Fourth

ARAB COMPETITION FORUM (ACF)

23-24 May 2023
Riyadh, Kingdom of Saudi Arabia

Shared Prosperity Dignified Life

الهيئة العامة للمنافسة
General Authority for Competition

UNITED NATIONS UNCTAD

OECD

E/ESCWA/ACF/2023/INF.4

Background note
Cross-border merger control

The present background document was produced by the United Nations Economic and Social Commission for Western Asia (ESCWA) for the session "Cross-border merger control" of the Fourth Arab Competition Forum 2023. This paper emphasizes the importance of adopting an effective merger control regime and the important role of regional and international cooperation in cross-border merger control.

Introduction

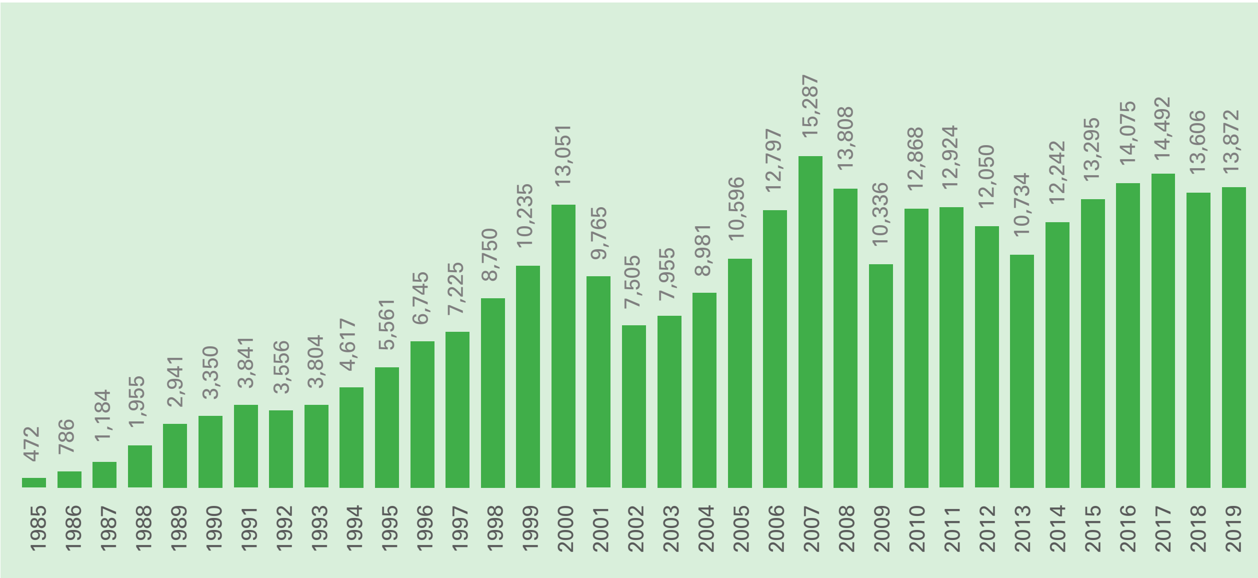
The advancement of sustainable development relies heavily on the promotion of market competition in view of the positive effects it has on economic prosperity and market efficiency. The literature overwhelmingly supports the assumption that increasing competition leads to a more optimal distribution of resources and production variables, as well as stronger innovation incentives. The positive effects of competition on economies at both the macro and micro levels are well known. The Organization for Economic Cooperation and Development (OECD) states that increased competition leads to more effective use of resources, faster economic growth, higher productivity and more business opportunities, less inequality, and the creation of more and better jobs. Additionally, it inspires innovation and the adoption of new technologies (OECD, 2014).[1]

Furthermore, the rapid emergence of global businesses with significant presence across multiple markets and jurisdictions, such as Google, Amazon, Apple and Facebook, can be attributed to the substantial growth of the digital economy sector. This has resulted in increasing scrutiny from competition authorities worldwide, and in a series of reports and reviews to address the issue of developing effective competition regulations. These obstacles are not confined to high-level policy issues, but also relate to actual enforcement issues that can benefit from inter-agency cooperation.

