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Global Forum on Competition

Cross-border Mergers – Summaries of contribution

- Session IV -

2 December 2024

This document reproduces summaries of contributions submitted under Session II of the Global Forum on Competition to be held to be held on 2-3 December 2024.

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

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Table of contents

Summaries of contributions 3
BIAC..... 4
Brazil 6
Canada 7
Chile..... 8
Costa Rica – COPROCOM 9
Costa Rica – SUTEL 10
Fiji..... 11
Japan 12
Korea 13
Serbia..... 14
Chinese Taipei 15
United Kingdom 16

Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Cross-border Mergers (Global Forum on Competition to be held on 2-3 December 2024, Session IV). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

BIAC

Business at OECD (BIAC) appreciates the opportunity to make this written contribution to the OECD Global Forum on Competition for its discussion on cross-border mergers. In doing so, it builds on the OECD’s previous discussions in respect of cross-border merger control.¹

Cross-border mergers and acquisitions (M&A) spanning multiple jurisdictions face increasing – and often intense – complexity and challenges of managing parallel regulatory reviews. With the proliferation of diverse regulatory regimes, businesses are confronted with varying legal frameworks, substantive analyses, and timelines, making the process of cross-border mergers very burdensome, lengthy, costly and in general difficult to predict. Navigating these challenges is further compounded by the rise of new regulatory mechanisms, such as foreign direct investment (FDI) screenings and the EU Foreign Subsidies Regulation (FSR), as well as industry-specific legislation, such as the Digital Markets Act (DMA), which introduce additional layers of scrutiny and complication to cross-border transactions, especially in sectors involving technology and operating within the digital markets/industry.

These challenges are not necessarily limited to the largest corporations, which may have the knowledge and resources to navigate such hurdles. It is not uncommon for smaller businesses to engage in cross-border M&A and they can often face intense regulatory complexity for their deals. Anything that can be done to ensure consistency, streamline processes, align timelines and, crucially, improve legal certainty and predictability, can only be welcomed by businesses.

BIAC therefore acknowledges the importance of addressing these challenges and emphasizes the need for global consistency and a harmonized framework for cross-border merger reviews. Without such a system, legitimate M&A activities that drive entrepreneurship, efficiency, and economic growth could be hampered. The growing complexities of national security concerns, data protection regulations, and evolving theories of harm, as well as remedy design in merger control, particularly in digital markets, underscore the urgency of international cooperation and the need to eliminate unpredictability in the regulatory process.

This paper explores the key challenges associated with cross-border mergers, focusing on the impact of non-economic factors such as jurisdictional complexities, national security concerns, FDI/FSR screenings, digitalization, and data protection, and the increased regulatory scrutiny that has led to a rise in deal delays and even abandonment. It also highlights the issue of divergent outcomes in merger control reviews across jurisdictions due to differences in approaches to market definitions, theories of harm, and remedies. Finally, it offers some practical recommendations to competition authorities, advocating

¹ See OECD, Roundtable on Cross-Border Merger Control: Challenges For Developing and Emerging Economies (2011), https://www.oecd.org/en/publications/cross-border-merger-control_b6efd932-en.html; OECD, Roundtable on Remedies in Cross-Border Merger Cases (2013), <https://web.archive.oecd.org/temp/2015-01-30/252542-competition-remedies-in-cross-border-merger-cases.htm>; OECD, Roundtable on Extraterritorial Reach of Competition Remedies (2017), <https://web.archive.oecd.org/temp/2019-05-15/450129-extraterritorial-reach-of-competition-remedies.htm>. See also OECD Recommendation of the Council on Merger Review, [OECD/LEGAL/0333](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333) (Mar. 22, 2005), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333>.

for greater international coordination, transparency, as well as streamlined, efficient procedures to ensure that merger control remains focused on promoting competition and consumer protection.

BIAC stresses the need for a coherent merger control framework that adheres to harmonized principles, considering recommendations of the OECD and the International Competition Network (ICN), particularly in relation to establishing jurisdictional nexus,² timing of notifications, coordinated review periods, theories of harm, and approach to merger remedies. This is vital for businesses and consumers, as it promotes predictability and legal certainty in merger reviews, while also reducing unnecessary international friction.

