointment of the same monitoring trustee to facilitate the monitoring of the implementation of the remedies.

Given the divergences in concerns raised by the reviewing authorities, the remedies were tailored in specific cases. For instance, in **Chile**, the FNE identified further concerns regarding the production of carbon dioxide in Praxair premises abroad. The parties modified the initial remedy package proposed to include the signing of a carbon dioxide supply contract in favour of the buyer of the divested package, on terms equivalent to those available to Praxair Chile.

In the **United States**, the remedies included selling assets in nine industrial gases product markets in numerous US geographic markets to four divestiture buyers, including the buyer for the Americas' package.

In **Argentina**, where the review of mergers is ex post, the Competition Authority (CNDC) issued its final decision on the merger in 2023. Earlier in 2021, the CNDC had issued its statement of objections

summarising the concerns that the merger brought in the jurisdiction. The CNDC ordered structural and behavioural remedies taking into account the divestitures that took place in the other jurisdictions in the region. The CNDC also held co-ordination calls with other authorities in the region during its assessment.

Sources: FNE, Case No. F108-2017; Superintendencia de Industria y Comercio, Resolución No. 46293 of 2018; CADE, Case No. 08700.0077777/2017-76; US FTC, C4660; Competition Bureau Canada, Position Statement on the proposed merger between Linde AG and Praxair, Inc.; CNDC Case No. IF-2023-57651161-APN-CNDC#MEC.

106. High levels of co-operation can even lead to instances where a competition authority may be sufficiently satisfied with the remedies package agreed to by another authority that it may clear a transaction subject to the parties being in compliance with the remedies accepted in the other jurisdiction. Box 9 outlines some examples where international co-operation has enabled authorities in multiple jurisdictions to accept the same remedies package.

Box 9. Mergers approved in a jurisdiction following remedies imposed in a foreign jurisdiction

Cisco/Tandberg

This was a merger in the market for videoconferencing tools. When clearing the merger, the US DoJ made express mention of the commitments made to the European Commission. Writing in the press release for the transaction, then Assistant Attorney General Christine Varney stated the merger review "*was a model of international cooperation*" and that "*the parties should be commended for making every effort to facilitate the close working relationship*" between the authorities reviewing the transaction.

UTC/Goodrich

This 2012 transaction in the commercial aerospace industry concluded with simultaneous approvals from the US DoJ, EC and Canadian Competition Bureau (CCB). The EC and US DoJ co-operated extensively, including joint approval of the hold-separate manager and appointing a monitoring trustee. In their decision, the CCB noted the remedies negotiated with other authorities "*appear to sufficiently mitigate the potential anticompetitive effects in Canada*".

Agilent Technologies/Varian

As part of this merger in the laboratory and life sciences instruments sector, the ACCC cleared the transaction, contingent on the merging parties providing an undertaking that they would comply with the remedies imposed by the EC. The ACCC observed the purchasers of the divested assets would be able to distribute the products into Australia through their existing channels, addressing the concern that the merger would reduce the number of firms selling these products into Australia. As such, compliance with the EC remedies was a sufficient intervention and did not require additional action from the ACCC, reducing the burden on all stakeholders.

Source: Louis and O'Daly (2024); United States Department of Justice (2010), Press Release: Justice Department Will Not Challenge Cisco's Acquisition of Tandberg, www.justice.gov/opa/pr/justice-department-will-not-challenge-cisco-s-acquisition-tandberg; Dentons (2012), Competition Bureau clears United Technology Corporation's acquisition of Goodrich Corporation, www.lexology.com/library/detail.aspx?g=03c1191b-d062-4d53-9b34-7dd9a5dd2097; Competition Bureau of Canada (2012), Competition Bureau Statement Regarding United Technology Corporation's Acquisition of Goodrich Corporation, http://web.archive.org/web/20140303212952/http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html; United States Department of Justice (2012), Press Release: Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with Its Acquisition of Goodrich Corporation, www.justice.gov/opa/pr/justice-department-requires-divestitures-order-united-technologies-corporation-proceed-its; Australian Competition and Consumer Commission (2010), Agilent Technologies Inc – section 87B undertaking, www.accc.gov.au/public-registers/undertakings-registers/section-87b-undertakings-register/agilent-technologies-inc-s87b-undertaking.

