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Challenges in the design of a merger control regime for young and small competition authorities

Note by the UNCTAD secretariat

Executive summary

The control of mergers is one of the basic pillars of a competition system, along with antitrust rules that prohibit collusive agreements and abuses of companies in a dominant position. Its adoption responds to the need to preserve competitive structures in markets that should not be adversely impacted by takeover operations or mergers.

The design of a concentration control regime requires the consideration of several elements that need to be adapted to each situation and the needs of each jurisdiction. If merger control rules are to be applied by a young and small competition authority, it is also necessary to take into consideration human and financial resources constraints and the lack of experience and competition culture faced by such an authority.

These circumstances should be taken into account in order to enable the competition authority to become familiar with the framework without undermining an effective enforcement of antitrust rules, the other key pillar of a competition system. Merger control rules should therefore be carefully drafted. The credibility of the competition authority, especially crucial for young authorities, will be at stake. In order not to lose credibility, it is necessary that control be carried out objectively, based on efficiency criteria and for the benefit of public interest.

This document highlights the essential elements to be taken into consideration in the design of a merger control regime for young and small competition authorities.

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I. Introduction: Characteristics of young and small jurisdictions

1. Competition laws are applied worldwide with some variation in substantive and institutional aspects, and even the specific goals to be pursued. In the design of a competition regime, each jurisdiction should decide whether it wishes to follow another jurisdiction's model, create its own or adopt a mixture of existing systems.

2. When designing competition law, there may be an underlying motive to follow established laws, as less experienced jurisdictions (mostly young and small and in developing countries) benefit from replicating the legislation of large, developed jurisdictions with efficient and effective competition law regimes. However, it is necessary to draft a law that encompasses the special characteristics of the jurisdiction in question.

3. In the economies of developing countries – the countries of focus in this document, since they have the majority of young and small competition authorities – certain common characteristics should be taken into account. One important characteristic relates to the ideology and methodology of market control. From an economic perspective, many of these economies may have been subject to government intervention and be in a transitional phase of liberalization, privatization and deregulation, while facing the introduction of new technologies in the productive process. Accordingly, the stage of transition of each economy and the degree of implementation of liberalization principles are a key factor when introducing and applying competition law. From an institutional perspective, the agencies have important constraints in terms of human and financial resources. From a political perspective, the lack of stability affects the ability of Governments to commit to long-term changes in the market, while competition may be restricted due to barriers faced by new market players, regardless of their comparative advantages. Finally, the lack of a competition culture impedes the assertion of the benefits of competition.[1]

4. Merger control is one of the main pillars of a competition system, along with antitrust rules, the other key pillar of a competition system. Its aim is to preserve the competitive structure of markets despite takeover operations or mergers. The above-mentioned circumstances should be considered in order to enable a competition authority to become familiar with the framework without undermining the effective enforcement of antitrust rules.[2] The credibility of the competition authority, especially crucial for young authorities, is at stake.[3] Merger control rules should therefore be carefully drafted.

5. Legislators of young and small jurisdictions should strike a balance between the benefits (increased legal certainty, better learning and compliance costs, a more competitive environment and trade or financial benefits, among others) and limitations (risk of making wrong decisions, low level of recognition of the benefits of competition and negative reactions regardless of the content of the law, among others) of adopting the model of law of a more advanced regime. It is therefore important to analyse some common problems of developing economies related especially to their tendency to have high levels of concentration and domestic firms that operate at a scale of less-than-minimum efficiency.[4]

6. The design of a concentration control regime should be adapted to each situation and the needs of each jurisdiction and it is also necessary for young and small competition authorities to take into account human and financial resources constraints, as well as their lack of experience and the lack of a competition culture.

[1] Many domestic companies are accustomed to acting under a monopoly regime protected by the Government, and may not be competitive when entering a competition regime.

[2] For example, as noted in the UNCTAD voluntary peer review of competition policy in Serbia (2011), merger review absorbs more than 80 per cent of the national competition agency's working capacity.

[3] For example, as noted in the UNCTAD voluntary peer review of competition policy in Armenia (2010), if pre-merger notification is required but not observed in practice, it weakens the authority.

[4] Organization for Economic Cooperation and Development (OECD) Secretariat, 2003, Competition policy and small economies, OECD Global Forum on Competition, CCNM/GF/COMP(2003)5.

