

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

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

**Background Note**

-- Session I --

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*The views expressed in this paper are the personal responsibility of the author. They should neither be attributed to the OECD Secretariat nor to OECD member countries. The author welcomes comments and corrections of factual errors, which can be sent to him at the following email address: [m.dabbah@qmul.ac.uk](mailto:m.dabbah@qmul.ac.uk).*

JT03295064



## **CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES (DEES)**

**-- Background Note \* --**

### **1. Introduction**

1. The purpose of this paper is to identify some of the main challenges related to cross-border merger control in developing and emerging economies (DEEs). The paper offers an analytical and critical account of the topic by focusing on a number of underlying themes. The paper is intended to offer a framework within which these themes can be examined from both theoretical and practical perspectives, as well as from the perspectives of law and policy. The paper highlights the importance of cross-border merger control in DEEs, notably in the context of their increasing integration into the global economy. In doing so, the paper focuses on the challenges faced by these economies when seeking to regulate cross-border mergers.

2. Merger control has become increasingly important over the last decade. A significant number of countries, including many DEEs have introduced some form of control of merger operations. However, not every competition law regime in the world has merger control provisions, and competition law in general has not been introduced in all countries around the world. This background paper will therefore not consider the challenges faced by countries without a merger regime, though certain aspects of it may be relevant to those countries in which competition law regimes exist but which do not include a specific mechanism for merger control.

3. The paper is structured as follows. Part 2 provides an overview of the topic. Part 3 will consider the particular challenges faced by DEEs in the area of merger control. Part 4 will discuss three important themes underpinning the topic: co-operation, jurisdiction and remedies. The conclusions of the paper appear in Part 5.

### **2. Cross-border merger control**

#### **2.1 *The concept of 'cross-border merger'***

4. There are a number of ways in which the term cross-border merger can be defined<sup>1</sup>, either on the basis of the 'structure' or the 'effect' of the merger.

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<sup>1</sup> See further below, at paragraph 21 which sets out different 'classifications' of cross-border mergers in the case of DEEs.

5. In relation to the structure, a merger can be considered to have a cross-border dimension if it involves firms established in more than one jurisdiction. In relation to the effect, such dimension can be said to exist where – regardless of the place of establishment of the merging firms – the merger affects the markets in more than one jurisdiction. Moreover, a cross-border dimension may be found, regardless of whether the classification is done on the basis of structure or effect. For example, in its Recommendation on Merger Review (2005), the OECD defines the concept of ‘transnational merger’ as one that is subject to review under the merger laws of more than one jurisdiction.

6. Regardless of the basis on which a cross-border dimension to a merger may arise, a number of views may be advanced in relation to how many jurisdictions this dimension should cover. On the one hand, a cross border merger may exist where the merger concerns two or more jurisdictions. On the other hand, the view may be taken that a cross-border dimension should be wider and will therefore only be found where the merger concerns more than two jurisdictions. Arguably, the former (narrow) view would be more sensible to adopt given that the difference between the two views is one of quantity and not quality. This means that when it comes to regulating such mergers, the same issues (or problems) are likely to arise in both situations. These issues include: the fact that notification of the merger needs to occur in more than one jurisdiction and the possibility of inconsistent decisions between the relevant competition authorities.

## 2.2 *The special nature and characteristics of merger control*

7. Merger control is a unique aspect of competition law.<sup>2</sup> Merger operations are a business phenomenon, and are therefore distinct in fundamental respects from other key antitrust conduct, such as cartels and abuse of dominance.<sup>3</sup> Mergers involve structural, as opposed to transient behavioural issues. They have the potential to fundamentally effect future development in a sector of the economy as they alter the very structure of an industry. Moreover, from a public interest perspective, mergers cannot be classified with negative antitrust conduct such as cartels and abusive dominance given that mergers will often produce positive effects.<sup>4</sup>

8. Mergers typically involve significant commercial and financial risks, and often have an impact on financial markets and stock exchanges. This enhances their value from a business perspective and necessitates a special regulatory approach within the overarching competition law regime. It is important in this context to emphasise the role that merger control should have in practice. Whilst merger control prevents the occurrence of anticompetitive outcomes, it also assists businesses in making sound decisions in the design of long-term business and commercial strategies. This point is of crucial importance for DEEs: merger control in such economies can have positive impact in terms of structuring different sectors of the economy and enhancing the prospects of stronger economic performance, in addition to protecting competition and consumers.<sup>5</sup>

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<sup>2</sup> See generally the special report produced by the IBA’s Global Forum for Competition and Trade Policy, *Policy Directions for Global Merger Review*.

<sup>3</sup> It is worth noting, however, the overlap which may exist between mergers and these other antitrust phenomena. For example, a merger may be considered to be an abuse of a dominant position where it leads to a strengthening of such position. See Case C-6/72 *Europemballage Corporation and Continental Can Company Inc. v. Commission* [1973] ECR 215.

<sup>4</sup> See Dabbah, Maher and Lasok, Paul, *Merger Control Worldwide* (Cambridge, 2005), ch. 1.

<sup>5</sup> See ‘The analytical framework for merger control’ produced by the UK Office of Fair Trading for the International Competition Network Merger Working Group, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>.

9. Cross-border merger control is a multi-faceted topic. An interesting interaction exists between all of the following: competition policy and other public policy considerations; jurisdictional, procedural and substantive issues relating to merger control; legal regimes and business interests; and global, regional and domestic interests and considerations. This unique interaction enhances the importance of, and difficulties associated with, merger control, especially when dealing with merger operations involving cross-border elements.

10. Merger control is designed to achieve public policy objectives concerned with the structure of industry within a particular jurisdiction.<sup>6</sup> It focuses on the commercial and economic consequences of a merger for the relevant jurisdiction rather than on the processes by which mergers are brought about. Through controlling merger operations, particular market structures can be maintained and effective competition guaranteed. The specific objectives behind merger control, however, may differ between jurisdictions.<sup>7</sup> Nonetheless, the consensus around the world is that the objective of merger control is maintaining competitive market structures to safeguard consumer welfare.

11. A number of developments in recent years have pushed merger control up the agenda of many countries as well as various international bodies and organisations. The following are worth mentioning.

12. First, as noted above, merger control is motivated by competition policy or industrial policy considerations. Therefore, the social and political conditions in a country must be sufficiently developed before merger control can be introduced.<sup>8</sup> An increasing number of countries – many of them DEEs – have now reached this point in recent years, which has pushed merger control to the fore. Mergers should therefore be considered from two opposing perspectives. On the one hand, they are essential operations for fostering the development of local economies and, on the other hand, they are operations likely to trigger changes and introduce new competitive structures, change employment patterns, and impact on consumer, environmental and other important economic and social aspects.<sup>9</sup>

13. Second, since the 1980's there has been global recognition that the uniqueness of mergers necessitates specifically tailored rules and tools for the purposes of regulating them.<sup>10</sup> In a number of key jurisdictions, experience has revealed the inadequacy of other competition law provisions, e.g. those dealing with abuse of dominance and horizontal agreements as merger control tools.<sup>11</sup>

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<sup>6</sup> See *Mussati, Giuliano, Mergers, Markets and Public Policy (Kluwer, 1995)*.

<sup>7</sup> For example, protecting local or small and medium size competitors, achieving various socio-economic and socio-political objectives, protecting employment, encouraging enterprise, and achieving various industrial policy objectives including promoting the international competitiveness of the local economy and building strong national firms.

<sup>8</sup> See Hamner, Kenneth, 'The globalization of law: international merger control and competition law in the United States, the European Union, Latin America and China' (2002) *The Florida State University Journal of Transnational Law & Policy* 385.

<sup>9</sup> Cowling, Keith, Stoneman, Paul, Cubbin, John, Cable, John, Hall, Graham, Domberger, Simon, and Dutton, Patricia, *Mergers and Economic Performance* (Cambridge, 1980).

<sup>10</sup> See *Ibid.*

<sup>11</sup> See, as an example, the EU experience prior to the adoption of the first merger Regulation, Regulation 4064/89. Until 1989, the European Commission relied on Article 101 (which prohibits anti-competitive agreements) and 102 (which prohibits abuses of a dominant position) of the Treaty on the Functioning of the European Union for the purposes of regulating merger operations. See the case of *Continental Can*, mentioned in note 3 above, for the use of Article 102 for this purpose. Whilst these two provisions were considered to be possible to use in dealing with merger operations, it became clear that they were not adequate. A specific tool for merger control was therefore deemed necessary.

14. Third, globalisation since the mid-1990s means that cross-border elements are now a typical feature of a significant number of merger operations, including those between local firms.<sup>12</sup> In practice, such operations may easily affect local markets of different countries throughout the world. Many of these countries include DEEs located in different regions.

15. Fourth, a number of bodies and international organisations have promoted the significance of cross-border merger control. The International Competition Network (ICN) devoted almost exclusive focus to the topic in the early years of its existence and the Organisation for Economic Co-operation and Development (OECD) has held a number of important roundtable discussions on the subject over the past two decades.<sup>13</sup> One notable result of this extensive policy discussion is in the 2005 Recommendation on Merger Review (see Box 1).<sup>14</sup> The United Nations Conference on Trade and Development (UNCTAD) has also been active in the area of merger control.<sup>15</sup> The work of these bodies has not only created an important 'bank of information', it has also given DEEs an extremely useful insight into the area of merger control as well as providing them with a platform in order to build their national rules and design their policies in the area.<sup>16</sup>

#### **Box 1. The OECD 2005 Merger Review Recommendation**

The Recommendation on Merger Review 2005 offers a number of suggestions for making merger control effective, efficient and timely. These include: ensuring that competition authorities have access to the necessary information to conduct their merger appraisal; reducing the burden on merging parties; allowing for greater flexibility in merger review; and using objective criteria for determining the issue of notification and for fixing the parameters of asserting jurisdiction over merger operations.

The Recommendation also emphasises the importance of countries upholding fundamental principles, such as transparency in the merger review process and procedural fairness, as well as the right to be heard during proceedings (which should be extended to third parties with a legitimate interest). Another principle that is given particular mention is that of non-discrimination between domestic and foreign firms.

<sup>12</sup> See Holmstrom, Bengt and Kaplan, Steven, 'Corporate governance and merger activity in the United States: making sense of the 1980s and 1990s' (2001) *The Journal of Economic Perspectives* 121.

<sup>13</sup> The output of these roundtables has been phenomenal. See the roundtables on: *Competition, concentration and stability in the banking sector* (2010); *The failing firm defence* (2009); *Standard for merger review* (2009); *Minority shareholdings and interlocking directorates* (2008); *Dynamic efficiencies in merger analysis* (2007); *Mergers and dynamic efficiencies* (2007); *Managing complex mergers* (2007); *Vertical mergers* (2007); *Media mergers* (2003); *Merger remedies* (2003); *Merger review in emerging high innovation markets* (2002); *Substantive criteria used for merger assessments* (2002); *Portfolio effects in conglomerate mergers* (2001); *Competition issues in joint ventures* (2000); *Mergers in financial services* (2000); *Airline mergers and alliances* (1999); *Notification of transnational mergers* (1999); and *Failing firm defence* (1995).

<sup>14</sup> See also the useful OECD Report on *International cooperation in transnational mergers* (2001).

<sup>15</sup> A number of publications have been produced within UNCTAD which deal with merger control; some of which with particular focus on developing countries. See for example: Correa, Paulo and Aguiar, Frederico, 'Merger control in developing countries: lessons from the Brazilian experience' (UNCTAD, 2002); and the note by the UNCTAD Secretariat, 'The role of competition advocacy, merger control and the effective enforcement of law in times of economic trouble' (UNCTAD, 2010).