² See Joined Cases C-611/22 P & C-625/22 P, *Illumina, Inc. v. Comm'n*, ECLI:EU:C:2024:677, ¶¶ 203-209 (Sept 3, 2024) (emphasizing predictability, foreseeability, and legal certainty in Article 22's interpretation and jurisdictional determination in cross-border mergers). See also Calvin Goldman, Frank Montag & John Pecman, *Statement of Concerns Regarding the Jurisdictional Issues Arising in the European Commission's Position in Relation to the Illumina/GRAIL Transaction*, Concurrences N° 4-2023, Art. N° 114064 (Nov. 2023), <https://www.concurrences.com/en/review/issues/no-4-2023/libres-propos/statement-of-concerns-regarding-the-jurisdictional-issues-arising-in-the>. Signed by 12 prominent competition experts, including former European Judges and ICN heads, this Statement references the ICN's 2018 recommendation that competition authorities assert jurisdiction only where there is a material nexus to the reviewing jurisdiction. It also noted that the same principles are reflected in the executive summary of the 2016 OECD Competition Committee roundtable regarding jurisdictional nexus in merger control.

Brazil

Cross-border mergers pose a challenge to competition authorities since they must harmonise established principles, such as territoriality and sovereignty, with the supranational effects of these transactions. It is essential to have an accurate understanding of the scope and range of these transactions, which is fundamental for the competition authorities to assess possible competitive impacts and for the companies to know when to notify transactions to the competition authorities, even if the decision-making centre and the installations of the parties involved are from another jurisdiction. Thus, the international cooperation among competition authorities is extremely important to reduce information asymmetry and to search for solutions that address competition concerns from different authorities. This article presents a brief description of the Brazilian experience on the topic, showing several hypothetical situations inspired in real case analyses and decisions.

Canada

International cooperation is important to support effective, timely and consistent merger reviews and remedies that benefit merging parties, competition agencies and market participants. This is particularly important in the context of investigating mergers in digital markets which involve ever-increasing volumes of records and data, and new and evolving business models and technology. Investigating mergers in digital markets requires timely international cooperation to identify relevant geographic and product markets in assessing potential harm to competition, design and implement remedies, and share digital expertise.

This submission describes the Competition Bureau's framework for international cooperation; some of the processes in the context of multi-jurisdictional mergers e.g. the use of waivers; and the formal and informal ways in which the Bureau cooperates with international partners when reviewing merger transactions. This submission also describes the Bureau's experience in several recent merger reviews that involved significant international cooperation and that led to important remedies to preserve competition in Canada and in other jurisdictions.

Chile

This document provides an overview of the procedures, challenges, and cooperation involved in the assessment of cross-border mergers under Chile's competition law. It outlines the notification process, which requires merging parties to inform other jurisdictions notified, the assessment and remedies negotiations and the role of international cooperation in each stage of the analysis. The FNE evaluates transactions based on their impact on Chilean competition but is often engaging in detailed discussions with other authorities, especially regarding remedy proposals. Despite the challenges posed by time constraints, access to information, and differing jurisdictional concerns, in the view of the FNE, cross-border cooperation remains crucial for thorough analysis and effective remedy design. However, local competitive conditions may lead to differing conclusions from other jurisdictions, highlighting the importance of context-specific investigations.

Costa Rica – COPROCOM

The rise of cross-border mergers, driven by globalization and market integration, has created significant challenges for competition authorities, particularly in developing economies like Costa Rica. The Commission to Promote Competition (COPROCOM) faces the task of balancing international investment with safeguarding local markets from monopolistic practices.

Several recent cases, such as the proposed JetBlue-Spirit Airlines merger, illustrate the complexity of analyzing such transactions. COPROCOM's assessment identified potential anti-competitive effects in key air travel routes between Costa Rica and the U.S., where reduced competition could lead to price increases and service degradation. Despite the global competitiveness benefits claimed by the merging parties, the local impact in Costa Rica raised concerns, leading to a decision to block the merger.