7. Legislators may decide not to establish a merger control regime because of the limited resources available or may consider establishing a system whose scope is limited to certain major mergers that affect the functioning of markets in a specific way.[5] It may be convenient to adopt transitional measures postponing the entry into force of a control regime (for example, five years after adoption of the law), in order for the competition authority to gather sufficient experience to appropriately assess the economic impact of such operations on consumer welfare. It is also possible to establish a voluntary or ex-post control system that allows the authority to act a posteriori against certain merger operations that distort competition.

8. Merger rules should nevertheless be simple and clear and their scope limited to the operations likely to cause structural problems in markets. A control system should not raise unjustified obstacles to the economic freedom of companies. Antitrust laws should achieve a trade-off through the adequate institutional design of merger control, regardless of the substantive standard that is applied because of such control.

9. Although most competition regimes worldwide include merger control provisions, the content and enforcement of such provisions vary in different jurisdictions. From the perspective of efficiency, merger control laws should establish systems that have as their objective a prompt and efficient control of mergers that guarantees legal security and does not constitute an unjustified brake on economic expansion and the growth of companies.

10. It is relevant to analyse the following:

(a) Legal provisions and enforcement policy related to different types of mergers

(b) The structural and behavioural factors taken into account and their relative importance, including the market share and/or turnover thresholds to trigger scrutiny by competition authorities

(c) Treatment of efficiency gains and of non-competition criteria

(d) Coverage and structure of exemptions

(e) Procedural arrangements, such as voluntary or compulsory notifications for mergers of firms meeting certain market share or turnover requirements or ex post facto possibilities for intervening against mergers, and remedies or sanctions.[6]

11. In the following chapters, the main elements that should be taken into account by legislators when designing a merger control system are analysed, from a formal and substantive perspective, taking into account in particular the characteristics and constraints of young and small competition authorities.

II. Basic elements in the design of merger control regimes for young and small authorities

12. The first step in the design of an effective, efficient and timely merger control regime is the definition of the scope of application, which may depend on three factors, namely definition of operations that should be subject to control of concentrations, establishment of a system of notification and determination of reporting thresholds.

[5] Another justification cited for a non-intervention policy focuses on the effect a merger policy might have on the ability of firms to grow and compete freely, as well as on the creation of large national champions that would enable domestic firms to produce more efficiently and better compete in world markets. For example, as noted in the UNCTAD voluntary peer review of competition policy in Jamaica (2005), Jamaica has not adopted a merger policy, based on the view that the law should not prevent companies from undergoing restructuring or merging, in order that they may grow and survive in the country’s newly open and free market environment.

[6] TD/RBP/CONF.7/L.6.

A. Definitions of mergers

13. An essential element of merger control legislation is the definition of the transactions that will be subject to control by competition authorities. The underlying idea is to capture all transactions that transform formerly independent market players into a single player and thereby alter the structure of a market, possibly to the detriment of competition. With regard to the definition of mergers, the law should be specific and detailed, to allow for a clear identification of the operations to be caught by the system.

14. The criteria used are particularly relevant in identifying operations that are within certain limits, such as strategic alliances (joint ventures) and the acquisition of minority interests, which may also require attention. The definition of concentration may also include criteria to control step-by-step operations or sequences of acts that together amount to a concentration.[7]

15. A concentration is an operation that implies a stable change in the control structure of an undertaking or part of it. There are two requirements inherent in the notion of concentration, as follows:

(a) Change of control: Control of the faculty, conferred by contracts, rights or any other means, to exercise, in fact or in law, decisive influence in a company. From a comparative perspective, the following transactions can qualify as concentration: merger of two or more companies previously independent; acquisition of control over one or more companies; and creation of a joint venture and, in general, acquisition of joint control in one or more undertakings. The control acquired may be exclusive, when exercised by a single person or company, or whole, when two or more persons or companies each have the possibility of exerting a decisive influence on the strategic decisions of the company, so that none of them can decide without the other.

(b) Stability of control: Concentration necessarily requires an element of permanence; exclusive or joint control for a limited period (generally a period of less than one year) or the temporary acquisition of shares by a credit or financial institution for further resale are therefore normally excluded.

16. The concept of concentration is independent of the legal form by which an operation is implemented. Thus, although the most common form is the purchase and sale of companies, shareholder agreements or the contribution of assets to a company may also determine, permanently, a change in control over a company or business unit.