<sup>16</sup> This particular point will be discussed in more detail in paragraph 54 below in the context of multilateral co-operation.

The Recommendation highlights the need and importance of co-operation and co-ordination between competition authorities in the area of merger control, in both bilateral and multilateral forms. It addresses a number of issues related to co-operation and co-ordination, most prominently that of confidential information. The Recommendation encourages merging parties to consider a waiver of confidentiality where possible. At the same time, however, it stresses the need for competition authorities to have the necessary safeguards for handling the exchange of confidential information.

The Recommendation encourages countries to conduct a periodic review of their merger regimes in order to achieve improvements in these regimes as well convergence towards best practices in the area.

16. A further reason for the increased attention given to merger control is that complicated large-scale merger operations attract significant media coverage.<sup>17</sup>

17. The international attention focused on merger control has been a catalyst for discussions not only of the socio-economic impact of merger operations on the industry in question but also of the legal-political nature of the merger control process itself. A number of issues fall under the latter, notably: the powers and mandate of the competition authority, including its independence from the government of the time; whether it is called upon to assess mergers purely on a competition basis or whether there is a consideration of broader socio-economic goals; how closely it can or will collaborate with other competition authorities (discussed further below in the context of international co-operation); and, fundamentally, the extent to which a merger control regime achieves the objectives of national economic policy.

18. The importance of these issues is magnified when multiple national competition authorities are involved in the same merger operation. The multiple reviews provide the opportunity for a comparison of different approaches, including the compatibility of the objectives pursued, the limitations of implementing procedures and the protection of local consumers. These approaches can easily diverge in some cases. The views taken by different countries on the policy regarding merger control reflect national economic and political preferences. Therefore, the scope of official intervention beyond certain market imperfections will often differ significantly.

19. Issues related to cross-border merger operations are important to all types of economies around the world, whether small or large, advanced or emerging. However, the topic is of particular relevance for DEEs, and its importance is expected to increase in the next decade. Nonetheless, these economies face serious hurdles in establishing fully effective merger control regimes that can deal with the challenges of cross-border merger operations.

20. DEEs have unique economic, political and social circumstances.<sup>18</sup> Merger control in these countries should therefore be approached with particular care. Crucially, one should make no assumptions regarding the topic based on knowledge or experience found in the developed world. There are substantial differences between experiences with merger control in DEEs and in developed and advanced economies. However, the experiences of these more advanced economies can be drawn upon by DEEs to gain insight into best practices in the area, in addition to improving international co-operation.

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<sup>17</sup> The prestige which some merger operations enjoy arises out of the hopeful nature of these operations, which are often devised as a solution to major industrial problems or a daring attempt to achieve additional commercial benefits (such as new synergies) and tap into and release additional revenue streams.

<sup>18</sup> See Dabbah, Maher, 'Competition policy, abusive dominance and economic development' in Hawk, Barry, *International Antitrust Law and Policy* (Juris Publishing, 2010).

21. A number of scenarios may be envisaged in which the unique circumstances of DEEs affect cross-border mergers.

- First, a cross-border merger may involve two or more foreign firms located in the same foreign jurisdiction but one or more of them may operate in the relevant DEE.
- Second, the same cross-border merger may involve two or more firms located in different foreign jurisdictions.
- Third, the foreign firms in question may have no presence in the relevant DEE but their merger operation (most notably the creation of a full-function joint venture)<sup>19</sup> may give them, or the merged entity, such presence.
- Fourthly, at least one of the firms in the merger may be located in the relevant DEE.

22. The unique circumstances of DEEs mean that the question of merger control in these economies acquires an added complexity, enhancing the challenges they face.

### 3. Particular challenges faced by DEEs

23. Developing and emerging economies face enormous challenges when seeking to establish merger control regimes and effective competition law regimes more generally.<sup>20</sup> During the past decade in particular, an abundance of academic literature, studies and reports by various international organisations have emerged in which challenges were identified and discussed at length in relation to establishing effective competition law regimes in DEEs. There has been, however, insufficient attention given to the challenges in the area of *merger control* specifically.

24. This is at odds with the expansion of merger activity – in particular cross-border mergers – in both value and volume over the past two decades, in parallel with the proliferation of merger control regimes around the world. And, as noted, it is of direct relevance to DEEs.

25. This part of the paper will consider the different challenges faced by DEEs in the area of merger control and their efforts to address cross-border merger operations. This is not intended to be an exhaustive discussion of all possible challenges. Rather, the purpose is to focus on the key challenges. Most of these challenges, however, are not unique to the area of merger control and are equally relevant to the field of competition law and policy more generally.

#### 3.1 *The absence of a proper competition culture*

26. Most, if not all, DEEs lack an established competition culture. This is due to a number of factors. At a basic level, many DEEs have for a long time suffered from heavy state control and planning. As a result, private forces have not been allowed to play a serious role in the marketplace. Furthermore, due to the prevailing culture in these economies, there is a lack of sufficient awareness of competition as an

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<sup>19</sup> Also referred to, in some cases, as a concentrative joint-venture. This operation involves the creation of a new entity, which is independent from its parents and to which assets and personnel will be transferred so that it is capable of carrying out its activities as an autonomous entity. The concept of full-function joint venture features in Article 3(4) of EU Regulation 139/2004.

<sup>20</sup> See Dabbah, Maher, “Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime” (2010) *World Competition: Law and Economics Review* 457.

economic process.<sup>21</sup> This culture often resembles unfair competition more than competition law because of the fairly widespread ideology that competition is something that must be overcome by defeating competitors through illegitimate means.<sup>22</sup>

27. The lack of a proper competition culture directly impacts on the role and significance that competition law assumes in practice. It narrows down considerably the scope for effective enforcement to emerge. It may even call into question the actual need for a strong competition law regime, with an independent and powerful competition authority. Obviously, the lower the significance or relevance attached to competition law, the more likely it is that merger control will not receive adequate attention in DEEs.

28. International and peer pressure – along with internal awareness – have led to a noticeable increase in concrete actions taken by DEEs to engage in competition advocacy and build domestic competition cultures. However, additional work remains necessary to further the privatisation process and enable private firms to play a greater role in the marketplace.

### 3.2 *The difficult transition towards a market-based economy*

29. Competition can only be a meaningful process if a market-based economy is established in the relevant country. China's transition to a market-based economy is illustrative in this regard. As the market system has progressively been introduced in greater parts of the economy, various laws have been enacted to combat anti-competitive practices and to regulate mergers.<sup>23</sup> This process has culminated in the adoption in 2007 of the Anti-monopoly Law (AML), which is the first specific competition law in China applying generally to public, private, domestic and foreign owned firms. The provisions of the AML are substantially similar to those found in competition laws of developed economies. Already in the two years since the AML has been in force, China's Ministry of Commerce (MOFCOM), the authority responsible for merger control, has adopted guidelines<sup>24</sup> and regulations<sup>25</sup> and reached a number of significant merger decisions, including those of conditional clearance or prohibition of some notable mergers.<sup>26</sup>

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<sup>21</sup> See Gal, Michal, 'The Ecology of antitrust preconditions for competition law enforcement in developing countries' (2004), *New York University Law and Economics Working Papers*, Paper 10, available at [http://lsr.nellco.org/nyu\\_lewp/10](http://lsr.nellco.org/nyu_lewp/10).

<sup>22</sup> These cultural trends are possible to observe throughout entire regions around the world, including in Latin America, Africa and the Middle East. See Dabbah, Maher, *Competition Law and Policy in the Middle East* (Cambridge, 2007); Fox, Eleanor and Sokol, Daniel, *Competition Law and Policy in Latin America* (Hart Publishing, 2009).

<sup>23</sup> Including, for example, the Anti-Unfair Competition Law (1993).

<sup>24</sup> See the guidelines produced in 2009: *Guidelines for merger review of concentrations*; *Guidelines on notification of concentrations*; and *Guidelines on merger filing documentations for the notification of concentration*.

<sup>25</sup> See the *Provisions on the Notification Thresholds for Concentration of Undertakings*, issued by the State Council of the People's Republic of China (2008); *Measures for Calculating the Turnover of Financial Sector Undertakings in Notification of Concentration* jointly issued by MOFCOM and other financial industry regulators (2009); *Measures on Notification of Concentrations* issued by MOFCOM (2010); and *Measures on Review of Concentrations* issued by MOFCOM (2010).

<sup>26</sup> One of the notable merger cases worth noting here is the *Panasonic/Sanyo* merger of 2010; another example is the prohibition decision adopted by MOFCOM in 2008 in the *Coca-Cola/ Huiyuan Juice Group Ltd* proposed merger.

### 3.3 *The dominance of industrial policy*

30. DEEs place heavy reliance on industrial policy considerations, and they dominate the economic decision-making and policy-formulation processes.<sup>27</sup> As a consequence, competition and competition-related considerations may be overshadowed. These are economies in which issues such as employment, economic development and various other industrial policy considerations, such as promoting international competitiveness of the economy occupy a key position on government agendas.<sup>28</sup> These are politically sensitive issues in any economy, but perhaps more so in DEEs.<sup>29</sup>

31. Many countries have placed particular emphasis on industrial policy over the years. The Korean approach up to the 1980's is one example.<sup>30</sup> It has been argued that this policy approach resulted in competition considerations being marginalised, and led to distortion of competition in local markets. This was evidenced from the subsidies offered to national firms and the protection offered to these firms from foreign competition.<sup>31</sup> It is important to note, however, that not everyone has looked at such favourable treatment to national champions in negative terms. Some have argued that important benefits have resulted from this policy approach.<sup>32</sup>

32. Where heavy emphasis is placed on non-competition considerations, merger activities involving local firms may be seen as particularly important for the purposes of giving expression to these considerations in practice. This is notwithstanding the possible negative effect such mergers may cause to competition locally. As a result, merger control – from a competition perspective – may not be looked at favourably, especially by politicians who may favour non-competition considerations over controlling these mergers on competition grounds.<sup>33</sup>

### 3.4 *The lack of resources*

33. Merger control is a particularly resource-intensive process in both human and financial terms. Without the necessary capabilities, the relevant competition authority will simply be unable to carry out its tasks in this area. This is especially so where a mechanism of mandatory notification is used.<sup>34</sup> Almost all competition authorities of DEEs face a major challenge due to the lack of adequate human and financial resources. The local skills markets of these economies do not always have the necessary expertise in the field of competition law. The picture has been changing, gradually, in a number of DEEs in recent years

<sup>27</sup> See Smith, Stephen, *Industrial Policy in Developing Countries* (Economic Policy Institute, 1991).

<sup>28</sup> Indeed, this is the position also in developed economies. See in particular the experience of countries such as Japan and Germany. In the latter, a decision of the Federal Cartel Office blocking a merger on competition grounds may be reversed by the relevant minister – using a statutory-based ministerial authorisation mechanism – if the merger is considered to be beneficial to the international competitiveness of the German economy.

<sup>29</sup> See the OECD Roundtable on *Competition policy, industrial policy and national champions* (2009).

<sup>30</sup> See *Ibid.*

<sup>31</sup> A notable example of a national firm benefiting from such favourable treatment is Hyundai.

<sup>32</sup> See Rodrik, Dani, 'Getting interventions right: how South Korea and Taiwan grew rich' (1995) *Economic Policy* 20. The author argues that the favourable treatment offered to the Hyundai group was beneficial for the purposes of enabling the group to internalise labour market externalities and encouraging it to become more efficient *vis-à-vis* its international rivals.

<sup>33</sup> See also below on the relationship between merger control and foreign direct investment.