107. As observed during the 2011 OECD Competition Committee session on Cross-Border Merger Challenges for Developing and Emerging Economies (OECD, 2011, pp. 12-13[1]), deference to the decision of another authority where appropriate should not be viewed as a form of unproductive *free-riding*. It can bring about benefits for competition authorities and the merging parties, by enabling "*the former [to] economise on their scarce resources and the latter benefit from a reduction in the burden and costs associated with cross-border mergers*" (OECD, 2011, p. 13[1]). These benefits are particularly relevant for smaller or newer competition authorities, who may be more constrained by resources.

108. One example of how a flexible strategy can be relevant to guarantee consistent outcomes in cross-border merger reviews is the Korean Air/Asiana Airlines case illustrated in Box 10. The case illustrates that allowing for flexibility to revise the decision can be part of the strategy of a competition authority in the review of a cross-border merger to guarantee effective enforcement in light of the outcomes in other jurisdictions.

Box 10. The possibility of reviewing the remedies in the Korean Air/Asiana Airlines merger

In 2021, Korean Air and Asiana Airlines announced their intentions to merge. From that point, the parties started notification processes to competition authorities in 15 jurisdictions.[1] Based on the number of passengers transported in a year, the airlines were the top two carriers in Korea and were the 44th and 60th in the global market for air passengers and cargo services.

In some jurisdictions the transaction was cleared, or the authority decided not to oppose it given that the parties faced competition from other airlines. Others considered that the notification was not necessary in their jurisdiction (Thailand and the Philippines). However, in half of the notified jurisdictions, the competition authorities performed an in-depth analysis of the merger, given the presence of both merging parties on certain routes.

In **Korea**, the KFTC cleared the merger subject to structural and behavioural remedies in February 2022. The remedies included the transference of slots and traffic rights on certain routes for ten years and a set of behavioural remedies until the structural ones were fully carried out. The KFTC highlighted in its decision that it had around 30 calls with competition authorities in eight jurisdictions to discuss competition concerns and suggested remedies per route. In addition, it signed and MoU and held four rounds of remedy discussions with the Korean Aviation Authority, given its relevant role in effectively implementing the remedies in Korea.

When the KFTC made its decision, authorities in Australia, China, Japan, the European Union, the United Kingdom and the United States still had their decision pending. Given those pending decisions, the KFTC decided that its decision would be subject to a final approval which was planned to happen in the framework of a "*full committee hearing in the future where elements of the remedies will be finalized after taking into account the review outcomes of other competition authorities*".[2] For the KFTC, this strategy would guarantee the effectiveness of its decision and the implementation of the remedies.

In **China**, MOFCOM, conditionally approved the merger with remedies that included the transfer of five of the same slots approved by the KFTC and additional four ones in routes identified to be highly concentrated in the Chinese markets. The **EC** also approved the transaction subject to structural remedies that included divestments in both cargo and passengers' routes where the companies overlapped. Similarly, in the **United Kingdom**, the CMA approved structural remedies related to the transfer of slots in the London-Seoul route. The JFTC imposed structural remedies similar to those of other reviewing authorities, impacting routes in **Japan**. In addition, the JFTC required the merging parties to sell Asiana's cargo business.

By August 2024, the **United States** Department of Justice was still in the process of negotiating remedies with the merging parties. therefore, the final KFTC hearing remains pending.

