Global Forum on Competition

CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Session I --

Call for Country Contributions

This document is a call for country contributions for Session I of the Global Forum on Competition to be held on 17-18 February 2011. GFC participants are invited to submit their contributions by 10 December 2010 at the latest.

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TO ALL GLOBAL FORUM PARTICIPANTS

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

Global Forum on Competition (17-18 February 2011)

Session I

Dear GFC Participant,

The OECD Global Forum on Competition will hold a roundtable on challenges faced by developing and emerging economies in the area of cross-border merger control on 17 February 2011. You are invited to make a written contribution to this session by 10 December 2010 at the latest.

Developing and emerging economies face considerable challenges in establishing effective competition law regimes, particularly in the field of merger control. The past two decades have witnessed a surge in the number of cross-border mergers, in both value and volume, alongside an increase in the number of merger control regimes around the world. Developing and emerging economies are becoming more integrated into the global economy, as evidenced by the increase in international merger activity affecting these economies.

However, developing and emerging economies may face challenges when dealing with cross-border merger control, due to their particular political, social and in some cases geographical circumstances. This makes for a highly complex framework, in which all of the following are interwoven in a deep and at times paradoxical interplay: competition policy and other public policies and considerations; jurisdictional, procedural and substantive issues relating to merger control; foreign and domestic interests; legal regimes and business interests; and global and domestic interests and considerations. Such issues are not unique to developing or emerging economies, but individually or collectively they may be more pronounced in economies with younger competition and merger control regimes.

The quality and utility of this roundtable will be greatly strengthened by written contributions from participants. It is of interest to understand the measures, if any, in place or planned by GFC economies to deal with cross-border mergers. Although this session is focused on the challenges faced by developing and emerging economies, the discussion will be further enriched with the experiences of both developed and developing economies. Please include summaries of any recent cases you have dealt with, in addition to any particular issues that have arisen as a result of cross-border mergers in your jurisdiction, and responses to such issues. This will help to inform the Secretariat’s background note.

To assist with the preparation of your contribution, a number of issues and questions are attached to guide your submissions. This is not an exhaustive list and participants are encouraged to raise and address other issues as well, based on their experiences. A suggested bibliography is also attached.
Please advise the Secretariat by 15 October 2010 if you will be making a written contribution. As noted above, written contributions are due by 10 December 2010. This deadline applies to both members and non-members. Failure to meet this deadline may result in the contribution not being taken into account in the preparation of the scenario for the roundtable discussion. In addition, late contributions may not be distributed via the Forum website www.oecd.org/competition/globalforum in advance of the meeting.

All communications regarding documentation for this roundtable should be sent to Ms. Erica Agostinho (Email: Erica.AGOSTINHO@oecd.org; Tel: +33 1 45 24 89 73; Fax: +33 1 45 24 96 95), with a copy to Ms. Helene Chadzynska (Email: Helene.CHADZYNSKA@oecd.org). All substantive queries relating to this roundtable should be sent to Ms. Sarah Long (Email: Sarah.long@oecd.org; Tel: +33 1 45 24 92 35). The GFC Programme Manager, Ms. Helene Chadzynska, will be happy to answer any questions you may have about the GFC more generally. She can be reached via telephone on +33 1 45 24 91 05.
Questions and points for consideration

A. General points

1. Please provide a brief overview (one page) of your merger control regime, with particular reference to the following issues:

- Whether a fully-functioning merger control regime exists in your jurisdiction; if not, whether one has been considered, or whether other types of instruments (primarily those aimed at fighting collusion between firms and abuse of dominance) are used to control mergers;

- The criteria (turnover, market shares etc.) used for establishing jurisdiction over merger operations;

- If a notification system is in place, whether this is voluntary or mandatory; whether notification fees are payable; whether there are special requirements for merger notification;

- The substantive test used to assess mergers;

- Any forms of exemptions or special provisions for cross-border mergers.

2. If you do not have a merger regime in your jurisdiction, please describe if any other statutes or legal provisions apply to the review of mergers.

B. Specific questions

I. Co-operation among competition authorities (international, regional and bilateral)

1. Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?

2. Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there particular limitations on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?

3. If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?

4. Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organisations?

5. Does your regime belong to a regional organisation in the field of competition law? Does this organisation have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?
II. Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)

1. If your jurisdiction requires merger notification, are the current notification thresholds appropriate to catch mergers which have an impact on your jurisdiction?

2. Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?

3. To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?

4. Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.

5. Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.

6. Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?

III. Remedies (types, consultation, monitoring and enforcement)

1. Has your jurisdiction imposed any remedies on parties to a cross-border merger? Please provide examples of which types of remedies have been, or could be, imposed.

2. If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.

3. Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?

4. What measures has your jurisdiction taken to monitor and enforce any remedies imposed? Have any arrangements been entered with any other countries to assist in the monitoring or enforcement of the remedies?

5. To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?


Correa, Paulo, and Aguiar, Frederic, “Merger control in developing countries: lessons from the Brazilian experience” (UNCTAD, 2002).