<sup>34</sup> See below on the issue of notification.

however. An increasing number of students and young professionals from these economies are seeking to specialise in competition law. This is a positive development which will, in the long-term, lead to a dramatic improvement of the current position.

34. Many competition authorities in DEEs invest significant efforts in recruiting, in maintaining their work force and in reducing the incentives for their young officials to leave for other career opportunities in the private or academic sectors.<sup>35</sup> On the other hand, in financial terms these authorities often suffer from serious budgetary constraints with the result that they are forced to prioritise in their work. Merger control is not considered to be a top priority and greater importance is usually attached to other areas, such as anti-cartel enforcement, competition advocacy and abuse of dominance.<sup>36</sup>

35. Handling merger enforcement work requires competition officials with the necessary expertise in law and economics. This expertise should include suitable knowledge in the operation of different sectors of the economy and the competition officials will need to adopt an international outlook in their approach to merger control. This is important in order to effectively assess the cross-border merger in question and to interact with foreign competition officials involved in assessing this merger, possibly through bilateral links. All of these points should be considered in the light of the special nature of merger assessment, which involves strict time limits and considerable time pressures. It also demands intensive communications between the reviewing officials and the merging firms, as well as third parties, and possibly other public authorities (such as sector regulators) in the same country.

36. The lack of adequate resources – especially when looked at in the light of the special nature of merger control – goes some way to explain the little attention given to the area in many DEEs. This is in addition to the fact, as noted above, that mergers have often been seen as important for achieving economic development and international competitiveness.

37. Many competition authorities in the developing world may also feel that it is unnecessary for them to be concerned with cross-border mergers. When mergers are regulated by more experienced foreign competition authorities, the competition problems can be identified and remedied quickly and effectively without the need for DEEs to intervene.<sup>37</sup> Some competition authorities (and even courts) have particular confidence in the credibility of foreign actions and decisions as an effective means of enforcement.<sup>38</sup> Some of these DEE authorities may prefer reliance on foreign actions in order to avoid possible conflicts with more experienced competition authorities. Other authorities from DEEs may prefer to limit their role to that of assisting foreign authorities. However, in the area of merger control this may not be particularly likely.

38. Furthermore, reliance by competition authorities in DEEs on foreign actions may not offer the required solution to the potential problems likely to be triggered by a given cross-border merger. These authorities are concerned with protecting competition and safeguarding the necessary competitive market structures in the local economy. A foreign action may not address effectively all of the potential

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<sup>35</sup> See note 20 above.

<sup>36</sup> This has been the experience of Singapore, and is also true for many other countries around the world.

<sup>37</sup> See further section 4.2.2 in relation to extraterritorial assertion of jurisdiction with regard to obtaining information.

<sup>38</sup> See for example the view of the Israel Antitrust Authority (IAA) in a case which was brought before the Israel Supreme Court (sitting as a High Court of Justice) which concerned abusive dominance: Case 6623/03 Oded Lavie vs. Director of Antitrust Authority (2003). According to the IAA it made no sense to bring an action against the abusive conduct of a firm when this conduct was brought to an end globally as a result of the action by a foreign competition authority.

competition problems from the merger at hand, some of which may be unique to the particular local jurisdiction. This means there is no substitute for local action in the relevant situation.

39. A final comment to be made is that there are situations in which a cross-border merger may occur without the competition authority in a DEE becoming aware of this fact.<sup>39</sup> This has been the position in a number of African countries, including Kenya and Zimbabwe. In the latter, it is thought that a number of harmful mergers with a cross-border element occurred without the knowledge of the Competition Commission in the country. The situation has improved significantly since 2002 with the strengthening of the merger control mechanism in the country and with the introduction of a requirement for mandatory notification.

### **3.5 *Inadequate legal framework***

40. Where the relevant competition law of a DEE does not provide an adequate framework for merger control or provides only basic provisions (i.e. that mergers are within the scope of the law), competition authorities face a challenge in controlling mergers. An interesting example is found in the Egyptian competition law regime (see Box 2).

41. An effective merger control regime requires more than a provision in the law stating that harmful mergers are prohibited or merely demanding merger notification. In practice, it requires a comprehensive mechanism for merger regulation, including: established avenues for notification; interaction between the competition authority and merging and third parties; and rules and principles which clearly lay down the powers of the competition authority and the obligations of all (the authority, the merging parties and third parties).

#### **Box 2. Merger Control in Egypt**

Article 11(2) of the Egyptian Law on the Protection of Competition and the Prohibition of Monopolistic Practices 2005 merely provides that one of the functions of the Egyptian Competition Authority (ECA) is to receive merger notifications. This is repeated in Article 44 of the Executive Regulations, albeit with more details. The latter Article provides that the ‘Authority shall receive notifications from Persons within 30 days from the acquisition of assets, proprietary rights, usufruct, shares, the setting up of unions, mergers or amalgamations or joint management of two or more Persons.’ Article 45 of the Regulations gives only a brief list of the kind of information that should be submitted as part of the notification. No proper mechanism in practice has been established, although a very basic, but under-developed, notification form has been devised. In practice, limited action is taken concerning the notifications received. The information submitted by merging parties is stored by the ECA, but not used to conduct a formal merger appraisal.

### **3.6 *Problems with implementation***

42. The implementation of a competition law regime in a DEE can be a challenge. It is often accompanied by various difficulties, ranging from institutional design, to equipping the competition authority with the necessary expertise or managing the relationship between the authority and the

<sup>39</sup> See Kububa, Alexander, ‘Issues in market dominance: merger control in Zimbabwe’, speech delivered at the *Regional Conference On Competition Policy, Competitiveness, and Investment in A Global Economy* (Tanzania, 10 May 2004), available at: [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences\\_CompetitionPolicyTanz\\_Alex+Kukuba.pdf/\\$FILE/Conferences\\_CompetitionPolicyTanz\\_Alex+Kukuba.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf/$FILE/Conferences_CompetitionPolicyTanz_Alex+Kukuba.pdf). Also, Dabbah, Maher, jurisdictional chapter on ‘Kenya’, in Dabbah and Lasok, note 4 above.

government or other public bodies. The process can be extremely slow and time consuming,<sup>40</sup> especially when merger control is not ranked highly on the agenda of governments and competition authorities in DEEs. Thus, a slow implementation process in the competition law regime as a whole can translate into a significant delay in implementing and achieving merger control in practice.

### 3.7 *The role of foreign direct investment*

43. In DEEs, foreign direct investment (FDI) is of key economic and political importance.<sup>41</sup> This has been recognised not only by many of these economies themselves, but also by several international organisations. Some of these organisations – most notably the World Bank – have been strong advocates of facilitating FDI in DEEs as a means of achieving international openness on the part of these economies and securing their integration into the global economy.

44. It is open to debate, however, whether FDI is perceived positively by all DEEs around the world. The attitudes of such economies seem to differ on this front. At one end of the spectrum, there are those economies in which FDI is embraced fully and foreign firms (and their governments) are given a wide opportunity to venture into the economic (and possibly also the political) landscape of DEEs.<sup>42</sup> These economies tend to consider FDI a key engine for advancing themselves technologically and enhancing their international competitiveness.<sup>43</sup> Some DEEs, at the other end of the spectrum, do not appear to share the same enthusiasm and they tend to exert strict control over foreign participation in different sectors and markets of the local economy.<sup>44</sup>

45. DEEs in favour of attracting FDI usually adopt carefully tailored measures for the purposes of attracting FDI which may include offering important tax incentives or concessions in the form of custom levies or monetary terms. However, a positive attitude towards FDI may be linked to a more hands-off approach to regulation more generally. The more emphasis placed on encouraging FDI, the less open a government may be to embracing a mechanism such as merger control fully, and opting for an effective mechanism for regulating cross-border mergers.

46. A cross-border merger is one form which FDI can take: a foreign firm without any presence in the relevant DEE acquiring a local firm established (or another foreign firm operating) in this economy. However, the foreign firm(s) involved in a cross-border merger may already have a presence in the DEE concerned. In either case, although the merger may raise competition issues, the government concerned may still not opt for regulating such merger for concerns over the possibility of the relevant foreign firms

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<sup>40</sup> One of the most notable examples of delayed enactment of a competition law is found in China where the process took two decades to complete. See, more recently, the position in Hong Kong in which a competition bill has been prepared and is expected to be enacted into law in 2011. Other examples may be found throughout the Middle East and Africa.

<sup>41</sup> See De Mello, Luiz, 'Foreign direct investment in developing countries and growth: a selective survey' (1997) *Journal of Development Studies* 1.

<sup>42</sup> See Dabbah, note 22 above.

<sup>43</sup> In some DEEs, the competition law itself may be utilised for the purposes of attracting FDI. There is indeed a growing recognition in many such economies that competition law should be adopted and used for this purpose.

<sup>44</sup> Among the different conditions which may be imposed are those that FDI should lead to economic growth, technological development, improvement in the quality of goods or services, increase in employment opportunities, or boosting the country's entry into world markets. In some cases, the relevant law may have additional strict conditions aimed at ensuring that the firm engaged in FDI would not come to enjoy a monopolistic position in local markets.

deciding either not to ‘invest’ or to quit the domestic market in response. A decision or a threat by foreign firm(s) involved in a merger operation to desert the local market of a DEE may arise where the relevant local competition authority opts to impose conditions on the merger.

47. The government and/or competition authority in a DEE may consider they do not have the upper hand in any possible dealing with foreign firm(s) involved in a cross-border merger. This perception may be more pronounced where particular emphasis is placed on FDI and the need to attract it.

48. The existence of effective merger control regimes in DEEs cannot be considered to be a hurdle impeding or excluding FDI in all circumstances. The existence of effective merger control and effective competition enforcement more generally may be seen as complementary to FDI, by providing a mechanism of addressing restraints impeding the latter and also creating a business and regulatory environment with enhanced legal certainty.<sup>45</sup> It ought to be remembered that there are many situations in which foreign firms (and their governments) need DEEs and markets in these economies as much as the latter need such firms and their home governments. Nonetheless, there is a prevailing view that the lack of such control or enforcement can prove to be particularly attractive to such firms as a good environment to invest in.<sup>46</sup>

#### **4. Co-operation, jurisdiction and remedies**

49. Having considered the challenges and unique circumstances faced by DEEs in the area of merger control, it is important to turn to issues of high practical significance in the area. This part of the paper will examine three key themes residing at the heart of the regulation of cross-border mergers, namely: the issue of co-operation between competition authorities; the question of jurisdiction (including merger notification); and the issue of merger remedies. These issues play a key role in the whole operation of a merger control mechanism. They also offer concrete illustrations of many of the challenges facing DEEs.

##### **4.1 Co-operation between competition authorities**

50. Co-operation between competition authorities around the world has received close attention over the years, particularly since the 1980s. This co-operation may take a number of forms. A distinction is usually made between three main types of co-operation: multilateral co-operation; regional co-operation; and bilateral co-operation. All of these are of direct relevance to DEEs, although some are slightly more relevant than others.

###### *4.1.1 Multilateral co-operation*

51. Multilateral co-operation in the field of competition law is the oldest of the three types of co-operation identified above. Its roots date back to the efforts made in the first half of the twentieth century to create an international trade organisation, which was intended to have competence in regulating restrictive business practices at an international level.<sup>47</sup> This particular effort put in place a form of

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<sup>45</sup> See as a good example the action taken by Coca-Cola to modernise the bottling plant of Schweppes Zimbabwe Limited and later to transfer it to an indigenous company in the country, Fidelity Life Asset Management Company (Pvt) Limited. This was done as part of the conditional merger clearance given by the Competition Commission of Zimbabwe in the *Coca-Cola Company/Cadbury-Schweppes* Merger in 1998.