Notes:
[1] competition authorities were notified in the following jurisdictions: Australia, China, Europe, Japan, Korea, Malaysia, New Zealand, The Philippines, Chinese Taipei, Thailand, Türkiye, Singapore, the United Kingdom, the United States, and Viet Nam.
[2] KFTC Press Release, KFTC gives conditional approval to Korean Air-Asiana Airlines merger, https://tinyurl.com/56h56869.
Sources: ibid; Korean Air press release: Korean Air receives approval from China on Asiana acquisition, https://www.koreanair.com/contents/footer/about-us/newsroom/list/221227_korean-air-receives-approval-from-china-on-asiana-acquisi; EC Case No. M.10149 KOREAN AIR LINES / ASIANA AIRLINES; CMA, Korean Air / Asiana Airlines merger inquiry, https://www.gov.uk/cma-cases/korean-air-slash-asiana-airlines-merger-inquiry; JFTC, press release "*The JFTC Reviewed the Proposed Acquisition of Asiana Airlines Inc. by Korean Air Co., Ltd.*", https://www.jftc.go.jp/en/pressreleases/yearly-2024/January/240131.html.

109. By contrast, not being able to co-ordinate or insufficient co-operation may limit the effectiveness of the remedies, as well as the companies' ability and incentives to comply with them. Box 11 illustrates the Grab/Uber case in the Philippines where lack of co-operation with other authorities in Southeast Asia, as well as internally with the sector regulator, did not result in the expected outcome by the Philippine Competition Commission (PCC).

Box 11. Was there insufficient co-operation in the Grab/Uber merger in the Philippines?

In 2018, Grab and Uber announced Grab's acquisition of Uber's Southeast Asia operations in the ridesharing and food delivery sectors. The acquisition would create the leading mobile platform in the region impacting services in transport, food and package delivery and mobile payments. The transaction had impact in Cambodia, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam. From a competition perspective, the most relevant decisions from competition authorities were issued in the Philippines and in Singapore. The Vietnamese competition authority approved the merger without conditions and the Indonesian competition authority did not review the transaction as it considered that the deal did not meet the criteria for review.

Singapore has a voluntary notification merger regime, and the transaction was not notified by the parties. However, the Competition and Consumer Commission of Singapore (CCCS) decided to start an investigation after the transaction was completed and imposed interim measures while reaching its decision. The Authority found that the transaction was anti-competitive and imposed remedies including prohibiting exclusivity clauses being imposed on drivers, maintaining Grab's pre-merger pricing algorithm and drivers' commission rates, and selling vehicle rental service owned by Uber to a competitor. It also imposed sanctions on the companies.

In the Philippines, the review process was more complex. While the Philippines has a mandatory merger regime, the notification did not meet the thresholds for mandatory review and therefore was not notified. The Philippine Competition Commission (PCC) used its powers to open a merger investigation on its own initiative for the first time. As in Singapore, the PCC imposed interim measures aiming at ensuring Uber's continuation of its independent operations while the authority reviewed the merger. However, the PCC was unable to properly enforce compliance with the interim measures due to a decision by the transport sector regulator that did not renew Uber's accreditation as a ridesharing or transport network company. The transport sector regulator ordered Uber to cease any operations following the merger, as Uber would no longer have the required corporate accountability and back-office support to guarantee safe operations for consumers.

While the PCC ultimately deferred to the sector regulator's decision, it continued its merger review. The PCC concluded that the merger raised significant competition concerns and decided to approve it with remedies submitted by the parties. The remedies included behavioural measures to improve the quality of Grab's services, particularly regarding response times to riders' complaints and pricing (maximum prices and transparency).

During the investigation, the PCC discussed the case with the SCCC within the framework of an MoU between the two competition authorities. However, due to confidentiality issues and a lack of a waiver, only general discussions on timelines and potential theories of harm took place. The PCC highlighted the lack of discussions on remedies as a key challenge for their review (OECD/ADB, 2023[13]) .

Source: Bernabe (2021[14]) Grab–Uber merger: challenges faced by a young competition agency, Journal of Antitrust Enforcement, Volume 8, Issue 3, November 2020, Pages 627–637, https://doi.org/10.1093/jaenfo/jnaa050; OECD/ADB (2023[13]) Assessment of Merger Control in the Philippines, OECD Business and Finance Policy Papers, https://doi.org/10.1787/4f76f1a7-en; SCCC Case No. 500/001/18; PCC Decision No. 26-M-12/2018.

