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Cross-border Mergers – Contribution from Colombia

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More documentation related to this discussion can be found at: oe.cd/gfc24.

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Cross-border Mergers

- Contribution from Colombia –

Practical Challenges from Cross-Border Merger Control for Emerging and Developing Economies

1. Within the OECD, there have been several discussions and studies regarding the challenges and complexities related to cross-border merger control, understanding a cross-border merger as a transaction that involves companies domiciled in more than one jurisdiction or that, notwithstanding the domicile of the merging parties, has effects in more than one jurisdiction.
2. Now, the competition authorities' power is determined by the regulation of their respective jurisdictions, and, therefore, any analysis that they can make, the legal scope of their decision, and the alternatives to react within the merger control procedures are also limited by their jurisdictions. Thus, the importance of international cooperation and coordination in merger control has been highlighted particularly when a cross-border transaction is involved, to facilitate the multiple-jurisdiction analysis.
3. That said, the challenges from cross-border merger control have already been analyzed, particularly regarding emerging and developing economies (EDEs), such as Colombia, considering the characteristics of those jurisdictions.
4. Specifically, in 2011, the OECD organized a roundtable on a competition policy paper named "*Cross-Border Merger Control: Challenges for Developing and Emerging Economies*"¹, where the authors identified as specific challenges for these economies, the following: (i) the absence of a proper competition culture; (ii) the difficult transition towards a market-based economy; (iii) the dominance of industrial policy; (iv) the lack of resources; (v) an inadequate legal framework; (vi) problems with implementation; (vii) the role of foreign direct investment.
5. Notwithstanding the abovementioned, this authority considers that these challenges have only been analyzed from an internal perspective. This means that they have been analyzed regarding the problems of the EDEs individually considered, but we have not considered in deep the relationship between these economies and their competition authorities with economic powers and their respective authorities.
6. In other words, the question that we want to ask is whether, once the ESEs have solved the problems previously mentioned such as, for example, having a robust legal system and strengthening the mechanisms available for the implementation and enforcement of the decisions taken, it is possible to assert that the EDEs are able or have the capacity to issue effective decisions regarding cross-border merger control.

¹ OECD (2011), "Cross-Border Merger Control: Challenges for Developing and Emerging Economies", *OECD Roundtables on Competition Policy Papers*, No. 122, OECD Publishing, Paris, <https://doi.org/10.1787/b6efd932-en>.

7. The answer to this question might be related to the fact that the economic realities might overcome the realities that we want to create from a legal perspective.

8. Think for example in a merger that affects mergers involving jurisdictions such as the United States, the European Union, United Kingdom, China and other countries in Africa or Latin America, such as Colombia. In this scenario, several questions arise, such as: If Colombia has a strong regulatory framework² and enough resources to issue its merger control decision, can the competition authority make a decision that differs, or even contradicts, the one issued by the authorities of other jurisdictions? Which implication might this decision have for the merging parties? Can this decision, for example, lead the parties to prefer to exit the market that involves the EDE, protecting or relying on the markets in the stronger economies which authorities have not objected to the transaction?

9. To answer this question, we need to go beyond the legal analysis, otherwise it is most likely that the answer will be that the authority can literally issue whatever decision it wants. From a mere legal perspective, an authority that stands behind a strong legal regime, that is clear and comprehensive, should be able to conclude that a certain merger must be blocked or approved subject to certain conditions or remedies, after assessing its effect in its jurisdiction. Nonetheless, the real question behind all this is whether, from an economic perspective, an EDE can bear the effects of a decision of this nature.

10. As an example, please consider the following case: In 2019³, the Superintendence of Industry and Commerce, the Colombian competition authority, assess the merger between GLAXOSMITHKLINE PLC and PFIZER INC, which took place in the market for commercialization of pharmaceuticals for systemic pain management (painkillers) under some specific classifications. This merger was also informed in the following jurisdictions: Australia, Brazil, Canada, China, European Union, India, Israel, Mexico, New Zealand, Philippines, Russia, and Serbia.

11. Needless to say, a merger like that one, which involved market agents with high market shares, took place in a moderately concentrated market, and that involved essential products like pharmaceuticals, should have been analyzed with particular attention and in consideration of its effects on the market and the effects on the wellbeing of the final consumer.

12. Now, under the Colombian competition law, the authority has full autonomy to make its own analysis of the merger effects in the Colombian market and the presence of other competition authorities is only relevant under the consideration that the applicable law provides for the possibility to separate the businesses involved in the merger for it to be completed in other jurisdictions while remaining on hold in Colombia while the authority undertakes the merger control procedure⁴.

² As we believe it does, despite the possibility to always improve it.

³ Superintendence of Industry and Commerce, Resolution No. 37233. August 16, 2019. Rad. No. 19-58066.

https://www.sic.gov.co/sites/default/files/files/pdf/estadisticas_integrales/Agosto/RESOLUCIÓN%20No.%2037233%20-%20PÚBLICA%20-%20GLAXOSMITHKLINE%20-%20PFIZER.pdf

⁴ Superintendence of Industry and Commerce. Resolution No. 2751. January 29, 2021. <https://sedeelectronica.sic.gov.co/transparencia/normativa/resolucion-2751-de-2021> Which quotes:

“2.7. Separation of the business in Colombia while the Superintendence of Industry and Commerce issues its decision.