<sup>46</sup> See Kee, Hiau Looi and Hoekman, Bernard, ‘Imports, entry and competition law as market disciplines’ (Centre for Economic Policy Research, 2003).

<sup>47</sup> See the draft Havana Charter for an International Trade Organisation, UN Doc. E/Conf. 2/78 1948.

multilateral co-operation widely referred to as hard law-based co-operation. This was based on binding obligations on countries under a multilateral agreement with the aim of creating an international body with competence in the field of competition law. The (unsuccessful) effort started in the 1990s to introduce competition law within the World Trade Organisation represents one variant of this idea.

52. Binding multilateral co-operation, however, is not the only type to be mentioned. Multilateral co-operation also takes a ‘soft law’ form, meaning co-operation without binding commitments by countries. The origins of this type of multilateral co-operation date back to the 1980s when UNCTAD adopted its Set on Multilaterally Agreed Rules and Principles.<sup>48</sup>

53. With the OECD’s increased input in the field of competition law since the 1990s and with the creation of the International Competition Network in 2001, the soft law model has become the dominant form of multilateral co-operation. Particular importance has been attached to it as an effective international strategy especially in the area of merger control. This can be seen from the impressive output of the OECD and the ICN since the mid-1990s.<sup>49</sup>

54. Multilateral co-operation of a soft law nature has direct relevance to DEEs in the area of merger control. This type of co-operation has the advantage of catering for the different interests and unique circumstances of DEEs. The experience of the ICN shows how this form of co-operation creates strong incentives for competition authorities from these economies to implement principles or recommendations produced at an international level.<sup>50</sup> This experience also shows how these authorities can be given an opportunity to participate in the deliberation process and to play an important role within it. The flexibility underpinning soft law multilateral co-operation is a major selling point as far as DEEs are concerned.

55. Soft law multilateral co-operation helps promote a level playing field notwithstanding the differences between developed and less developed economies. This is particularly important in the area of cross-border merger control where competition authorities located in the latter may easily become involved in regulating cross-border mergers alongside more experienced and established competition authorities.<sup>51</sup> This particular type of co-operation has some clear advantages especially when compared with other forms, notably bilateral co-operation. It has the potential to achieve important convergence and harmonisation but without imposing rules, principles or standards on DEEs or their competition authorities. It also paves the way for good policy design within DEEs through facilitating the creation of an important bank of principles and ideas from which DEEs and their competition authorities can draw when building their domestic experience in the area of merger control.

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<sup>48</sup> It is worth noting that the *Set* was produced following substantial efforts made by developing countries. However, only a passing reference is made to merger control.

<sup>49</sup> In addition to the OECD output mentioned in note 13 above, see the *Recommendation on Cooperation between Member Countries on Anticompetitive Practices affecting International Trade* (1995); and ICN *Guiding Principles for Merger Review* (2002), among other ICN output.

<sup>50</sup> See, for example, the changes introduced by Brazil in relation to its notification thresholds on the basis of OECD and ICN principles, explained in Box 4 below.

<sup>51</sup> See OECD Whish and Wood study on *Merger Control Procedures* (1994) which includes a number of case studies where DEEs were involved in the regulation of cross-border mergers; see in particular the case studies dealing with two mergers which occurred in 1989: the *Gillette/Wilkinson* merger and the *Coats Viyella/Tootal* merger.

## 4.1.2 Regional co-operation

### 4.1.2.1 General

56. Regional co-operation in the field of competition law has been a widespread phenomenon in the developing world. A number of regional efforts have been launched, although this type of co-operation has not proved itself to be fully effective. Among the high profile examples of these efforts are: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU). However, these are not the only regional communities in existence.<sup>52</sup>

57. Regional co-operation in the field of competition law generally and the area of merger control particularly, may be designed using different models, three of which are worth mentioning.

- First, the regional co-operation may take the form of a forum for consultation and experience sharing between the relevant countries as well as for offering technical assistance or helping with capacity building in these countries. This forum may be used specifically for the purposes of establishing domestic competition law or merger control regimes in the countries concerned.
- Second, there is the European Union (EU) model of establishing a regional institution(s) with competence to handle enforcement at the regional level and with a regional network bringing together the relevant regional and domestic competition authorities (as is the case with the European Competition Network (ECN)).
- Third, regional co-operation may rest on approaches seeking to achieve procedural and/or substantive law convergence and harmonisation among the competition law regimes of the countries concerned.

58. There are mixed views about the value of regional co-operation as a practical way to develop merger control (as part of competition law) in DEEs. On the one hand, this co-operation has been considered particularly relevant to these economies for a number of reasons. First, there are the unique circumstances of DEE economies. Second, competition policy is seen as a good fit within the wider economic co-operation between countries and as complement to trade policy. Both of these areas – economic co-operation and trade policy – form the cornerstone of regional co-operation. Third, there is the strong belief that creating a ‘centre of gravity’ at a regional level helps to enhance the status and importance of competition law domestically within the countries concerned. This can assist with facilitating the provision of technical assistance between the participating competition authorities to build domestic competition capacity. A further benefit of this centre of gravity would be the harmonisation of the various national rules and standards. This would be advantageous from the perspective of business, which is interested in reducing costs, having greater legal certainty and operating in similar regulatory environments.<sup>53</sup> Fourth, regional co-operation is considered to be an effective means of addressing serious

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<sup>52</sup> See Dabbah, Maher, *International and Comparative Competition Law* (Cambridge, 2010), pp. 366-7 for a comprehensive list of all relevant regional organisations and communities.

<sup>53</sup> One of the ways this is achieved is through using a one-stop shop principle, under which when a transaction is regulated at the higher regional level it will be excluded from the jurisdiction of the competition authorities at the lower national level. See the existence and the operation of this principle under Regulation 139/2004 in the EU.

competition problems (especially those of a cross-border nature) within the countries concerned where they lack effective domestic merger control regimes.<sup>54</sup>

59. The advantages identified in the previous paragraph are well-illustrated by the EU's experience, which has been very successful in the area of merger control. It demonstrates how a regional approach can help achieve effective and efficient enforcement in relation to cross-border mergers.

60. Many regional co-operation initiatives around the world have been inspired by the EU model especially in an era of intensive globalisation and with an increasing number of competition problems taking on a cross-border dimension as a result. Indeed, it should be acknowledged that regional co-operation may, in some cases, offer a suitable tool to address (and where relevant regulate) competition issues of a cross-border nature more effectively than domestic enforcement.

61. Nonetheless, building effective regional co-operation in the area of merger control in the case of DEEs is an extremely challenging and ambitious goal. This is highlighted by the fact that to date no single regional effort has proved effective or fully workable. Building regional co-operation in the regulation of cross-border mergers is also dependent upon sufficient progress being achieved in the field of competition law more generally. The effectiveness of a regional merger control mechanism requires the presence of merger control in at least some (if not all) of the countries concerned in the first place. This may not feature highly on regional agendas where other more pressing economic and political issues take precedence, such as regional conflicts and poverty. Furthermore, it is uncertain – given the absence of effective merger control regimes in many DEEs – whether a top-down approach would prove effective for the purposes of establishing merger control mechanisms within the countries comprising the regional grouping.

62. A top-down approach is based on the notion that a strong and advanced regional competition law framework could enable the relevant countries to strengthen their own domestic regimes and ensure harmonised standards in those regimes. It is questionable whether this is a sound approach, however, given that achieving such a desired outcome would – at any rate – be undermined by the fact that competition law is simply lacking or not enforced in some of the countries concerned.

63. Moreover, it would be vital for the regional regime and the domestic regimes to operate in harmony, ensuring full and effective co-operation. In practice, this requires a properly defined relationship between the regional and domestic actors, as well as between the different domestic regimes of the relevant countries.

64. Finally, one comment should be added on the benefit of harmonisation of the domestic merger laws of the relevant DEEs within a regional setting, which was referred to above. Even with a comprehensive regional approach to harmonisation, success can never be guaranteed when major divergences exist in the legal, political and economic regimes and circumstances among the different countries concerned. There are clearly significant differences between the countries which are members of regional communities or organisations in the developing world. Any harmonisation initiative will be harder to achieve in these circumstances. Moreover, the countries within one and the same community may be at different stages of economic development with varying degrees of economic and trade strengths. Any attempt to achieve harmonisation – regardless of the mechanism used in this case – is likely to result in one or a small group of countries 'dominating' the process and this is likely to trigger objections on the part of weaker countries. Alternatively, this may result in a lowest-common denominator approach resulting in a mechanism of little practical value.

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<sup>54</sup> See Gal, Michal, 'Regional competition law agreements: an important step for antitrust enforcement' (2010) *University of Toronto Law Journal* 239.

#### 4.1.2.2 Assessing existing regional efforts

65. It may be helpful at this stage to offer an assessment of existing regional efforts, notably the four examples mentioned above: the Association of South East Asian Nations (ASEAN); the Southern Common Market (MERCOSUR); the Common Market for Eastern and Southern Africa (COMESA); and the West Africa Economic and Monetary Union (WAEMU).

- **Association of South East Asian Nations (ASEAN)**<sup>55</sup>

66. A number of references to competition law and policy feature within various ASEAN documents.<sup>56</sup> More concretely, some steps have been taken towards establishing a form of regional co-operation. This includes adopting the ASEAN Regional Guidelines on Competition Policy and publishing the Handbook on Competition Policy and Law in ASEAN for Businesses in 2010.<sup>57</sup> However, no proper framework for this purpose has been created.<sup>58</sup>

67. At present, only five of ASEAN's members have enacted competition law, with provisions dealing with merger control<sup>59</sup>. However, competition law and policy are high on the ASEAN agenda and there is potential for development in the future.<sup>60</sup>

- **Southern Common Market (MERCOSUR)**<sup>61</sup>

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<sup>55</sup> The Association of South East Asian Nations (ASEAN) was established in 1967 in Bangkok. Currently, it has ten member states. The goals behind ASEAN range from political to socio-cultural to economic integration. The emphasis however has been put in practice on the third of these. See the proposal to establish the ASEAN Economic Community (AEC).

<sup>56</sup> See paragraph 41 of the *ASEAN Economic Community Blueprint 2007* which provides that all member countries 'endeavour to introduce competition policy... by 2015'. This paragraph also provides for the establishment of 'a network of authorities or agencies responsible for competition policy to serve as a forum for discussing and co-ordinating competition policies' and encouraging 'capacity building programmes/activities for ASEAN Member Countries in developing national competition policy'. The *Blueprint* is available at: <http://www.aseansec.org/21083.pdf>

<sup>57</sup> The adoption of the Guidelines is based on the idea expressed in the *Blueprint* which was to develop a 'regional guideline on competition policy based on country experiences and international best practices with a view to creating a fair competition environment'. See paragraph 41, *ibid*. The Guidelines deal with a number of issues, ranging from, among others, the aims of competition policy to those of enforcement, competition advocacy and international co-operation. The Guidelines are available at: <http://www.aseansec.org/publications/ASEANRegionalGuidelinesonCompetitionPolicy.pdf>.

The Handbook is addressed to businesses operating in the ASEAN region. It provides basic information and an explanation of the key principles and concepts of competition law and policy. It also gives an account of the substantive and procedural competition rules of ASEAN member countries.

<sup>58</sup> It is worth noting that to date no official ASEAN competition authority has been established. Nonetheless, in 2007, an agreement was reached by all ASEAN leaders to establish a network of local competition authorities which could serve as a forum for holding discussions and facilitating co-ordination on competition matters and also developing a regional policy framework. To this end, a group of experts was set up – the ASEAN Experts Group on Competition (AEGC) – which was given the task of studying and making recommendations on competition law and policy including enforcement on a regional level. The group has focused on issues such as capacity building within domestic competition authorities, competition advocacy, establishing new competition authorities, and determining the priorities of such authorities.