110. The need for international co-operation in remedies does not end with the merger decision and the potential imposition of remedies. Implementation can also require co-operation to ensure all jurisdictions are aware of remedy requirements from abroad which may impact their domestic markets. Avenues for international co-operation in remedy implementation include mutually agreeing to the purchaser of any divested assets.

111. One useful instrument for this is the appointment of common monitoring *trustees*, as they allow competition authorities to rely on a common set of information about the implementation of the remedy, reduce repetition, as well as to limit the possible inconsistent approaches to their review (see Box 8). If this is not possible, co-operation between appointed *trustees* seems to be the second-best. Communication between competition authorities regarding specific issues in the implementation of remedies should also be part of the co-operation between them.

112. Finally, when a subset of the reviewing jurisdictions does not find suitable remedies but there is a clear path for the consummation of the merger in the rest of the relevant jurisdictions, a jurisdiction may design remedies to exclude itself from the transaction.

113. This was the case of the Çimsa/CEMEX where the Israeli Competition Authority imposed remedies requiring that the merging companies form an agreement with a new cement supplier with the resources and skills sufficient to import the same or a greater amount of white cement into the jurisdiction, removing all the effects of the transaction in Israel. Israel's authority followed this approach considering that the assets of the company to be acquired were all located in Spain and that the Israeli market depended entirely on imports, meaning that there was no scope for a structural remedy.[33] While the Spanish competition Authority (CNMC) approved the transaction subject to structural remedies consisting of selling off some assets in certain regions of Spain,[34] this remedy package was insufficient to alleviate the concerns found in Israel. This solution guarantees that while the transaction is consummated, it won't have effects in the jurisdiction where the remedies were imposed and that there is a smaller probability of the companies, together, exiting the local market.

4.7. Conclusions

114. This chapter has identified the need to engage in international co-operation at all stages of a cross-border merger as the most important way to address these challenges. Authorities can use the best practices outlined in this chapter such as aligning timelines, using waivers and regular communication on both substance and remedies to guarantee that the outcome of their cross-border mergers reviews are consistent. Flexibility and adaptability have proven to be essential for a successful co-operation.

5 Conclusions and future of the review of cross-border mergers

115. The landscape of a cross-border merger is shaped by the interplay between different competition law frameworks in a single transaction, which raises challenges for competition authorities.

116. In chapter 2, this paper first identified sources of divergence in cross border mergers, namely:

- differences in local market conditions;
- differences local laws, rules and standards for evaluating mergers;
- differing practices in gathering and interpreting evidence.

117. The chapter showed that the divergences are not inherently problematic as, often, they are the natural outcome of different competition authorities acting according to the needs of their local jurisdiction. While convergence is usually desirable, the only issue that divergence raises is the risk of competition authorities reaching conflicting outcomes, meaning that the transaction cannot be consummated. However, these conflicting outcomes remain to be rare. Chapter 3 identified the main challenges that competition authorities face when reviewing cross-border mergers such as misaligned timeframes, information asymmetries and issues related to remedies design and implementation. These challenges may have a higher impact on smaller jurisdictions, who may find themselves in a situation where they are unable to play a meaningful part in a cross-border merger review.

118. Ultimately, the future of successful cross-border merger review will depend on the continuous evolution of best practices and the strengthening of international co-operation. As markets become increasingly interconnected through global supply chains and digitalisation, the need for a cohesive and collaborative regulatory approach becomes ever more critical. Through organisations such as the OECD and the ICN and international good practice instruments and guidance, competition authorities are moving towards improved co-operation in the review of cross-border mergers.

119. By embracing the best practices outlined in chapter 4 of this paper such as aligning timelines, facilitating the report of cross-border mergers to all relevant competition authorities, using waivers and regular communication on both substance and remedies, competition authorities can ensure cross-border mergers are evaluated without compromising the principles of fair competition globally.