International economic interconnectivity and interdependence can be measured by various indicators, such as trade flows, trade agreements, foreign direct investment levels, and global value chains. However, it is important to note that no single indicator can comprehensively capture global economic interdependence. The continued growth of digital trade is one such indicator. Additionally, cross-border mergers and cartel trends are also indicators of global economic interconnectedness. For example, in 2017, cross-border mergers accounted for almost half or 47 per cent of all global mergers in value and 36 per cent in volume (figure 1).

Three primary drivers of international enforcement cooperation have been identified, all of which have been present over the past two decades but have expanded in importance since 2014. These include an increase in the number of competition authorities and their competencies, ongoing growth in worldwide economic interconnectivity and interdependence, and developments in the international digital economy.

Figure 1. Number of cross-border mergers and acquisitions worldwide



Source: ESCWA compilation, retrieved from: https://www.statista.com/statistics/955594/worldwide-number-of-cross-border-merger-and-acquisition-deals/.

I. Cross-border mergers and acquisitions

In the last decade, merger control, i.e., the regulation of mergers and acquisitions, has emerged as a critical component of competition law. A rising number of countries, both developing and developed, have incorporated merger control provisions. However, not every country has competition laws, and not every competition law includes merger control provisions. When merging enterprises are based in more than one jurisdiction or the merger affects markets in numerous jurisdictions, the merger is classified as a cross-border merger. Merger control differs from other antitrust practices, such as cartels and abuse of dominance, as it includes structural changes to an industry rather than temporary behavioural changes, and can have long-term consequences on economic performance and consumer welfare. Moreover, cross-border merger control is important because of its capacity to prevent anti-competitive consequences, aid businesses in making informed decisions, and help boost economic performance.

However, the regulation of cross-border mergers also presents complex challenges, including considerations related to competition policy, public policy, jurisdiction, procedure, and substance, as well as the balancing of global, regional, and domestic interests. The regulation of cross-border mergers can have a profound impact on both competition and socioeconomic development. An effective regulatory regime for cross-border mergers can promote competition by deterring anti-competitive mergers and reducing market concentration. This, in turn, can lead to a more dynamic and efficient economy and provide benefits to consumers in the form of increased choices and lower prices. Conversely, a lack of cooperation among competition authorities may result in inconsistent or conflicting decisions, creating legal uncertainty, adding complexity to the merger and acquisition process, and increasing the costs for businesses seeking to merge across borders.

Challenges in developing and emerging economies

Establishing effective competition law regimes, including merger control regimes, in developing and emerging economies presents significant challenges. Over the past decade, numerous studies, academic literature, and reports from international organizations have analysed these challenges in detail. The different forms of challenges are illustrated in figure 2.

Given these challenges surrounding the regulation of cross-border mergers mainly across developing and emerging economies, an effective review of cross-border transactions is essential along with a high degree of coordination and cooperation between competition authorities.

II. Merger control regimes in the Arab region

The merger control regime in the Arab region is not uniform and varies significantly between different jurisdictions. Some countries in the region have well-established merger control laws, while others have limited or no provisions for such control.

The Gulf Cooperation Council (GCC) and other Arab countries have taken steps towards harmonizing their merger control regimes through their competition laws. For example, GCC countries and Egypt have detailed merger control provisions that delineate notification and review procedures, including notification thresholds, review timelines, and potential remedies or penalties for anti-competitive mergers. For example, the United Arab Emirates competition law 31/2018 includes provisions related to the economic concentration regime, given the impact of such concentration on competition levels within the market. The law also mandates a merger notification regime that requires companies to submit a request to the Ministry at least thirty days prior to completion of the merger. Moreover, the competition authority is responsible for evaluating the potential effect of the merger on competition and may approve, reject, or impose certain conditions within 90 days. During this assessment period, companies are prohibited from carrying out the transaction and any related activities.

Figure 2. Challenges of establishing competition law regimes in developing and emerging economies

Source: OECD (2011). Cross-Border Merger Control: Challenges for Developing and Emerging Economies. https://www.oecd.org/competition/50114086.pdf.