<sup>59</sup> These are Indonesia, Singapore, Thailand, Viet Nam and Malaysia.

<sup>60</sup> See Dabbah, ch. 7, note 52 above.

68. A specific effort has been made within MERCOSUR to seek harmonisation between the domestic competition law regimes of its different member countries. This particular attempt was seen as a necessary step towards regional integration. However little progress was made in practice until 1996,<sup>62</sup> when Argentina, Brazil, Paraguay and Uruguay adopted the *Fortaleza Protocol*<sup>63</sup> within the MERCOSUR framework under which they agreed to form a common institutional framework to address competition issues. For this purpose, the *Protocol* created a number of tools for co-operation between domestic competition authorities.<sup>64</sup> It also advocates greater harmonisation between the domestic competition law regimes of MERCOSUR countries in the area of merger control. However, despite the *Protocol* having been formally in force since 2000, it has yet to be actually implemented in practice (See Box 3).

### Box 3. The MERCOSUR Protocol

The *Protocol* has only been ratified by Brazil and Paraguay, with Argentina and Uruguay yet to agree. Furthermore, only Brazil and Argentina have a merger regime under their competition law and fully dedicated competition authorities. Although full ratification has not occurred, it is worth noting that an informal ‘network’ exists between the domestic competition authorities of MERCOSUR member states. Practical examples include in 2007 the Brazilian Administrative Council for Economic Defence (CADE) deciding to block the merger between Saint Gobain and Owens Corning because of likely adverse effect on competition in the relevant markets due to risks of concentrations in these markets (especially the glass manufacture market) in Brazil. The CADE took the step of informing competition authorities of relevant MERCOSUR member states.

69. Responsibility for adjudication and enforcement of the *Protocol* was placed in the hands of the MERCOSUR Trade Commission (TC) and the Committee for the Defence of Competition (CDC).<sup>65</sup>

70. However, the framework of the Protocol has yet to reach its full potential.<sup>66</sup> To ‘compensate’ for this, a *memorandum of understanding* was approved in 2003 which was intended to enhance co-operation

<sup>61</sup> The Southern Common Market (MERCOSUR) was founded in 1991. MERCOSUR stands on a regional free trade agreement between four South American nations (Argentina, Brazil, Paraguay and Uruguay). Venezuela signed a membership agreement and currently is awaiting ratification before being formally admitted as a full member state. Bolivia, Chile, Colombia, Ecuador and Peru are associate member states.

<sup>62</sup> Some pre-1996 developments, however, had promising competition relevance. This includes the *Ouro Preto Protocol* signed in 1994 which provided for a dispute settlement mechanism.

<sup>63</sup> See [http://www.cade.gov.br/internacional/Protocolo\\_de\\_Ouro\\_Preto.pdf](http://www.cade.gov.br/internacional/Protocolo_de_Ouro_Preto.pdf).

<sup>64</sup> See Andrade, Maria, ‘Competition law in Mercosur: Recent developments’ (2003) *Global Competition Review* 1.

<sup>65</sup> The CDC is intended to be composed of national competition authorities. The TC and the CDC are not supranational bodies. The CDC was intended to take charge of intra-regional investigations, which are handled in three stages. First proceedings begin before the competition authority of each member state at the request of an ‘interested’ party which, after a preliminary determination considering whether there are MERCOSUR implications, decides whether to submit the case to the CDC for a second determination. At the second stage the CDC must decide whether there is an infringement of the *Protocol* and recommend that sanctions and/or other measures be imposed. Finally, through a directive, the CDC ruling is submitted to the TC for a final decision to be adopted.

<sup>66</sup> In 2004, the TC requested a revision of the *Protocol* which was intended to finally create the CDC. The revision was also intended to enhance co-operation between domestic competition authorities and provide technical assistance by Argentina and Brazil for Uruguay and Paraguay. See Rosenberg, Barbara and Tavares de Araújo, Marianna, ‘Implementation costs and burden of international competition law and

within the MERCOSUR framework. The *memorandum* addresses: notification procedures; exchange of information; and technical assistance. The *memorandum* has been implemented within the legal systems of MERCOSUR member states.<sup>67</sup>

- **Common Market for Eastern and Southern Africa (COMESA)<sup>68</sup>**

71. COMESA has, in many respects, been inspired by the EU model. Competition law is a foundation stone within the COMESA framework<sup>69</sup> as the economic transition experienced by the majority of COMESA member states indicated the need for competition law. Such transition appears to have highlighted and helped articulate the need for a regional framework to confront possible anticompetitive situations.<sup>70</sup>

72. A number of COMESA member states have domestic merger control regimes, but these were considered to be inadequate to deal with complex cross-border and multi-jurisdictional issues.<sup>71</sup> It was acknowledged that co-operation at bilateral level could resolve and redress some of these issues, but a regional framework was perceived to be a more consistent and sustainable way of doing so.

73. COMESA's competition law and policy incorporates a mechanism for achieving harmonisation among the competition rules and policies of its member states in order to minimise and avoid conflicts. Under Article 55(3) of the COMESA Treaty, regional competition law was adopted in the form of the *COMESA Competition Regulations*. A designated body, the COMESA Competition Commission – which has responsibility in the field of competition law –<sup>72</sup> is given the function of applying the *Regulations*.<sup>73</sup>

74. As far as merger control is concerned, the *Regulations* have a wide scope and provide for, among other things, the notification and control of mergers and acquisitions. Merger control is covered under Part

policy agreements,” in Brusick, Philippe, Alvarez Ana Maria, and Cernat, Lucian (eds.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (United Nations, 2005).

<sup>67</sup> See Jenny, Frederic and Horna, Pierre, ‘Modernization of the European legal system of competition law enforcement: lessons from other regional groupings’ in Brusick, Alvarez and Cernat, *ibid*.

<sup>68</sup> The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) was signed on 5 November 1993. It brings together 18 African nations. COMESA resembles more an overarching community given that it covers other regional organisations, including the East African Community (EAC) and the Southern African Development Community (SADC). The impact of COMESA on these regional organisations is clear. For example, a Memorandum of Understanding was signed with the EAC under which the EAC has agreed to adopt and implement the COMESA trade liberalisation and facilitation programme. A Joint Task Force has also been established with SADC in order to harmonise its programmes with those of COMESA.

<sup>69</sup> See *Aide Memoire: Trade Capacity Building: Strengthening the COMESA trade region through a culture of competition* (COMESA, 2008).

<sup>70</sup> See *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD, 2005).

<sup>71</sup> See, for example, the views of Kenya, Zambia and Zimbabwe who openly acknowledged prior to the creation of COMESA that national competition rules were insufficient to combat restrictive practices manifested at a regional level.

<sup>72</sup> The Commission is a corporate body with an international legal personality.

<sup>73</sup> The *Regulations* are considered to have supremacy over national laws: in the case of conflict the *Regulations* must prevail over the conflicting national law (Article 5(2) of the *Regulations*). This idea of supremacy has been borrowed from the EU.

4 of the *Regulations* which contains fairly detailed provisions. These provisions, however, are not comprehensive and in many places are incomplete.<sup>74</sup> The COMESA Competition Commission has jurisdiction in relation to ‘notifiable mergers’.

75. A notifiable merger is a merger with ‘regional dimension’, a concept defined in Article 23(2) as requiring two conditions: (i) one or both of the firms involved operate in two or more COMESA member states, *and* (ii) the thresholds of combined annual turnover or assets – provided for in Article 23(3) of the *Regulations* – are exceeded.<sup>75</sup> There is an obligation to notify these mergers to the Commission. The Commission, however, may require notification of a merger, which does not meet the two conditions for notification, if the merger appears to the Commission likely to lead to substantial lessening of competition (SLC) or likely to operate against the public interest.<sup>76</sup> The Commission will use the SLC test to conduct its substantive appraisal of mergers within a timeframe of 120 days, which may be extended if the Commission feels this is necessary to be able to complete its investigation.<sup>77</sup> Article 26 of the *Regulations* deals with the Commission’s procedures when conducting its review, the factors taken into account as part of its merger assessment and the likely outcomes of a merger investigation. The Article also sets out the powers of the Commission when conducting its merger appraisal.

- **West African Economic and Monetary Union (UEMOA<sup>78</sup> or WAEMU)<sup>79</sup>**

76. A regional competition law regime has been established within WAEMU. The WAEMU Commission has competence to apply the competition rules,<sup>80</sup> subject to the control of the Court of Justice, which has jurisdiction to rule on all decisions issued and fines imposed by the Commission.<sup>81</sup>

77. In 2002, the WAEMU Council of Ministers adopted the *Community Competition Law*, which came into force in January 2003. The law has five elements: (i) control of anticompetitive behaviour within WAEMU; (ii) rules and procedures relating to the control of cartels and abuse of dominant position within WAEMU; (iii) the control of state aids within WAEMU; (iv) transparency of the financial relationship between members states and public enterprises on the one hand, and between public enterprises and international or foreign organisations on the other; and (v) co-operation between the WAEMU Commission and national authorities in the enforcement of the *Law*.

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<sup>74</sup> See, for example, below regarding the timeframe for merger review (under Article 25 of the *Regulations*) within which the Commission operates.

<sup>75</sup> Details of these thresholds have yet to be published.

<sup>76</sup> See Article 23(5) of the *Regulations*.

<sup>77</sup> See Article 25 of the *Regulations*. The Article is silent, however, on how long such an extension is likely to be.

<sup>78</sup> Acronym for the French name *Union Économique et Monétaire Ouest Africaine*.

<sup>79</sup> The West African Economic and Monetary Union was established in 1994 as a union between 8 African countries. Its objectives are mainly of general economic nature.

<sup>80</sup> The Commission acts through the Department of Fiscal Customs and Trade Policies, via the Trade and Competition Authority. It monitors compliance with WAEMU competition rules at the national level and; (i) receives complaints directly through national structures; (ii) initiates and investigates legal actions; and (iii) takes provisional measures, deciding on restrictions and fines. Before the Commission acts, it seeks advice from the Competition Advisory Committee.

<sup>81</sup> The Court of Justice enjoys the power to hear legal actions launched by WAEMU bodies and appeals against Commission decisions, which can be amended or annulled as the Court of Justice sees fit.

78. There is thus no specific reference to merger control in the WAEMU Treaty. However, WAEMU's position has been that this does not rule out the control of merger operations. Such operations are thought to be possible to control under the provisions dealing with abuse of dominance.<sup>82</sup>

#### 4.1.2.3 *Comments on existing regional efforts*

79. Comprehensive regional co-operation in the area of merger control in the developing world is an ambitious goal. A fully-fledged regional merger control framework does not seem realistic without at least undertaking some preliminary steps. The first of these steps is the removal of serious political obstacles facing DEEs. Raising the profile of competition law on the regional agenda will depend on domestic successes by the countries concerned both in terms of competition law enforcement and progress towards economic integration more broadly. Due to the highly complex nature of the economic integration process, political disagreements will very likely emerge and will likely impact on the field of competition law and ultimately on merger control.

80. Beyond the potential political disagreements, 'functional' constraints also present serious problems. Huge differences exist between the countries concerned in terms of their experience in the area of merger control. It is therefore premature to embrace the idea of regional co-operation as a means of introducing effective merger control regionally to overcome domestic constraints. The initial focus should be on reaching a stage where merger control rules are introduced domestically in the countries concerned and enforced effectively. It is an essential premise that countries have the same level of development for regional co-operation to work effectively in this area. One solution would be for merger control rules in different regions of the developing world to be developed from the bottom up, i.e. with each country designing its own merger control regime and making some progress in enforcing it. Advancing in this way is more conducive to achieving meaningful co-operation at a regional level.