Another case involved the acquisition of InfraCo SpA by KKR and Telefónica Chile. While the operation primarily affected Chile, COPROCOM's review considered potential future impacts in Costa Rica, especially given the parties' local presence. However, no direct competitive threats were identified, and the transaction was cleared.

Further cases, such as Barentz International's acquisition of DIVSA and Hapag-Lloyd's purchase of SAAM Ports, highlight how cross-border mergers can consolidate global market positions while posing unique regulatory challenges in local jurisdictions. For example, port operations in Costa Rica, crucial for trade in the region, must comply with stringent local regulations, mitigating risks of anti-competitive practices.

These cases underscore the need for enhanced international cooperation and the design of remedies tailored to the specific needs of developing economies. Moreover, post-merger monitoring remains crucial to ensuring long-term compliance with competition policies. As COPROCOM continues to evaluate such transactions, collaboration with global agencies becomes essential for managing cross-border merger impacts while fostering economic growth.

Costa Rica – SUTEL

This contribution addresses the regulatory challenges that arise when companies with operations in different countries or regions undergo mergers and acquisitions that affect markets in multiple jurisdictions.

The following aspects are discussed in this contribution:

- **Impact on Competition:** Cross-border mergers can reduce competition in local markets, increase prices, or diminish innovation. Competition authorities benefit from cooperating to assess the effects, although this can be complex due to differing laws and approaches.
- **Case Study of Telefónica's Exit from Central America:** *Telefónica S.A.U.* sold its operations in several Central American countries (Guatemala, El Salvador, Nicaragua, Costa Rica, and Panama) to competitors *América Móvil (Claro)* and *Millicom (Tigo)*. These transactions impacted the telecommunications market in the Central American region.
- **Challenges of International Coordination:** Cooperation among competition authorities in different countries is essential, but complex due to varying legal and regulatory frameworks. In the context of the analyzed transaction, SUTEL benefited from its membership in the *Central American Network of Competition Authorities (RECAC)* as a mechanism to facilitate technical exchange.

In summary, SUTEL's experience in this case reflects the importance of establishing cooperation mechanisms with authorities from other jurisdictions, in order to gain a broader perspective on regional transactions. However, it also highlights the challenges posed by differing regulatory frameworks and requirements in each specific jurisdiction, which can lead to disparate outcomes from various authorities.

Fiji

This paper outlines the current merger notification regime, review procedures and key assessment factors employed by the Chinese Taipei Fair Trade Commission (the CTFTC) when reviewing cross-border mergers. It also includes case examples for more detailed explanation. Additionally, the paper discusses the CTFTC's experiences with international cooperation in merger cases and challenges encountered in its enforcement activities.

Under the Fair Trade Act, there are no specific provisions governing cross-border mergers. Any transaction that falls within the scope of merger definitions set forth in the FTA and meets notification thresholds must be notified to the CTFTC, unless it qualifies for an exemption. Since the CTFTC repealed the 'Guidelines on Extraterritorial Mergers' in 2023, domestic sales serve as a critical threshold in practice for the purpose of filtering notifiable extraterritorial mergers. In brief, with the application of local nexus requirements, a transnational merger that does not significantly affect domestic market competition will either be exempt from notification or be reviewed under the simplified procedure which has a reduced review period.

There are no specific provisions with regards to the timing of cross-border merger notifications filed to competition authorities in different jurisdictions. However, notifying parties involved in a cross-border merger generally inform the CTFTC of their separate notifications to foreign competition authorities, and provide an update on the status of those filings throughout the review process. In practice, the merger review period is not interrupted while the same merger is subject to merger review by foreign competition authorities. Post-merger changes in market shares of the parties to a proposed merger serve as a starting point for the CTFTC in its competition analysis. Under the FTA, the CTFTC is required to assess both the overall economic benefit of a merger and disadvantages resulting from a lessening of competition. To determine whether a merger may have anti-competitive effects, several key considerations are set out in the Merger Guidelines. They include unilateral effects, coordinated effects, market entry, countervailing power and factors with substantial effects on actual or potential competition. In acquisitions of domestic firms by foreign firms, the CTFTC often consults with sector-specific regulatory agencies, and interviews competitors and upstream and downstream stakeholders.