17. The concept of control in this area is of a substantive nature and depends exclusively on the capacity of one person or undertaking to exercise decisive influence over another. To the extent that a minority participation brings this possibility, there will thus be a measure of control and, therefore, concentration. In this regard, strategic decisions are considered, fundamentally, the approval of the business plan or company budget, the appointment of management and the agreed investment policy.

18. From an economic perspective, a merger may be horizontal, vertical or a conglomerate.[8] Examples of legal bases and definitions of mergers are provided in table 1.

Table 1
Legal base and definition of a merger, selected countries

Albania	Governed mainly by Law No. 9901 On Entrepreneurs and Companies of 14 April 2008, as amended, and Law No. 9121 On Competition Protection of 28 July 2003, as amended, as well as instructions and regulations issued by the competition authority.
Botswana	In broad terms, under the Competition Act of 2009, in a merger or amalgamation, the assets and liabilities of two or more companies are pooled

[7] The UNCTAD model law on competition provides detailed descriptions of different types of mergers.

[8] The term conglomerate merger refers to mergers between parties involved in completely different markets and activities. Generally, such mergers few competition concerns.

	into a single company, which may be either of the combining companies or a newly formed company. Mergers arise by way of agreement between parties, the result being that one entity assumes control over the other.
Paraguay	All mergers, acquisitions and associations, including joint ventures, covered by merger regulations as long as they meet prescribed thresholds and have certain defined effects on the national market, under Law 4956/13 On the Defense of Competition, of 21 June 2013.
Philippines	In determining the control of an entity, the commission presumes that control exists when the parent owns, directly or indirectly, through subsidiaries, more than one half of the voting power of an entity, unless in exceptional circumstances it can clearly be demonstrated that such ownership does not constitute control, under Act No. 10667.

B. Merger control regimes: Ex ante, ex post or voluntary control systems

19. The main objective of merger control policy is to avoid and prevent anti-competitive concentrations, to identify the most anti-competitive effects, to have the possibility to correct problems and to efficiently allocate resources.

20. In order to facilitate the assessment of merger operations by competition authorities, it is necessary to establish a system of notification of such operations. There are many existing designs; some are voluntary and others mandatory, while some are a priori (based on a prospective analysis) and others, fewer in number, are ex post. There are also mixed regimes. The choice of notification system is one of the issues to be decided in the design of a merger control system.

21. Most countries have adopted an ex ante approach to merger control. Unlike anti-competitive agreements and abuses of market power, which are investigated ex post, the control of concentrations provides competition authorities an opportunity to carry out an assessment beforehand, thus preventing ex ante potential damage to consumers.[9] Merger control is thus designed to encourage and, more often, oblige the parties to inform the authorities of proposed mergers before they are concluded.

22. For efficiency purposes and to minimize administrative costs, virtually all competition law regimes establish mandatory notifications for transactions that have a certain economic significance that may raise competition concerns. However, in young and small authorities, analysing all requests for mergers is highly time and resource consuming and may harm enforcement efforts under antitrust law. As a result, many developing economies adopt a system of voluntary notification while giving the authorities the power to investigate potentially anti-competitive mergers and to apply remedies in order to limit anti-competitive effects.[10]

C. Criteria applicable to merger notification: Notification thresholds

23. Notification thresholds should be clear, accessible and based on objectively quantifiable criteria to permit parties to readily determine whether a transaction is notifiable. In this regard, jurisdictions should explicitly identify several elements, namely the applicable measurement tool, for example assets or sales; the geographic scope to which the measurement tool is to be applied, for example national or worldwide; and the applicable time frame. With regard to other measurement tools, such as assets, the time

[9] "An important practical issue focuses on the adoption of a pre-merger notification system. Some developing economies, including Algeria, Argentina, Brazil and Thailand, require ex ante notification. A notification system allows the NCA [national competition authority] to respond in a timely manner to external changes in market structure that might significantly impede competition for a very long time, rather than attempt to 'unscramble the eggs' once an anti-competitive merger was discovered" (MS Gal and EM Fox, 2014, Drafting competition law for developing jurisdictions: Learning from experience, New York University Law and Economics Working Paper No. 374).