81. Regional communities around the developing world often lack the necessary tools to deal with the issues and problems that arise following the exercise of jurisdiction by regional authorities.<sup>83</sup> Most notably, it is important to have suitable tools for the following: (i) the allocation of jurisdiction between the 'community' level and 'national' levels; (ii) the enforcement role and powers of the regional authorities (for example whether they will have the ability (and, if yes, how) to access and gather information in actual cases from firms operating in the different countries); and (iii) the necessary safeguards in place for an expansion in workload beyond the capabilities of the regional authorities (for example, the ability to involve national competition authorities to lessen the burden on the regional authorities).

82. The issue is aggravated by the fact that some DEEs are parties to more than one regional community.<sup>84</sup> This leads to difficulties related to whether an individual country will give priority to the merger control framework of one community over another. The existence of overlaps in membership has the potential to undermine the real prospects for creating a fully effective merger control regime at regional level.

83. It is clear that regional communities which exist in DEEs have been inspired by the EU model. While drawing from the EU experience is beneficial, it is important to appreciate the limitations of attempting to transpose the EU model. It took the EU over five decades (including two long decades of

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<sup>82</sup> Article 88 (b) prohibits practices 'comparable' to situations of abusive dominance and it has been thought to serve as a legal basis for a certain degree of merger control.

<sup>83</sup> See *The Attribution of Competence to Community and National Competition Authorities in the Application of Competition Rules* (UNCTAD, 2008).

<sup>84</sup> This is particularly notable on the African continent.

intensive work in the area of merger control) to reach its current position in the field of competition law and the area of merger control. Many DEEs are still in the nascent phase of developing their competition law and their circumstances and history also differ significantly from those of the EU.

84. A large part of the work and discussion on regional co-operation has been merely academic. Considerable efforts need to be made to promote the regional co-operation agenda. In particular, ‘implementation’ at the domestic level of regional rules or principles in many cases is crucial for this purpose. This necessitates instituting domestic merger control regimes in the countries concerned, as noted above.<sup>85</sup> Overly burdensome bureaucracy is also a major constraint facing all regional organisations among DEEs making the task of setting a clear future for regional co-operation and achieving effective implementation much harder.<sup>86</sup>

85. The problems facing regional co-operation are exacerbated by uncertainty faced over whether the emphasis of these regional communities should be placed on economic or political goals. Merger control is not seen through a pure competition law lens, and it cannot be detached from the wider political and economic issues that affect it. Co-operation cannot, therefore, stand in isolation and in almost all cases will depend on the wider political and economic circumstances prevailing in the region and on the individual countries concerned.

86. A final comment concerns capacity constraints, which is an issue for many of the regional communities in the developing world suffer. As noted in the previous part of the paper, the members of these communities are generally small economies which lack the necessary resources to be able to establish effective domestic merger control regimes, let alone devote resources to a regional merger control regime. The latter have the potential to be extremely high. Many of these countries do not consider allocating resources for merger control at regional level to be a national priority.<sup>87</sup>

#### 4.1.3 *Bilateral Co-operation*

87. Bilateral co-operation has developed into an important tool by which competition authorities engage, among themselves, in a variety of enforcement and enforcement-related activities. Bilateral co-operation may occur in both a formal (on the basis of an agreement) and informal (without the conclusion of an agreement, including on a *de facto* basis) manner. In the discussion below, the reference is made to competition-specific bilateral co-operation agreements, which should be distinguished from general bilateral links between countries including those of free trade agreements and memoranda of understanding. The latter do usually contain provisions dealing with competition law and policy but they are not suitable as a vehicle for proper bilateral co-operation in the field of competition law.

88. The number of bilateral co-operation agreements has grown quite considerably since the 1990s. However, compared to the number of competition authorities in existence, the number of agreements is relatively small. The vast majority of bilateral agreements and links have been entered into between experienced competition law agencies in the developed world. Thus, there is a noticeable absence from the competition law scene in most DEEs of specific bilateral co-operation agreements. This is interesting given the strong regional ties, as seen in the previous part of the paper, which exist between many of the

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<sup>85</sup> For example, in relation to the MERCOSUR *Protocol*, implementation here would require the introduction of competition law regimes and the setting up of domestic competition authorities in Uruguay and Paraguay, two of the member states.

<sup>86</sup> Establishing a proper institutional structure at domestic level with sufficient financial resources and expertise is important to ensure successful implementation.

<sup>87</sup> See Stewart, Taimoon, ‘Is flexibility needed when designing competition law for small open economies? A view from the Caribbean’ (2004) *Journal of World Trade* 725.

countries in these regions. One explanation for this absence may be that competition law was introduced only recently in the different countries and therefore competition enforcement (let alone merger control) has not matured to an extent to make the conclusion of such agreements possible or deemed necessary. However, given the extent of ‘cross-border’ or ‘inter-regional’ trade within regions and the existence of many firms operating in the different countries of these regions, the likelihood of merger transactions with cross-border elements is a realistic prospect.

89. The absence of bilateral links with competition authorities in DEEs is also understandable as far as their relationships with more experienced competition authorities in the developed world are concerned. The lack of a level playing field between the two groups is a major reason for this. There is also the fact that experienced authorities are usually time constrained in their merger investigations. Engaging in bilateral co-operation with authorities in DEEs (who may be reviewing the same merger) may not be seen as compatible with their goal of ensuring efficiency in these investigations.

90. Bilateral free trade agreements have been concluded between different countries within the same region. Some of these agreements have competition provisions, although these agreements are arguably not the most suitable medium for bilateral co-operation in the area of merger control to be established. The lack of formal or competition-specific bilateral co-operation agreements between the different countries does not mean, however, that co-operation is non-existent. Different forms of bilateral co-operation can be found, such as those involving joint meetings between competition officials and training seminars and workshops that may occur on an informal basis.

91. Bilateral co-operation offers a number of important benefits to countries and their competition authorities specifically. These were identified and advocated by the OECD in its 1995 Recommendation.<sup>88</sup> The Recommendation lists the following specific benefits: (i) improved efficiency in enforcement and investigations; (ii) avoidance of jurisdictional conflicts; (iii) protecting the legitimate interests of countries; (iv) reducing the need for exchange of confidential information; (v) enhancing the interests of merging parties and legal certainty; and (vi) creating a closer nexus between the relevant competition authority and the relevant merger.<sup>89</sup>

92. These benefits are relevant to DEEs. Thus, introducing bilateral co-operation should be a positive development for these economies. In reality, however, serious obstacles exist in the face of any effort to convert bilateral co-operation in the case of DEEs into an effective tool in the area of merger control. In particular, as noted above, the chances that experienced competition authorities will enter into such agreements with competition authorities in DEEs are quite slim. Arguably, only where the merger control regime of a DEE is modelled on that of a developed economy, and where the necessary wider political and economic circumstances exist which may facilitate such co-operation, will a competition authority in the latter consider entering into a bilateral co-operation agreement with the former.

93. Bilateral co-operation can only work if both parties to the agreement will benefit or at least consider it beneficial to enter into such co-operation. This is well demonstrated by the experience with the EU-US<sup>90</sup> bilateral co-operation and that of Australia-New Zealand.<sup>91</sup> These are the two most successful examples of bilateral co-operation in the field of competition law. The success achieved in these two

<sup>88</sup> See OECD Recommendation on *Cooperation between member countries on anticompetitive practices affecting international trade* (1995).

<sup>89</sup> The idea in relation to the latter point is that a given merger will be assessed by the relevant competition authority.

<sup>90</sup> The EU/US co-operation is based on two co-operation agreements: the 1991 and 1998 agreements.

<sup>91</sup> The co-operation between Australia and New Zealand is founded in the Closer Relations Agreement 1983 and a co-operation agreement from 2007.

instances is due in a large part to the similarities between the parties. In the case of the EU and the USA, this is seen in light of the fact that these are the world's most advanced competition law regimes and there is a significant jurisdictional overlap between them in many cases, especially in merger operations. In the case of Australia and New Zealand, this is seen in light of the similar levels of economic development existing in both countries as well as the close political ties and mutual trust and confidence between them.

94. Notwithstanding the limitations from which bilateral co-operation suffers as an international option for DEEs, it may nevertheless be advantageous for these economies to attempt to establish bilateral links in the field of competition law either among themselves or with more developed economies. These links do not have to be exclusively for the purposes of co-operation in individual enforcement actions,<sup>92</sup> but may facilitate technical training and capacity building. These would be particularly important in the area of merger control given the specific demands, as we saw above, of this area, especially in terms of adequate resources, most notably relevant expertise.<sup>93</sup> This could also enhance the prospects for convergence and harmonisation which are likely to emerge from such bilateral links.

#### 4.2 *Jurisdictional issues*

95. Jurisdictional issues sit at the very heart of the merger control mechanism. As a process, merger control begins with the question of jurisdiction: i.e. whether a particular transaction falls within the scope of the relevant regime and whether the relevant jurisdictional requirements are satisfied. This is what triggers the entire process of substantive merger appraisal. Where the jurisdictional thresholds are not met, no notification of the merger will be necessary and as a consequence the relevant competition authority will not carry out an assessment of the merger.<sup>94</sup>

96. The jurisdictional question assumes particular importance in relation to cross-border merger operations given the high probability of these operations having to be notified *ex ante* in many jurisdictions. One issue concerns whether these mergers, where they involve foreign firms, should be caught – under all circumstances – by the relevant local merger rules of a given jurisdiction or whether this should only happen under certain circumstances.<sup>95</sup> In relation to DEEs, this question is particularly relevant in the context of cross-border merger control.

##### 4.2.1 *Notification*

97. In the vast majority of merger control regimes in the world, a mechanism of mandatory notification exists. Only a few jurisdictions in the world (including the United Kingdom, Chile, Australia and New Zealand) have a mechanism of voluntary notification. When designing or operating a merger control regime, a DEE will need to consider whether to rely on mandatory or voluntary notification and, more importantly, the jurisdictional thresholds which trigger notification to the relevant competition

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<sup>92</sup> It is important to note that the prospects of this cannot be ruled out completely even in the absence of a formal co-operation agreement. See for example the consultations conducted between the Competition Commission of Zimbabwe and the Australian Competition and Consumer Commission in the *Coca-Cola Company/Cadbury-Schweppes* merger, mentioned in note 45 above.

<sup>93</sup> See above.

<sup>94</sup> It should be borne in mind however that jurisdiction may nonetheless be exercised by the relevant competition authority in such cases. See for example the provision in the *COMESA Regulations* to that effect, note 73 above and accompanying text; or where a voluntary notification mechanism exists and the relevant competition authority chooses to examine a merger *ex post*.

<sup>95</sup> In some jurisdictions, an exemption exists for certain types of 'foreign' mergers. See, for example, the exemption in existence in the US merger control regime.

authority. This is a complex issue that requires careful consideration. Such thresholds should, on the one hand, reflect the size of the economy in question and relevant national sensitivities and, on the other hand have proper regard to the interests of firms engaged in merger operations.

98. There is a particular difficulty in setting the jurisdictional thresholds at an appropriate level. In relation to this task, a risk exists that these thresholds may be set too high or too low. There are implications in both of these situations. Where the thresholds are set at a high level, there is a risk that some problematic mergers (which normally should require appraisal on substantive grounds) would escape scrutiny. Where the thresholds are set at a low level, this will increase dramatically the number of merger operations caught under the notification rules.<sup>96</sup> Some of these mergers may not have a sufficiently material link to the relevant jurisdiction (See Box 4). Such an outcome will have serious repercussions for the scarce resources available to competition authorities in DEEs. This is in addition to the unnecessary regulation to which merging parties in cross-border situations will be subjected to. This point deserves particular emphasis given that most mergers do not give rise to competition problems.