Where appropriate and applicable, the CTFTC may exchange both confidential and non-confidential information with its counterparts when reviewing cross-border mergers. The required documents and the scope of information disclosure for a merger notification may differ from country to country and the notification may not be filed to competition agencies at the same time. These variations can make it difficult for competition authorities to coordinate the timing of international cooperation and request waivers of confidentiality obligations. Information obtained from different jurisdictions will enable the CTFTC to have a more comprehensive understanding of market definitions and enforcement focuses and thereby inform its competition analysis. Moreover, for cross-border mergers involving emerging technologies or highly dynamic industries in the digital economy, competition agencies will face further enforcement challenges. In this context, international cooperation may offer an opportunity to benefit from others' perspectives to complete a more robust assessment.

Japan

As globalization in corporate activities and digitalization are progressing, we can see the increase in the number of business combinations not only in the domestic market but also across borders of multiple countries and regions. Under this circumstance, a business combination might sometimes be necessary to be notified to several competition authorities, and it might be reviewed by the authorities in parallel. The JFTC reviews such business combinations with close communications with other competition authorities.

This paper describes the JFTC's efforts on international business combination cases and examples of cooperation with other competition authorities in the cases such as the acquisition of Fitbit, Inc. by Google LLC, the acquisition of Asiana Airlines Inc. by Korean Air Co., Ltd. and the acquisition of Activision Blizzard, Inc. by Microsoft Corporation.

Korea

Cross-border mergers and acquisitions involve multiple competition authorities across at least two jurisdictions, as these transactions are likely to impact markets in multiple countries. The Korea Fair Trade Commission (hereinafter the “KFTC”) has proactively responded to cross-border M&As. A specialized team, established in December 2022 and dedicated to reviewing cross-border cases, is part of the efforts. Mergers between foreign firms or acquisitions of foreign firms by domestic firms are also required to submit a merger notification to the KFTC and undergo its merger review process, if the deals are likely to affect the domestic market—e.g., in a case where foreign firms involved record annual revenues of at least KRW 30 billion in the Korean market.

The KFTC has been active in sharing information on its merger assessments with other competition authorities regarding review progress, findings, and other useful materials to secure consistency among competition authorities and enhance effectiveness and efficiency of the review process. Particularly, to share confidential business information with other competition authorities, the merger parties are encouraged to submit a waiver of confidentiality upon the commencement of a review.

One of the high-profile cases reviewed by the KFTC is Korean Air-Asiana merger, whose review process was completed in May 2022. The KFTC determined the merger may lead to increased airfares, so imposed structural remedies such as the transfer of slots and traffic rights. During the review process, the KFTC actively communicated with competition authorities from foreign jurisdictions including the United States and the European Commission, gaining insight from their precedents in the aviation industry and the remedies they received from the merging parties.

Another notable case is the merger between Microsoft (MS) and Activision Blizzard (AB). The KFTC completed its review in May 2023 and concluded that the merger would not harm competition in relevant markets, such as the gaming console market, by withholding AB’s games from competitors. This conclusion which was different from the outcomes in the United States or the United Kingdom, where AB’s titles were highly popular and MS’s X-Box held a significant share of the gaming console market, which was not the case the Korean market.

While other competition authorities mostly require merging parties to propose remedies, the KFTC had been designing its own remedies to address antitrust concerns identified until very recently. To enhance consistency among jurisdictions, the KFTC officially introduced the “Remedy Proposal System” in August of this year.

Serbia

In Serbia, there is an established practice of jurisdiction over cross border mergers on the basis of the Law on Protection of Competition. Serbian practice contains a number of decisions where cross-border mergers with extremely low or even no effects at all on Serbian market were found to be notifiable and where the approval has been granted by the Commission for Protection of Competition (the Commission). Serbian merger control rules do not contain provisions which limit the application of merger control rules on cross border mergers by the Commission since they apply to all concentrations which meet financial thresholds. As long as any of the turnover thresholds are satisfied, the Commission can control even cross-border mergers.