Endnotes

[1] At the time of writing of this paper, Luxembourg's Parliament was discussing Bill 8296 that would introduce a merger control regime in the jurisdiction.

[2] Examples are (Dryden and Dubowitz, 2024[24]), (Hoffman and Schwartz, 2023[26]), (Harkrider and O'Mara, 2023[5]), and (Ford and Monaghan, 2022[25]).

[3] By way of illustration, section 12A (1A) of the South African Competition Act obliges the Competition Commission (SACC) to "*determine whether the merger can or cannot be justified on substantial public interest grounds".* The SACC is required to assess some aspects of the functioning of the industrial sector or region, employment, the ability of national industries to compete in international markets, and the inclusion of disadvantaged people within the ownership and workforce of firms. Public interest considerations in merger control were discussed during an OECD Working Party 3 OECD Roundtable on public interest considerations in merger control (2016).

[4] Article 8 of China's Anti-Monopoly Law allows the government to protect businesses of state-owned firms or other firms in certain sectors that are vital to the national economy, including some commodities where local companies have a monopoly over the production and sale. Moreover, Foreign investment in China is regulated by the Foreign Investment Law and its implementing regulations. This includes a 2022 Catalogue of Sectors Where Foreign Investment is Encouraged (available in Chinese at: https://www.gov.cn/zhengce/zhengceku/2022-10/28/content_5722417.htm) and a Negative List where it is highly restricted or not allowed (available in Chinese at: https://www.ndrc.gov.cn/xxgk/zcfb/fzggwl/202112/P020211227540591870254.pdf) .

[5] Under the dominance test, a merger is anti-competitive if it strengthens or creates a dominant position in the market. This could be interpreted either narrowly or more broadly to include collective dominance.

[6] Under the SLC test, a merger is considered to have anti-competitive effects if it is likely to substantially lessen competition in the market. This means that it focuses on the effects of the merger and the loss of competition among firms, rather than on structural issues. The main concern is whether prices (or other variables) are likely to be affected if the merger is consummated.

[7] Under the hybrid tests, such as SIEC, a merger in anti-competitive if it significantly impedes effective competition in the market, in particular, through the creation or strengthening of a dominant position.

[8] See (OECD, 2023[22]), particularly box 4 for examples and the hypothetical merger in 2.8 illustrating how the choice of standard could result in different outcomes in merger review.

[9] For example, in 2020, the EC approved Aurubis' acquisition of Metallo, two large purchasers of scrap copper, after analysing whether the merger might lead to increased buyer power and lower prices for scrap

copper. See European Commission (2020), Case M.9409, Aurubis and Metallo Group Holding; For a more detailed discussion on buyer power, see (OECD, 2022[28]), particularly Box 8 which illustrates the approach to buyer power in merger control.

[10] These discussions are out of the scope of this paper as the OECD Competition Committee will discuss them separately during its meeting in December 2024.

[11] Canada Competition Bureau (2024). Guide to the June 2024 amendments to the Competition Act. Available at: https://competition-bureau.canada.ca/how-we-foster-competition/education-and-outreach/guide-june-2024-amendments-competition-act#sec01

[12] It seems, however, that another strategic behaviour that is common in the notification of cross-border mergers is to notify in the United States last, to preserve the option of litigating in US Courts, particularly if the transaction raises concerns that are particular to the United States markets. See: (Harkrider and O'Mara, 2023[5]). See also (Wilmer Cutler Pickering Hale and Dorr LLP, 2024[23]) for comments on timing of notifications.

[13] In its contribution to the 2011 OECD Roundtable on cross-border mergers, Australia, which has a voluntary merger regime, indicated that it was often one of the last jurisdictions to receive notification from the parties in cross-border merger matters and that these delays made it more difficult to the ACCC to conduct efficient reviews, engage in co-operation, and ultimately increases the risk of inconsistent analyses and remedies.