[10] This model was adopted, inter alia, in the Bolivarian Republic of Venezuela, Chile, Costa Rica, Côte d'Ivoire and Panama.

component translates into a particular date to which the measurement should refer. Criteria may be defined by reference to pre-existing, regularly prepared financial statements, such as annual statements of income and expense and year-end balance sheets.

24. The establishment of adequate thresholds is a key element in the systems of young and small agencies, since this will determine the scope of the quantitative application of control. The threshold determines the number of operations to be notified and the resources to be used. It is advisable, at least initially, to set high thresholds, in order that the authorities receive a reduced number of notifications during the first few years of operation.

25. To facilitate the capacity of merging parties to gather multi-jurisdictional data on a consistent basis, jurisdictions should seek to adopt harmonized guidelines, if not uniform definitions. Furthermore, parties should be given appropriate guidance as to the methodology to be applied when gathering the required data (see table 2).

Table 2
Merger notification thresholds, selected countries

Albania	Merger control applies to mergers when either of the following thresholds are met: (a) The combined worldwide turnover of all participating undertakings is more than lek 7 billion (approximately €50 million) and the domestic turnover of at least one participating undertaking is more than lek 200 million (approximately €1.42 million) (b) The combined domestic turnover of all participating undertakings is more than lek 400 million (approximately €2.8 million) and the domestic turnover of at least one participating undertaking is more than lek 200 million (approximately €1.42 million).
Botswana	Under the regulation 20 of the Competition Regulations, a merger is subject to control if the combined annual turnover in Botswana of the merging enterprises exceeds P10 million, combined assets in Botswana of the merging enterprises exceeds P10 million or the enterprises concerned would, following implementation of the merger, supply or acquire at least 20 per cent of a particular description of goods or services in Botswana.
Paraguay	A concentration must be notified to the competition authority if, as a consequence of the operation, a quota equal to or greater than 45 per cent of the national market of the product or of a defined geographic market is acquired or increased; or the combined aggregate turnover of all the undertakings concerned in the preceding fiscal year exceeds 100,000 minimum monthly salaries.
Philippines	Under section 17 of Republic Act No. 10667, parties to the merger or acquisition agreement referred to in section 16 wherein the value of the transaction exceeds Pts1 billion are prohibited from consummating their agreement until 30 days after providing notification to the commission in the form and containing the information specified in the regulations issued by the commission.

III. Principles to be followed in procedure design: Celerity, transparency and respect of rights of defence

A. Deadlines and form of notification

26. Jurisdictions differ considerably in their requirements as to when parties must submit their formal notifications. Certain jurisdictions do not permit formal notification until a definitive agreement has been concluded, while others accept it based on a letter of intent, an agreement in principle or a public announcement of the intention to make a tender offer, and some also require an express certification by the notifying party or parties with a good faith intention to consummate the notified transaction, and these jurisdictions have found that this practice has not resulted in a considerable number of speculative notifications.

27. Parties may be required to submit appropriate information that they intend to proceed with a transaction as a precondition for filing a notification. In such instances, competition agencies should accord the parties the opportunity of pre-notification consultations to present and discuss the proposed transaction in advance, to facilitate timely

submissions and reviews of formal notification. In addition, the standards for determining when a definitive agreement has been reached should be clearly defined, in order that the parties understand when their notification will be accepted for filing.[11]

28. Jurisdictions that prohibit closing of an agreement until the competition agency has reviewed the transaction should not impose deadlines for notifications, as parties will have the incentive to notify promptly after closing an agreement.

29. To enable a competition agency to accomplish its mission without imposing unnecessary burdens on merging parties, jurisdictions should adopt mechanisms that allow for flexibility in the content of initial notifications and/or with respect to additional information requirements during the initial phase of a review. Whichever mechanisms are used, competition agencies should seek to limit the information sought from parties for transactions that do not appear to raise competition concerns.

B. Review periods

30. Merger reviews should be completed within a reasonable period of time. However, as merger transactions may present complex legal and economic issues, competition agencies need sufficient time to properly investigate and analyse them.

31. Delays may jeopardize the success of transactions due to intervening developments and/or other time-sensitive contingencies such as financing arrangements. Delays may also have an adverse impact on the individual transition planning efforts of merging parties and on their ongoing business operations, due to workforce attrition and marketplace uncertainty. In addition, delays defer efficiencies that would arise from the transaction. A reasonable period for review should take into account, inter alia, the complexity of the transaction and possible competition issues, the availability and difficulty of obtaining information and the timeliness of responses to information requests by the merging parties.