Box 1. The mergers and acquisitions regime in Saudi Arabia

The General Authority for Competition (GAC) defines economic concentration as any action that results in a total or partial transfer of ownerships, assets, equity, or shares through a form of merger and acquisition that leads to the control of a firm(s) decisions.[a] The GAC is committed to study and decide on any economic concentration application received.

According to article 7 of the Competition Law, “Entities seeking to participate in an economic concentration transaction must inform GAC at least ninety (90) days before completion if the total annual sales value of the entities seeking to participate in the economic concentration exceeds the amount determined by the Regulations”. Article 12 of the Implementing Regulations also specifies that the threshold for notifying the GAC regarding an economic concentration is established at a minimum sales amount of 200 million Saudi riyals.

Moreover, referring to article 3.2 of the Implementing Regulations, “The provisions of the Law and Regulations shall apply to behaviours and practices occurring outside the Kingdom when they have impact on domestic competition”. Through this article, GAC opened the door to monitor cross-border mergers, especially if the acquirer has not established a company inside Saudi Arabia, which is the case for big corporations.

According to article 22 of the Implementing Regulations, “When examining and reviewing economic concentration transactions, GAC seeks to maintain and encourage the effectiveness of fair competition in the Kingdom’s markets. To that end, it may undertake assessment of one or more of the following factors:

1. Structures of relevant markets and the level of actual or potential competition [...]
2. Financial positions of the parties to an economic concentration
3. Commodity alternatives [...] and how accessible such alternatives are
4. Level of product differentiation
5. Consumer interests and welfare
6. Potential impact of the economic concentration on prices, quality, diversification, innovation, or development in a relevant market
7. Actual or potential harm or benefits to competition from the economic concentration transaction
8. Supply and demand growth and trends in the relevant market and commodities.
9. Barriers to entry or exit of new firms into a relevant market [...]
10. The extent to which an economic concentration may create or strengthen a significant market power [...]
11. The level and historical trends of anti-competitive practices in a relevant market, either for the parties to an economic concentration or the firms influential in such market
12. Views of the public, economic concentration-related parties, and sector regulators”

a. General Authority for Competition, about market concentration. https://gac.gov.sa/AboutConcentration#.

Box 2. The mergers and acquisitions regime in Egypt

According to ESCWA assessment, the Egyptian Competition Authority (ECA), through the Competition Law 175/2022 and its Executive Regulations (2005), defines any economic concentration as the change in control or material influence, which is a result of mergers and acquisitions, or joint venture projects. The ECA is committed to study and decide on any economic concentration application received.

The merger control regime does not apply to cases of mergers or acquisitions between entities that are under the same legal body. Additionally, temporary acquisitions of securities are also excluded, provided that the acquiring company resells them within one year of acquisition and refrains from exercising any voting rights or taking actions that could influence strategic decisions, as per the applicable regulations.

The Competition Law compliance guidelines (2022) specify criteria for the assessment of vertical agreements, such as the effect of the agreement on market competition, its benefits for consumers, and its contribution to preserving the quality of products and national security.

Law No. 175/2022 stipulates that companies engaged in economic concentration activities are required to notify the ECA prior to completion of any such transaction. Failure to comply with this notification requirement may result in a penalty ranging from 1 per cent to 10 per cent of the total annual turnover, assets, or value of the operation. In case the thresholds are not calculable, the fine will range between 30 million and 500 million Egyptian pounds (EGP).

Moreover, Law 175/2022 provides that the ECA should be notified in case of an economic concentration transaction if the combined annual turnover of the parties exceeds EGP 900 million, and the turnover of at least two parties exceeds EGP 200 million. The ECA should also be notified if the global combined annual turnover of parties exceeds EGP 7.5 billion, and one of the parties' turnover in Egypt exceeds EGP 200 million.