In the cases in which a transaction must be assessed and approved by competition authorities from several jurisdictions, the merging parties can propose, before the decision by the Superintendence

13. In this sense, from a strictly formal perspective, the Colombian legal regime does not condition or subordinate the content of the decision to the analysis of the effects of the merger in other jurisdictions or the conclusions or analysis made by other authorities. Nonetheless, the economic reality does in fact show that the Colombian authority has tend to consider and follow the analysis and conclusions from authorities from economic powers such as the United States and the European Union, despite not being compelled to it.

14. Similarly, as acknowledge in the competition policy paper mentioned before, as is the case of other EDEs, the Colombian authority tends to rely on the decisions of other authorities, such as any conditions for approval or remedies, when the economic realities allow it.

15. At the end, this merger was approved by the European Commission subject to a condition for the global divestment of Pfizer's topical pain management business carried out under the *ThermaCare* brand⁵, while the Federal Trade Commission concluded that the merger did not have any relevant effect in the structure of the market or the competition.

16. Under this frame, the Superintendence decided to approve the merger subject to the compliance with general obligations that are not different from the compliance of the existing regulation, such as not to implement predatory pricing, or differentiated commercialization conditions, or to prevent the entry or growth of other agents in the market, among others. In other words, the authority's capacity to ask for stronger conditions for approval was limited by an economic reality that goes beyond the legal reality, which is that other authorities from bigger and stronger economies had already approve the merger or condition it in a particular way. In this case, the conditions from the European Commission extended to global business, but it could have been restricted to the European Union exclusively.

17. Moreover, there are other types of mergers that require a special awareness in consideration of the nature of the merging parties and the relevant markets. In those cases, it is key for the authorities to have a real capacity to assess the merger and issue decisions based on the necessities of their jurisdictions.

18. An example of these cases is a merger control for the media industry, which, besides being subject to the general competition rules, requires the assessment of specific market considerations such as democratic principles to access the media or information plurality, that are not considered for other industries.

19. A case of study in this regard is the merger between THE WALT DISNEY COMPANY and TWENTY-FIRST CENTURY FOX, INC, which took place in the market of production and provision of TV content, the operation and provision of TV channels,

of Industry and Commerce that decides the merger control procedure becomes enforceable, mechanisms for the completion of the merger in other jurisdictions in which they have already receive approval without it being a merger in Colombia.

The proposed mechanisms must be addressed to ensure that the businesses in Colombia remain separated despite completing the merger in other jurisdictions, and while the Superintendence of Industry and Commerce issues its decision regarding the merger control.

For the purposes of completion of the merger abroad before the decision of the Superintendence of Industry and Commerce regarding the merger control, the Superintendence will grant its green light to the mechanisms proposed by the merging parties for the separation of the business.”

⁵ https://ec.europa.eu/commission/presscorner/detail/sv/ip_19_4030

and the provision of advertisement services. This merger was informed in the following jurisdictions: Argentina, Australia, Brazil, Canada, Chile, Costa Rica, Ecuador, European Union, Honduras, India, Israel, Japan, Mexico, Philippines, Russia, Serbia, South Africa, South Korea, Taiwan, Turkey, Ukraine, and United States.

20. The different competition authorities from jurisdictions with bigger economies, and therefore, a bigger power to decide, approved the merger subject to the compliance of certain divestment obligations intended to prevent the concentration in the media. The European Commission, for example, conditioned its approval to Disney's divestment of its interest in all factual channels it controls in the EEA, namely: History, H2, Crime & Investigation, Blaze and Lifetime channels⁶.

21. By its part, the FTC approved the merger after entering into a consent decree with the parties for the sale of the Fox Sports Regional Networks⁷. Even Latin-American authorities from bigger economies, such as the Mexican authority, authorized the merger subject to the compliance of structural and conduct commitments to prevent risks within the sports and factual channels markets. Specifically, the Mexican authority request to disinvest the business and all assets related to the production, provision and licensing the Fox Sport channels to Mexican TV providers⁸.

22. Nonetheless, the result of the merger control in the Colombian case was the approval without any condition for it⁹, despite the same risks identified by other authorities were also applicable to the Colombian market. Moreover, it is even possible that additional risks should have been considered after applying the principles included in the local regulation applicable to media. Therefore, the merger control assessment should have gone beyond the general competition law analysis, but also consider that the transaction was not affecting the information pluralism or democracy in the access to media.

23. Therefore, the subsequent questions are intended to understand what kind of solutions, if any, can be proposed to solve this kind of problems, and what is the role that the competition authorities of the great powers can take to protect the markets at the EDEs. In other words, the discussion that we want to propose is regarding the scope of the cooperation expected between competition authorities and how such cooperation can ensure that the EDEs' competition authorities can in fact issue effective decisions in consideration to the necessities and regulations of their respective jurisdictions.

24. This discussion also requires to acknowledge that globalization and digitalization of the markets have led to the need to redefine the States' responsibilities, to create different cooperation mechanisms that work in an ex ante manner and that intend to compensate for the inequalities and differences between the different jurisdictions, especially in a scenario like the OECD, which purposes include the joint work between countries to strengthen multilateral trade and promote economic growth and stability.

⁶ https://ec.europa.eu/commission/presscorner/detail/en/ip_18_6312

⁷ <https://thewaltdisneycompany.com/u-s-department-of-justice-clears-disney-acquisition-of-21st-century-fox/>

⁸ https://www.cofece.mx/wp-content/uploads/2023/05/LACCF_FusionesMedios_Septiembre2022.pdf

⁹ Superintendence of Industry and Commerce. Resolution No. 92709. December 21, 2018. Rad. No. 18-201153. https://www.sic.gov.co/sites/default/files/files/Proteccion_Competencia/18-201153.pdf