32. Merger review systems should incorporate procedures that provide for an expedited review and clearance of notified transactions that do not raise competition concerns. Given that the vast majority of notified transactions will not raise material competition concerns, merger review systems should be designed to permit such transactions to proceed expeditiously. Many jurisdictions achieve this objective by employing review procedures that allow such non-problematic transactions to proceed following a preliminary review undertaken during an abbreviated initial review period.[12] In some merger review systems, the initial review period is referred to as phase I, and the extended review period as phase II. Other jurisdictions employ single phase or multiphase review procedures that similarly permit transactions that do not present material competition concerns to proceed expeditiously following an abbreviated review and/or waiting period.

33. Competition agencies should inform the parties of incomplete submissions in a timely fashion to facilitate the provision of additional information and to avoid uncertainty regarding deadlines.

C. Access to files

34. Procedural fairness should be afforded to merging parties and third parties with a legitimate interest in the merger under review in all procedures, to allow them to express

[11] Merger laws should ensure procedural fairness for merging parties, including the opportunity for the parties to obtain sufficient and timely information about material competition concerns raised by a merger, a meaningful opportunity to respond to such concerns and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such reviews should be completed within reasonable time periods (OECD, 2005, Recommendation of the Council on merger review, available at http://www.oecd.org/daf/competition/oecdrecommendationonmergerreview.htm (accessed 20 April 2017)).

[12] Abbreviated procedures are used to analyse operations that have a negligible impact on domestic markets despite exceeding the thresholds established in the law. For example, in the European Union regime and in the regimes of many countries, this procedure allows for the short-term analysis of some mergers.

their views. Merging parties should also be informed of competition concerns in a timely manner for the parties to respond to the issues raised and to consider and propose remedies to address the concerns prior to the issuance of a final enforcement decision.

35. Third parties should also be allowed to express their views during a merger review process. However, a competition agency should seek to defer contacts with third parties until the proposed transaction becomes public where such deferral would not adversely affect the reviewing agency's ability to conduct its investigation effectively or complete its review within applicable deadlines.

36. In all instances, competition authorities should avoid the unnecessary public disclosure of confidential information, whether in public announcements, court appeals or administrative proceedings, decisions and other communications respecting a pending transaction. If competition agency procedures provide for public and non-public versions of certain documents, the parties should have an opportunity to review the public version prior to issuance to ensure that it does not disclose confidential information.

D. Transparency

37. Merger control laws should be enforced with a high level of transparency, subject to the appropriate protection of confidential information, to promote accountability, predictability and consistency, thereby contributing to the credibility and effectiveness of the applicable legal framework and of the enforcing authority.

38. Publicly available materials should permit ready determination of the types of transactions to which the merger control law applies, any exemptions or exclusions from the merger control law and the specific tests or thresholds that determine whether the parties must notify of the transaction or whether the competition agency has jurisdiction over the transaction.

39. The design of competition law is affected by the fact that young and small competition authorities may lack independence and by the risk of corruption. It is important to set, wherever possible, clear parameters for decisions, which limit the discretion of decision makers as to whether to open an investigation and how to decide whether an infringement has been committed, and which require elaborate details on how these are applied in each case, in order to allow third parties to verify their applications. Following this recommendation might imply preferring clarity over precision and flexibility in some instances.[13]

40. Competition agencies can promote transparency through general public guidelines and notices on substantive law and procedure, the publication of individual enforcement and non-enforcement decisions and information materials, the issuance of press releases on important decisions and statements explaining actions or non-actions that signify a change in enforcement policy and the delivery of speeches. Such materials should also be made available on a publicly accessible dedicated website and updated regularly to reflect the current state of law, policy and practice.

IV. Substantive analysis of impacts of mergers on competition

41. Merger control analysis is necessarily forward looking and involves a comparison of the market situation before and after a proposed merger in order to assess the potential effect on competition, that is counterfactual and/or prognosis analysis. Such as counterfactual analysis of the market generally incorporates the following aspects:

(a) Market definition (relevant market in geographical or product terms)

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[13] For example, as noted in the UNCTAD voluntary peer review of competition policy in Armenia (2010), the national competition law sets fines at fixed percentages of an offender's turnover without any margin of discretion, in order to limit incentives for corruption. Yet this rigidity raises concerns with regard to the principle of proportionality.