#### **Box 4. Reform of Merger Notification Thresholds in Brazil**

It is worth mentioning the change which occurred in Brazil.

Under section 54 of the Competition Act 1994, notification is mandatory for all mergers, acquisitions, joint ventures, or any other type of corporate grouping where: the transaction generates effects in Brazil; *and* the transaction results in a market share equal to or higher than 20% of a given relevant market; *or* any of the parties to the transaction achieved a turnover above R \$400 million in the preceding financial year.

For a long time, the Brazilian competition authorities gave an expansive interpretation to the concept of ‘effects in Brazil’. This was encouraged by the wording of section 54 which omits a geographic reference to Brazil in relation to the market share and turnover thresholds. With such low thresholds, many merger operations which produced no impact at all on competition in local markets had to be notified to the Brazilian Administrative Council for Economic Defence (CADE).

A new interpretation was given to the concept of effects and the turnover criterion in a key decision delivered by the CADE on 19 January 2005. The CADE stated that notification should occur in the case of transactions, which involved economic groups with a turnover exceeding R \$400 million – *in Brazil* – in the preceding financial year. This significant change has been facilitated by the adoption of the principle of appropriate nexus of jurisdiction as advocated by the OECD and the ICN. The change in position led to a significant decrease in the number of merger operations, which would have had to be notified in Brazil in the absence of this change. Therefore at present only those merger operations in which the turnover generated in Brazil exceeds the stated threshold should be notified.

It is worth noting that there is a proposed change currently under discussion in Brazil (Bill of Law 06/2009) which is seeking to place exclusive reliance on turnover thresholds and not market share thresholds for establishing jurisdiction. This proposed change also follows OECD and ICN best practices (see note 97 below and accompanying text).

99. The work of the OECD and the ICN demonstrates the difficulty involved in determining the appropriate jurisdictional nexus and the appropriate level at which to set the notification thresholds. The ICN principles produced on this issue<sup>97</sup> show that it is difficult to determining the criteria for such thresholds. This is in part due to the general nature of the criteria proposed under these principles for

<sup>96</sup> See Lorenz, Moritz, ‘Legislative comment: the new Chinese competition act’ (2008) *European Competition Law Review* 257.

<sup>97</sup> See ICN Recommended Practices for *Merger notification and review procedures*.

determining the notification thresholds i.e. that they should be clear and understandable and based on objective and quantitative and not subjective factors.<sup>98</sup>

100. The OECD Recommendation on Merger Review (2005) offers further clarification on this issue. According to the Recommendation, OECD member countries should assert jurisdiction only where a merger operation has an appropriate nexus with their jurisdiction. It also states that the criteria for determining notification must be clear and objective. Clearly, such recommendations are motivated by an interest to reduce the cost and burden on merging firms and third parties. They are therefore welcome.

#### 4.2.2 *Obtaining information and information exchange with other competition authorities*

101. Another jurisdictional issue, which has great practical significance, concerns the tools and powers for seeking and gathering information in merger cases and for exchanging information between competition authorities. In merger cases, the information will usually come from the merging parties themselves as part of the merger notification exercise. However competition authorities in DEEs encounter a number of difficulties in obtaining information from, and exchanging information with, firms involved in cross-border mergers. To understand this issue, the discussion should be placed in the wider context of extraterritorial assertion of jurisdiction by competition authorities (especially those of DEEs) over these operations.

102. The doctrine of extraterritoriality has been a source of controversy in the field of competition law.<sup>99</sup> The aggressive use of the doctrine in some parts of the world has triggered disputes and conflicts between countries and has led to some countries and their authorities taking measures to block extraterritorial efforts by other countries.<sup>100</sup>

103. However, the doctrine of extraterritoriality has an important role to play in the field of competition law and in merger control particularly. Without it at least some potentially harmful transactions might escape scrutiny. Extraterritoriality has a particularly important role in the absence of an effective multilateral strategy in the relevant country and given the limitations from which bilateral co-operation suffers.<sup>101</sup>

104. Extraterritoriality is an inherent feature of merger control. This can be seen in light of the wording and nature of the jurisdictional thresholds triggering merger notification (whether mandatory or voluntarily), which feature in different merger control regimes. The judicial confirmation given in the US

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<sup>98</sup> Criteria such as turnover figures and assets are considered to be objective; market shares, on the other hand, are considered to be subjective criteria.

<sup>99</sup> See Dabbah, ch. 8, note 52 above. Extraterritoriality refers to a situation where a competition authority or court asserts jurisdiction over a situation involving foreign elements (such as behaviour, conduct or transactions of foreign firms). This may be done on the basis of 'effects' produced on competition in local markets, or on the basis of 'implementation' of the behaviour, conduct or transaction in the relevant jurisdiction, or (in some cases) on the basis of the 'single economic group' doctrine (where although the firm(s) concerned may be foreign, nonetheless they may own a local subsidiary). The 'effects' and 'implementation' doctrines are the main scenarios for asserting jurisdiction extraterritorially. The former is used in the USA (and many other) regimes whereas the latter is used in the EU.

<sup>100</sup> See, for example, the blocking efforts – through both case law and statute – by the United Kingdom in relation to extraterritorial assertions of jurisdiction by the USA. Other countries which have adopted blocking legislation against US extraterritorial actions include Australia and South Africa.

<sup>101</sup> See discussion above in paragraphs 93 and 94.

and Europe strengthens this point.<sup>102</sup> However, the ability of competition authorities of DEEs to assert jurisdiction extraterritorially in cross-border merger cases remains a challenge.<sup>103</sup>

105. As a starting point competition authorities in DEEs may struggle to obtain all the necessary information required to conduct the merger analysis.<sup>104</sup> When the relevant information is located outside the territory of the DEE in question, it can be very difficult for the relevant competition authority to obtain it. The firm(s) concerned may refuse to comply with the orders of the authority to supply the relevant information and the only way to obtain it would be to rely on the possible assistance of the relevant foreign competition authority. However, unless a bilateral co-operation agreement to assist and exchange information exists between the relevant jurisdictions, ad hoc co-operation of this type is unlikely.<sup>105</sup> This highlights the need for bilateral co-operation, although as stated above considerable constraints may prevent it from materialising.

106. Even if the competition authority is able to obtain the necessary information and reach a conclusion that the relevant merger should be blocked or cleared subject to conditions, it can still face serious problems in enforcing its decision where there are no assets belonging to the firm(s) concerned in local markets.<sup>106</sup> The likelihood of an authority succeeding to enforce its decision in the courts of the relevant foreign jurisdiction is slim. The situation is exacerbated where fundamental differences exist between the two jurisdictions, for example in civil and common law jurisdictions, or because one jurisdiction allows for criminal penalties whereas the other allows only for civil penalties.<sup>107</sup>

### 4.3 Remedies

107. Remedies play a decisive role in merger control.<sup>108</sup> Without the ability to impose remedies, agencies would have no other choice than to reject problematic mergers. Remedies allow problematic mergers, which nonetheless have obvious and important benefits, to be cleared where these benefits outweigh possible competition problems which the relevant merger is likely to give rise to. Merger remedies create a third category – next to unconditional clearance or prohibition decisions – of outcome in merger cases, namely that of conditional clearance.

<sup>102</sup> Judgments of the US Supreme Court and the European Court of Justice have been crucial in recognising the doctrine of extraterritoriality. See, for example, the judgement of the General Court of the EU (then the CFI) in Case T-102/96 *Gencor v. Commission* (1999) ECR II-753.

<sup>103</sup> This does not mean that such assertion is impossible however. A number of examples are possible to identify of successful assertion of extraterritorial jurisdiction, including the *Coca-Cola Company/Cadbury-Schweppes* merger, mentioned in note 45 above.

<sup>104</sup> This arguably highlights the importance of having mandatory notification as opposed to voluntary notification.

<sup>105</sup> For illustrations, see Dabbah, ch. 4, note 22 above.

<sup>106</sup> See for example the *Rabies-Vaccines* merger which was investigated by the US Federal Trade Commission (Case No. 891 0098, 55 Fed. Reg. 1614 (1990)). This case concerned the acquisition of the French firm, Connaught by Institute Merieux of Canada. Despite identifying competition concerns in the case, the firms had no assets in the USA and so the FTC needed the co-operation of the Canadian Competition Bureau in the circumstances.

<sup>107</sup> Some important illustrations can be found from practice, most notably: the decisions of the UK House of Lords (now the Supreme Court) in *Huntington v. Attrill* [1893] A.C. 150 and in *Government of India v. Taylor* [1955] AC 491; and the judgement of the UK Court of Appeal in *United States of America v Inkley* [1988] 3 All ER 144.

<sup>108</sup> For a useful discussion of merger remedies, see the OECD Roundtable on *Merger Remedies* (2003) and the ICN principles on remedies.

#### 4.3.1 *Types of remedies available*

108. There are several types of merger remedies. Broadly speaking, these remedies are divided along the lines of structural and behavioural remedies. In some merger control regimes, however, the categorising of remedies is more sophisticated than this.<sup>109</sup> In these regimes, a distinction is made between: structural remedies;<sup>110</sup> ‘other’ structural remedies;<sup>111</sup> behavioural remedies;<sup>112</sup> and other types of remedies.<sup>113</sup>

109. Competition authorities overwhelmingly prefer structural remedies over behavioural ones. Structural remedies are considered to have greater effectiveness than behavioural remedies in addressing the competition problem(s) identified during merger appraisal. Moreover, unlike behavioural remedies, they do not require ongoing monitoring. Nonetheless, when it comes to designing merger remedies and determining its policy on this topic (including what type of remedies to accept), a competition authority faces a difficult task. This is particularly the case in DEEs.

110. A competition authority in a DEE may choose – as part of its policy – to express preference towards structural remedies. In practice, however, authorities may struggle to implement this type of remedy where the merging parties maintain no relevant assets in the jurisdiction in question and (more generally) where the merging firm(s) have the upper hand in their dealings with the authority.<sup>114</sup>

111. The merger may also require the divestiture of a number of assets and the relevant competition authority in a DEE may lack the experience to deal with such complex cases.<sup>115</sup> It may also be the case that the competition concerns identified in the investigation are related to issues which are behavioural in nature such as exclusivity clauses in contracts between one or more of the merging firms and customers of these firms.<sup>116</sup>

112. In practice, competition authorities in DEEs may therefore have to opt for behavioural remedies in more instances than they would like to be the case. This has been the situation adopted in Korea. (See Box 5). However, despite their drawbacks one should not dismiss the importance and relevance of behavioural remedies and the need to opt for a behavioural remedy in a given case as a first choice or as one part of a sophisticated remedies package.

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<sup>109</sup> See for example the classification made by the UK Office of Fair Trading and UK Competition Commission.

<sup>110</sup> Structural remedies include most commonly divestiture.

<sup>111</sup> Other structural remedies may include granting access to facilities of infrastructure or intellectual property rights.

<sup>112</sup> Behaviour remedies may include things like licensing of intellectual property rights, removal of exclusivity clauses in contracts with customers or price regulation measures.

<sup>113</sup> Other types of remedies may include recommendations by the competition authority to the government or parliament to change a law or regulation deemed to be an obstacle to competition in the relevant market.

<sup>114</sup> One such example is whether the firms may be able to threaten to withdraw from the relevant jurisdiction and/or to lobby the government in order to exert heavy pressure on competition officials, as discussed previously.

<sup>115</sup> See for example the views submitted by Mexico within the OECD Policy Roundtable on *Merger remedies* (2003).