[14] CMA (2023). Microsoft / Activision Blizzard merger inquiry, https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry; EC Case No. M.10646 Microsoft/Activision Blizzard.

[15] It is important to note, however, that the CMA cleared the transaction posteriorly, after the merging parties presented a restructured deal. See: https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry

[16] See for example, (Schnell, 2004[18])*;* (Davison, 2002[19]); and (D.K., 200[27]).

[17] International Competition Network, *About page*, www.internationalcompetitionnetwork.org/about/.

[18] Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings [OECD/LEGAL/0408], https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408; International Competition Network, *ICN Framework for Merger Review Cooperation*, www.internationalcompetitionnetwork.org/portfolio/icn-framework-for-merger-review-cooperation/.

[19] OECD Competition Enforcement Co-operation Database, http://data-explorer.oecd.org/s/8y.

[20] International Competition Network, ICN Framework for Merger Review Cooperation, www.internationalcompetitionnetwork.org/portfolio/icn-framework-for-merger-review-cooperation/.

[21] The OECD has collated a database of 233 bi-lateral or multi-lateral arrangements between competition authorities relating to competition enforcement co-operation, where at least one party is a Member, Associate or Participant of the OECD Competition Committee or is the European Union. See OECD (2024), *Competition and international co-operation*, www.oecd.org/en/topics/competition-and-international-co-operation.html.

[22] International Competition Network, *Merger Notification and Procedures Templates*, /www.internationalcompetitionnetwork.org/working-groups/merger/templates/.

[23] KFTC. Press Release "*KFTC Establishes New International M&A Division*". Available at: https://www.ftc.go.kr/solution/skin/doc.html?fn=0d42c2f28c17df5a6a1275e1c057482e85772e56493900b662de0b04be017242&rs=/fileupload/data/result/BBSMSTR_000000002402/

[24] See ASEAN, Competition – Overview, https://asean.org/our-communities/economic-community/competitive-innovative-and-inclusive-economic-region/competition; and (Kurita, 2023[20]).

[25] OECD/ICN (2021), *OECD/ICN Report on International Co-operation in Competition Enforcement*, https://doi.org/10.1787/86f9eb12-en, p. 91.

[26] International Competition Network, *Merger Working Group – Practical Guide to International Enforcement Cooperation in Mergers*, www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

[27] KFTC Press Release, KFTC gives conditional approval to Korean Air-Asiana Airlines merger, Available at: https://tinyurl.com/56h56869; CMA, Korean Air / Asiana Airlines merger inquiry, Available at: https://www.gov.uk/cma-cases/korean-air-slash-asiana-airlines-merger-inquiry; Louis and O'Daly (2024).

[28] International Competition Network, *Merger Notification and Procedures Templates*, /www.internationalcompetitionnetwork.org/working-groups/merger/templates/.

[29] ASEAN (2024), Press release – Brainstorming Meeting on Merger Information Sharing Portal, www.asean-competition.org/read-news-brainstorming-meeting-on-merger-information-sharing-portal-misp.

[30] ASEAN (2024), Press release - The AHCA Joint Statement on the Acceleration of Regional Cooperation in Competition Law and Policy, https://asean-competition.org/read-publication-the-ahca-joint-statement-on-the-acceleration-of-regional-cooperation-in-competition-law-and-policy.

[31] International Competition Network, *Merger Working Group – Practical Guide to International Enforcement Cooperation in Mergers*, www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

[32] International Competition Network, *Merger Working Group – Practical Guide to International Enforcement Cooperation in Mergers*, www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_GuidetoInternationalEnforcementCooperation.pdf.

[33] See press release "The Competition Commissioner has Approved under Remedies the International Merger between Çimsa and Cemex, for the Acquisition of a White Cement Factory in Spain" on July 22, 2020, available at: https://www.gov.il/en/pages/whitecement

[34] Decision No. C/1052/19 ÇIMSA / ACTIVOSCEMEX, 29 September 2020.

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