(b) Assessment of pre-merger market structure and concentration (existing firms, market shares and strategic importance with regard to product markets and potential competition)

(c) Assessment of likely effects of notified merger, including unilateral and coordinated effects (likelihood that merged entity will have power to exercise market power unilaterally and likelihood that merger will give rise to more opportunity for market players to coordinate behaviours)

(d) Likelihood of new entries and existence of effective barriers to new entries and expansion.

A. Ways to verify impacts on competition

42. Concentration control systems are generally aimed at preserving the competitive structure of markets. Over the last 15 years, many jurisdictions have modified their merger control statutes to adopt a new legal standard for the review of mergers.[14] This wave of legislative reform has led to a much more uniform situation at the international level and significantly contributed to the convergence of methods and tools used by competition authorities as they review and assess mergers.

43. Competition authorities generally rely on one of two tests to assess whether a merger has anti-competitive effects, namely a dominance test and a substantial lessening of competition test. Some countries opt for a hybrid test that combines elements of both. The tests may be described as follows:

(a) Dominance test: A merger is considered anti-competitive and can be prohibited if it strengthens or creates a dominant position in the market. The notion of dominance is not clearly defined in economics but encompasses situations in which a market leader with a degree of independence from competitive pressures is created. Dominance can be interpreted either narrowly, whereby it covers only situations where the merged firm becomes dominant, or broadly, whereby it also covers collective dominance, that is situations where a merger affects the competitive structure of a market in a manner conducive to creating a coordinated equilibrium among competitors (coordinated effects).

(b) Substantial lessening of competition test: A merger is considered anti-competitive if it is likely to substantially lessen competition in the market. This test focuses on the effects of a merger on the market and on the loss of competition among firms, rather than on threshold structural issues such as market shares.

(c) Hybrid test: A merger is considered anti-competitive if it significantly impedes effective competition in the market, in particular through the creation or strengthening of a dominant position. This test is currently in force in, for example, Paraguay and the European Union.

44. The substantial lessening of competition test or a hybrid test is used in the vast majority of jurisdictions. Overall experience in shifting from the use of the dominance test to the substantial lessening of competition test has been positive, and jurisdictions that have changed standards have not experienced any increase in the number of cases assessed or negative impacts on legal certainty.[15]

45. Significantly, without considering details of methods of economic analysis that may be used to calculate the impact of a merger operation on a relevant market, this analysis shows that competition authorities should act in a way that ensures that examinations are

[14] For example, Brazil, Chile and Costa Rica, among others, have recently modified and strengthened their control systems, and Peru is preparing a legal project to establish a merger control regime.

[15] For example, as noted in the UNCTAD voluntary peer review of competition law and policy in Uruguay (2016), one of the recommendations provided to the young and small authority was to change the substantive analysis of concentrations rules, in order that the commission might intervene in cases where concentration might have anti-competitive effects, such as the establishment or consolidation of market power, and might facilitate coordination. This would replace the current rules, whereby the commission can act only when a de facto monopoly may be created.

conducted with fairness, efficiency and consistency with regard to both procedural and substantive aspects. However, a highly relevant issue for merger policy in developing country jurisdictions involves the weight to be given to wider industrial policies or socioeconomic considerations that go beyond each specific firm or market in a merger analysis. Many developing jurisdictions incorporate a wider set of considerations in their merger laws that may be considered when assessing a merger. Such considerations may include, inter alia, financial stability, protection of national champions, industrial policy goals, promotion of employment and other non-economic factors.[16] In developing jurisdictions, the goal of promoting long-term production and dynamic efficiency should be at centre stage, even at the cost of some harm to allocative efficiency in the short term.[17]

B. Adoption of remedies or conditions for merger approval

46. Competition authorities usually have the power to clear or prohibit a merger based on their analysis of the likely effects on competition. If a notified transaction raises competition concerns, several merger control regimes allow the notifying party to propose remedies and to restructure the proposed transaction in a way that resolves the competition issues.