<sup>116</sup> Exclusivity clauses in particular constitute a problem in several DEEs; see most notably the position in different sectors of the Mexican economy, including that of soft drinks.

### Box 5. The Use of Behavioural Remedies in Korea

In recent years, the Korean Fair Trade Commission (KFTC) has heavily relied on behavioural remedies as part of merger clearance in a number of cases. Two examples offer interesting case studies.

The first concerns the acquisition in 2007 by CJ Cable Net of a stake in Chungnam Broadcasting System and Modu Broadcasting System<sup>117</sup> which led to the integration of the provision of cable-TV by these firms in six cities in Korea. The KFTC cleared the transaction subject to a rigorous and sophisticated remedies package. This included a prohibition on: direct or indirect price increases; reduction in the number of channels offered per subscription class of customers; refusal to make information available on cheapest products or refusal to supply such products; and refusal of applications to convert subscriptions to cheaper services.

In the second case, the 2005 acquisition by Hite Brewery Co. of Jinro Ltd<sup>118</sup>, the KFTC made use of extensive behavioural remedies. These remedies included: a prohibition on raising the prices of alcoholic beverages by the merged entity by more than the average inflation rate during a five year period; an agreement that any price increase must be approved by the KFTC in advance; a prohibition on unfair coercion or inducement by the merged entity of wholesalers to deal with it on unfair terms by taking advantage of its position; and an obligation on the merged entity to submit to the KFTC information concerning transactions entered into with liquor wholesalers.

113. A number of characteristics which make behavioural remedies appealing and particularly relevant for DEEs can be identified. Among these characteristics, the flexibility of behavioural remedies is noteworthy. In the absence of a jurisdiction-specific structural remedy, a behavioural remedy enables competition authorities in DEEs to adopt a solution which suits the circumstances and needs of the jurisdiction in question. This should also enhance the willingness of merging parties in cross-border operations to comply with the conditions and obligations imposed on them as part of the merger clearance.

114. The types of behavioural remedies which should feature in the toolbox of remedies available to competition authorities in DEEs depends on the characteristics of local markets and the enforcement experience and regulatory perspectives of the authorities. Nonetheless, a number of behavioural remedies will be particularly relevant to DEEs. These include: (i) behavioural remedies designed to address issues of vertical restraints (including those related to exclusivity clauses); (ii) non-structural access remedies in the form of licensing of intellectual property rights; and (iii) granting access to facilities<sup>119</sup>. It should be noted, however, that these issues present a more difficult remedy for competition authorities in general, including those of DEEs.

115. DEEs should not rely excessively on behavioural remedies as there is a cost attached. The demands of monitoring compliance can be very high especially given these authorities suffer from limited resources. However, on balance, the benefits resulting from using behavioural remedies in some cases to address a competition issue may outweigh or justify the inevitable cost. This should be a consideration for these authorities to take into account when designing their policy on merger remedies.

<sup>117</sup> KFTC Decision no. 2007-274, 7.5.2007.

<sup>118</sup> KFTC Decision no. 2006-009, 24.1.2006.

<sup>119</sup> In some cases, competition authorities may 'condition' the relevant merger using other behavioural tools. See for example the conditional clearance given by the Competition Commission of Zimbabwe in the *Coca-Cola Company/Cadbury-Schweppes* merger (mentioned in note 45 above). The relevant conditions included an undertaking by Coca-Cola to maintain the local *Mazoe* and *Calypso* brands on the Zimbabwean market and develop them into regional brands with wider circulation; and to promote and develop Zimbabwean suppliers and supplies with respect to the raw materials necessary to produce the finished product brands.

#### 4.3.2 *Consultation and co-operation*

116. Recent developments in the area of merger control have established the value of consultation and co-operation between competition authorities on the question of remedies in merger cases. This is especially important in light of the serious potential for conflicts between competition authorities which can arise in a number of contexts. These contexts include:

- first, the relevant competition authorities might reach conflicting conclusions concerning the need for remedies in the same cross-border merger case;
- second, the jurisdiction in which the merger has its ‘centre of gravity’ might decide not to regulate the merger and allow it on non-competition grounds, whereas one or more other jurisdictions may seek to impose remedies under their merger control laws; and
- third, two competition authorities could identify competitive concerns with respect to different aspects of the same merger operation in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority.

117. Bilateral co-operation in this context brings a number of important benefits to both the competition authorities and the merging parties.<sup>120</sup> The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case where co-operation enhances the prospects for effective design and implementation of a remedy in a particular case.

118. The prospects of consultation and co-operation between competition authorities of DEEs and experienced competition authorities cannot be taken for granted. However, at the same time, they cannot be completely ruled out.<sup>121</sup> Co-operation between competition authorities in the remedies phase can be of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussion at the OECD and in other fora<sup>122</sup> explored different options for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities. This idea might deserve further examination though so far there has been a lack of consensus over the best way forward in this case. This can be seen in light of the difference in views over the viability and practicability of the ‘lead jurisdiction’ idea.

#### 4.3.3 *Monitoring and Enforcement*

119. Where behavioural remedies are used as a condition to clear a merger, it is important that the relevant competition authority puts in place a means for the effective monitoring of the remedies implementation. This is vital for ensuring full compliance by merging firms and guaranteeing the effectiveness of the relevant behavioural remedy. Monitoring is also important, though to a lesser extent, in

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<sup>120</sup> See OECD Issues Paper on *Cross-border remedies in merger review* (2005).

<sup>121</sup> See note 92 above.

<sup>122</sup> It should be noted that this was not the first time when this idea has been discussed. The idea was examined in the 2000 report of the International Competition Policy Advisory Committee (ICPAC). The report expressed strong support in favour of co-operation here. It put forward two different possibilities for having such arrangements: first, through joint negotiation (here every relevant competition authority would express its concerns over the transaction and a remedies package would be agreed through joint negotiation); and secondly, by designating one jurisdiction as ‘lead jurisdiction’ which negotiates remedies with the merging parties.

the case of structural remedies.<sup>123</sup> The same holds true for enforcement: competition authorities must have the necessary powers and tools to be able to take enforcement actions where merging parties fail to comply with conditions or obligations featuring in remedies agreed with the parties.

120. Monitoring and enforcement are not an easy task and the requirements for these functions are not unique to the area of merger control. Competition authorities require adequate financial and human resources, which is a constraint relating to the field of competition law in general and not only the area of merger control.

121. Competition authorities face a serious hurdle in their monitoring efforts of remedies in cross-border mergers on two fronts. The first is limited access to the necessary information, and the second is the limited recourse to enforcement actions if the merging firms fail to comply with the conditions and obligations set out under the remedies. There are two possible avenues for enhancing the effectiveness of the function of monitoring. These include (i) taking actions against a local subsidiary of the merging parties (which may not always exist) and (ii) relying on co-operation. The latter avenue might be more promising although co-operation may have to be particularly extensive for it to work.

122. In some cases, achieving success in enforcement actions by one competition authority in cross-border merger cases requires the assistance of foreign competition authorities also involved in the transaction.<sup>124</sup> This assistance is more likely to be given where the two competition authorities in question operate within a framework of close co-operation. As noted above, such frameworks are lacking in the case of competition authorities in DEEs. As a consequence, engaging in effective enforcement actions in cross-border merger cases becomes much harder to achieve.

123. One final issue to be discussed in the present context concerns non-competition factors. In the relevant DEE, industrial policy and other types of considerations – such as those related to foreign direct investment – may be paramount.<sup>125</sup> The relevant competition authority may feel that such considerations should guide its work in the area of merger control. As a consequence, the authority may be concerned that the prospects of effective monitoring and enforcement of remedies may prove unattractive to foreign firms. Alternatively, government concerns may exist and pressure may be put on the authority to prioritise attracting foreign participation in local markets. The authority may therefore choose to develop or implement a policy-approach based on these consideration(s).

## 5. Conclusions

124. Among all of the branches of competition law and policy, merger control is the area that has had the most impact on the globalised economy. Yet, it is the area which, in geographical terms, has expanded the least. There is a significant scope for further developments to occur in the area: whether in terms of building effective merger control mechanisms in all existing competition law regimes around the world or in terms of developing merger control at the regional and international levels.

125. Impressive progress has been made in pushing for and achieving convergence and harmonisation in the area, most notably using soft law instruments. There has also been an increase in the number of bilateral co-operation links established between different competition authorities which have direct relevance to the regulation of cross-border mergers. This is in addition to the expansion in regional efforts to address competition law and policy in many parts of the developing world.

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<sup>123</sup> In the case of structural remedies, monitoring will be important to ensure that divestiture occurs according to the terms and conditions agreed between the competition authority and the merging parties. Once it has been completed, no on-going monitoring will be necessary.

<sup>124</sup> See note 106 above.

<sup>125</sup> See the discussion above in relation to these two issues.

126. DEEs occupy a unique position in the area of merger control. Most of these economies do not have effective merger control regimes; although some have established competition law regimes. They are also not active participants in bilateral co-operation.

127. In relation to multilateral co-operation, some competition authorities in DEEs have taken part in important proceedings, within the OECD, the ICN and UNCTAD.

128. Only in relation to regional co-operation have some of these economies achieved notable success in building some form of regional framework for regulating cross-border mergers (and for addressing competition issues more generally). However, none of these regional efforts have proved to be fully effective and they are still some way from reaching maturity.

129. This state of affairs raises the question of how DEEs should go about designing their strategies in the area of merger control. A number of points should be made in this regard. Cross-border mergers clearly impact many DEEs around the world. Provisions should therefore be made for dealing with cross-border mergers within current competition rules in DEEs. Competition authorities in DEEs should develop strategies which incorporate elements of multilateral, regional and bilateral co-operation and which reflect the unique positions and circumstances of these economies.

130. Competition authorities would benefit from becoming more actively involved in international proceedings in the area of merger control within bodies such as the OECD and ICN. This will widen their learning curve and offer them important insights into this highly complex area. This approach will bring about important benefits for these authorities: of achieving convergence and harmonisation and interacting with many other competition authorities, including those more experienced.

131. In relation to regional co-operation, this type of co-operation can be helpful for the purposes of building a mechanism for dealing with cross-border mergers affecting a number of countries in the relevant region. Such a mechanism will enable the countries to become a more significant force, individually and collectively, in regulating cross-border mergers and to enjoy more weight *vis-à-vis* powerful firms involved in these mergers.

132. In relation to bilateral co-operation, the chances for competition authorities in DEEs to engage in this kind of co-operation in enforcement actions in individual cases – especially with experienced competition authorities – are not particularly high. Nonetheless, bilateral links may be possible and useful to establish for the purposes of sharing experience, technical assistance and capacity building and for undertaking policy dialogues more generally. All of these activities should yield considerable benefits for competition authorities in DEEs.

133. At the most fundamental level, however, action should be taken by DEEs to ensure the existence of a fully effective framework for regulating mergers domestically. This includes ensuring that: the law contains adequate provisions dealing with the key aspects of merger control (including those dealing with jurisdiction); proper practicable and transparent procedures are in place (particularly in relation to the issues of merger notification and merger remedies); appropriate guidance is provided from which merging firms and their advisors can benefit; and an independent competition authority with the relevant expertise in handling merger control is established.

134. Moreover, it must be recognised that building effective merger control in a DEE requires the existence of an effective competition law regime in the first place, unless of course the relevant country establishes a merger control regime on sectoral basis as has been the case in countries such as Hong Kong.

135. These are crucial pre-conditions for enabling DEEs to address cross-border mergers. Only once the domestic frameworks are in place will engaging in any of the different types of co-operation, whether multilateral, regional or bilateral, be meaningful.

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