Considering the Regulation on the Content and Manner of Submitting Notification on Concentration, the merging parties in these cases submit the short form of notification which does not require listing other jurisdictions where the transaction has been or must be notified. Only if notification cannot be submitted in summary form, the merging parties are obliged to submit information on whether the notification is submitted to competition authorities in other countries and/or the European Commission, i.e. information on the intent to submit such notification. The Commission usually requests these data, including other data submitted in notification to competition authorities in other countries, if it considers important to find out how the transaction was presented to other jurisdictions. The Commission very rarely engage with other jurisdictions when it finds out that the same transaction was notified in other jurisdictions.

The Commission does not support the view that a concentration, besides meeting the thresholds, also needs to have an effect on competition in domestic market in order to trigger a filing obligation. Such “domestic effects doctrine“ has not been adopted by the Commission because the purpose of merger control in Serbia is the assessment of (potential) effects of the transaction on domestic market, which is only relevant once the Commission’s jurisdiction has been established.

Anyway, when defining the relevant market for the analysis of a merger, the Commission does not consider the possibility to define supra national markets. The Commission always assess the effects of merger within the territory of the Republic of Serbia and design and impose remedies independently.

When evaluating cross-border mergers, Serbia has not faced challenges that could impact its proceedings. Sometimes, the Commission waits merging parties to complete the merger notification because the deadline in Serbia is short and merging parties are preparing notification for other jurisdiction where the transaction had to be notified.

When co-operating with other authorities, the Commission uses formal and informal way, as well as the other authorities do when contacting the Commission. The Commission has signed several memorandums (International protocols) which provide legal basis to exchange non-confidential information on merger cases or collects information of in those countries. The Commission also uses the formal procedure prescribed by the Regional Center for Competition in Budapest (OECD-GvH RCC) to exchange information. When co-operating with other competition authorities, the Commissions respects confidentiality restrictions.

Chinese Taipei

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Where appropriate and applicable, the CTFTC may exchange both confidential and non-confidential information with its counterparts when reviewing cross-border mergers. The required documents and the scope of information disclosure for a merger notification may differ from country to country and the notification may not be filed to competition agencies at the same time. These variations can make it difficult for competition authorities to coordinate the timing of international cooperation and request waivers of confidentiality obligations. Information obtained from different jurisdictions will enable the CTFTC to have a more comprehensive understanding of market definitions and enforcement focuses and thereby inform its competition analysis. Moreover, for cross-border mergers involving emerging technologies or highly dynamic industries in the digital economy, competition agencies will face further enforcement challenges. In this context, international cooperation may offer an opportunity to benefit from others' perspectives to complete a more robust assessment.

United Kingdom

The Competition and Markets Authority (CMA) is the UK's competition and consumer protection authority. This submission sets out our approach to cross-border mergers, and how we continue to be involved in international cooperation to promote competition and achieve growth in each jurisdiction.

Large multi-jurisdictional deals impact consumers, business and the UK economy. It is therefore imperative that we assess these transactions to ensure we fulfil our statutory duty to promote competition within and outside the UK. Working together with our counterparts is an essential mechanism for the CMA to achieve this aim, while ensuring our decisions are independent, evidence based, and we seek an outcome that is right for UK consumers and businesses.

In this submission, we explain the CMA's jurisdiction to review a merger through our jurisdictional test, and our increased remit to consider global mergers after the UK's exit from the European Union. We also set out changes to the CMA's approach following the introduction of the Digital Markets, Competition and Consumer (DMCC) Act. We explain the CMA's position on international cooperation (including where there are divergent outcomes between authorities reviewing parallel deals) and summarise several examples of recent CMA merger investigations of cross-border deals.

Finally, we summarise several examples of the CMA's involvement with multilateral networks and cooperation agreements, which the CMA will utilise to share knowledge on specific cases, foster bilateral relationships and seek to achieve the benefits of international co-operation.