47. The object of a remedy should be to restore or maintain competition, thereby preventing competitive harm that a transaction would otherwise cause. The remedy should adequately address the potential competitive harm identified, but should not have the objective of improving pre-merger competition. The merging parties should be permitted to propose alternative resolutions that permit the transaction to proceed, and the competition authority concerned should consider such alternative resolutions before pursuing or adopting outright prohibition. Merger review procedures should provide a means to ensure that the competition authority and merging parties have adequate time to discuss and evaluate suitable remedies. Competition remedies can take two basic forms, as follows:

(a) Structural remedies, which involve a change in the market structure (commitment to divest assets)

(b) Behavioural remedies, which involve constraints on the future conduct of a merged entity (commitment with respect to certain contractual clauses).

48. Structural remedies are easier to administer than behavioural remedies, as they do not require monitoring in the medium or long term to ensure compliance. Various smaller merger systems give preference to structural remedies. For example, the New Zealand Commerce Commission accepts only structural commitments to divest assets or shares and not behavioural commitments. In Slovenia, the standards are such that, although behavioural remedies are not expressly excluded, they are not acceptable in practice. A working group set up by Nordic competition authorities, including those of Denmark, Finland, Iceland, Norway and Sweden, along with the Faroe Islands and Greenland, has expressed a preference for structural remedies.

49. In contrast, there are several smaller economies in which behavioural remedies are preferred. For example, in Latvia, although both structural and behavioural remedies are acceptable, the Competition Council considers purely behavioural remedies the most effective, as they are less burdensome for merging parties and easier for the Council to control. Similarly, the competition authority of Ireland has noted that if there is a choice between a behavioural and a structural remedy, the former is preferred. Behavioural

[16] Another consideration may be to increase the ownership status of historically disadvantaged persons, for example as noted in the UNCTAD voluntary peer review of competition policy in Indonesia (2009). While such public interests are important, they are not strictly related to competition and usually entail trade-offs.

[17] As noted in one study, the optimal degree of competition in a developing country might require a combination of competition and cooperation, rather than maximum competition, in order to promote long-term economic growth. If the market is not sophisticated, governmental assistance may be required for rationalization and efficient production (A Singh, 1999, Competition policy, development and developing countries, South Centre Working Paper No. 7).

remedies have also played a key role in the merger control practices of Austria, Czechia, Greece and Serbia.[18]

50. Greater flexibility is needed with regard to young and small jurisdictions.[19] With regard to the imposition of remedies, the following factors may be noted:

(a) Markets tend to be more concentrated and domestic demand can often sustain only the efficient operation of a limited number of market players due to the lack of economies of scale

(b) Divestiture remedies are more difficult to implement

(c) Economic relevance to a multinational supplier may be limited and suppliers may leave the country in order to avoid interference from the competition authority

(d) The competition authority may lack the standing and gravitas to enforce effective structural remedies, particularly with regard to extraterritorial remedies.

51. To be effective, the terms of a merger remedy should be clear and detailed, to provide the parties with adequate guidance and to enable the competition agency to monitor implementation.[20] Competition agencies should have the means to investigate compliance, through the possibility of inspecting and copying company files and records or conducting reviews and/or requiring periodic or one-time reporting obligations by the parties and/or trustees on the implementation of remedies.[21] In the event of a failure to comply, the terms of the remedy should be enforceable by the competition agency, directly or through the courts.

V. Institutional resources and powers for young and small competition authorities to carry out effective, efficient and timely merger control

A. Powers and tools

52. Competition agencies should have the authority and tools necessary for the effective enforcement of applicable merger review laws. Merger review is fact intensive. Competition agencies therefore require the capacity to obtain information relevant to the review of proposed transactions. They should be provided with appropriate mechanisms by which to have the capacity to act against proposed mergers and compel the merging parties and third parties to produce relevant information, for example through the imposition of sanctions for non-compliance with formal requests for documents, testimonials and other information. Competition agencies should also have sufficient independence to enforce merger control in an objective manner.

[18] K Paas, 2008, Implications of the smallness of an economy for merger remedies, *Juridica International Review*, 15:94–103.

[19] A characteristic of many developing jurisdictions that often results from the lack of institutions, involves high levels of aggregate concentration, whereby a small group of economic entities controls a large part of economic activity through holdings in many markets.

[20] Taking into account the fact that merger control is concerned with safeguarding a competitive market structure, structural remedies appear to be the first choice to remedy competition concerns raised by a transaction under scrutiny. The divesture of certain aspects of the businesses of merging parties (usually areas of overlap) in order to prevent or reduce the increase of market power is the most effective form of structural remedy available to competition authorities.

[21] Regardless of the generally recognized enforcement difficulties related to behavioural remedies, it may be argued that in certain respects the small size of an economy might make the monitoring of compliance with behavioural remedies easier.

B. Efficient use of available resources

53. Although developing country jurisdictions have different institutional features, they usually have the common problem of scarce human and financial resources.[22]

54. Institutional endowments should play a role in determining the scope of the application of rules. For example, with regard to merger regulation, a regulatory model based on ex ante notification and authorization is resource consuming, given that the authority must review all mergers that meet the thresholds. This might have spillover effects on other areas of enforcement, since a competition authority generally has one pool of enforcement resources for all its activities. Some modifications might therefore be necessary to create a more efficient enforcement system within existing endowments.[23]

55. Merger application fees might solve financial concerns, assuming that the fees cover the resources needed to analyse merger applications. Such a solution requires an in-depth cost-benefit analysis of the effects of fees, inter alia, on the incentives of firms to engage in pro-competitive mergers. Nevertheless, competition agencies should seek to avoid the perception that their enforcement activities are motivated by considerations other than those presented by the merger legislation.

56. Finally, jurisdictions should periodically review their merger control provisions, especially with regard to young and small authorities, to seek continuous improvement towards recognized best practices. Such reviews should include all substantive and procedural aspects of a merger review process, including notification thresholds, notification procedures and enforcement practices. The frequency and nature of a review may depend on the subject matter.

VI. Conclusion

57. Merger control is a basic pillar of a competition defence system, along with antitrust rules.

58. The design of merger control requires taking into account a series of basic elements that should be adapted to the reality of each jurisdiction. Young and small competition authorities wishing to establish a merger control regime should be aware of their limitations in order to avoid negative effects on their markets and on social welfare. In this sense, both goals and substantive and procedural aspects should be analysed in a comprehensive way, in order for the control system to be effective and efficient.

59. The models of merger control applied in developed countries are an important reference, but none provides the best fit for young and small authorities in developing countries. Models designed for developing economies have some advantages, but may be most useful as a source to be consulted rather than as the basis of law. Developing jurisdictions can benefit from specific parts of existing models – substantive and procedural

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[22] The lack of institutions has specific implications for merger policy. If the market does not supply the basic legal and financial institutions necessary for a functioning trading system, then the justification for allowing firms to supply such functions internally in order to overcome the jurisdiction's deficiencies is strengthened. This consideration, which conforms to the Coase theorem, is absent from most developed markets, yet should be taken into account when shaping merger policy in developing jurisdictions that experience a lack of or highly deficient institutions. However, this is a second-best solution; the best solution is the creation of a basis for a functioning market. Given the potential negative effects of a merger once the lack of institutions has been addressed, such considerations should also be taken into account (MS Gal and EM Fox, 2014).

[23] In designing a regime for young and small agencies, the dedication of a specific unit to the analysis of merger operations is not always possible. Such agencies generally have a small number of lawyers and economists, who must analyse both antitrust cases and merger operations indiscriminately. For this reason, it is necessary to reduce the scope of the application of control to those operations that have an impact on markets in which the degree of concentration is already high. Otherwise, resource scarcity should be compensated for through alternative methods.

– in order not to be locked in to any one model but, rather, to learn from the experiences of other developing jurisdictions and create the law appropriate for them.

60. In designing a merger control system for young and small agencies, legislators should consider the best ways to defend the general interest, market structures and consumers. The economic, political, social and institutional characteristics of each jurisdiction condition the designs of such regimes. However, the search for efficiency in a system should respect the principles of legal security and due process.

61. The UNCTAD model law on competition offers different means and ways to guide young and small agencies in the design of a merger control regime. The technical assistance carried out by UNCTAD over many years in numerous jurisdictions in the developing world has been useful in helping to create models flexible enough to encompass the characteristics of the jurisdictions and to determine whether they are sufficiently lean, simple, transparent and easily enforced.

62. Discussions at the sixteenth session of the Intergovernmental Group of Experts on Competition Law and Policy may explore knowledge and experience in the application of merger control in different jurisdictions. It is important to share any problems encountered (for example in implementation, deadlines and the number of notifications), constraints faced in this work (for example, in human and financial resources, the lack of knowledge of markets and the need for cooperation) and proposals to improve the design of such regimes.