Law 175/2022 stipulates that the ECA shall conduct a two-phase assessment to investigate economic concentration:

- Phase 1: By establishing the examination committee, the authority examines the application within 30 days of the notification and makes one of the following decisions: retain the complaint, grant approval or conditional approval, or refer to phase 2 of the investigation.
- Phase 2: The ECA conducts further investigation within a period of 60 days from the referral, during which it may make decisions such as retaining the application, granting approval, granting conditional approval, or issuing a refusal.

Egypt's competition regime has expanded the powers of the ECA, granting it the right to investigate any economic concentration that is deemed harmful to competition within a period of one year, even if the before-mentioned thresholds do not apply. This includes cases where economic concentration limits technological development and innovation, controls the market through product prices, reduces product quality for consumers, creates entry barriers, or hinders market expansion.

However, other Arab countries do not have specific merger control laws. For example, Iraq, Libya and Yemen have general provisions related to the competition law, but do not have specific rules or procedures for merger controls. This imposes challenges in developing effective regulations related to mergers and acquisitions, and negatively impacts businesses and consumers. Moreover, some competition authorities in the region lack the necessary resources and expertise to effectively enforce the existing merger control regime.

Given the diversity of merger control regimes in the Arab region, there is potential for international and regional cooperation to establish harmonized merger control frameworks and enhance cross-border merger control cooperation. This could involve a collaborative framework among competition authorities in the Arab region, as well as engagement with international competition bodies. Effective cooperation among Arab competition authorities would yield several advantages for businesses and consumers, including cost reduction, enhanced enforcement of competition laws, increased legal certainty for businesses, and promotion of investment and economic growth.

III. The role of international and regional cooperation in cross-border merger control

In today's interconnected world, multinational coordination among competition authorities is critical for effective regulation and review of cross-border mergers. This coordination is required to ensure fair trading conditions and a level playing field, which will ultimately contribute to enhanced well-being and better economic conditions. Bilateral, regional and multilateral agreements are different forms of cooperation between countries or competition agencies. This cooperation can take the form of formal agreements with written instruments and legal formality, or it can take the form of informal agreements based on communication and personal ties. Formal cooperation can include legal tools, such as bilateral agreements, confidentiality waivers where information is disclosed to the only extent necessary to fulfil inquiries in the proposed merger or acquisition, and regional trade agreements. Formal cooperation is often more effective when combined with informal cooperation.

In the context of cross-border mergers, international and regional cooperation among competition authorities can serve a variety of short-term goals, including the exchange of case-related information, the provision of investigative assistance, the prevention of the destruction of relevant documents, the avoidance of conflicting decisions, the sharing of analytical methods and best practices, and the coordination of remedies. Furthermore, the long-term goals of international and regional cooperation include improving the detection and deterrence of anti-competitive behaviour; streamlining the merger review process; fostering trust, transparency, and predictability; promoting effective and efficient global enforcement; improving enforcement practices by sharing techniques and strategies; and raising the authority's profile within the competition authority community.

Cooperation between competition authorities can also benefit firms by contributing to legal certainties. In other words, firms can have a clear understanding of the competition regulatory framework in their jurisdiction, which will help them reduce the risk of unexpected enforcement actions that can be costly to their business activities. Reducing legal certainties will allow firms to operate in a competitive environment, thus attracting long-term investments that contribute to the economic growth of countries.

A report by the OECD and the International Competition Network found that since 2012, international enforcement cooperation had increased across all areas with a rising use of various legal bases for cooperation.[2] Although there are still limitations to effective cooperation, including legal barriers, authorities still reap significant benefits from international cooperation, regardless of their size and level of maturity. The main challenges to cooperation are related to resourcing, coordination, legal limitations, and practical issues.

Despite challenges, competition authorities can work to improve international cooperation by engaging in general cooperation activities such as forums to build relationships, develop international standards, encourage resource sharing, communication, and collaboration in investigations, and improve transparency.

Another approach for mitigating the harmful effects of transnational anti-competitive activity is to work with different authorities within the same geographical region for better competition enforcement. This strategy enables more efficient and effective enforcement of anti-competitive practices that affect numerous countries in the region. Regional agreements on competition enforcement are often considered as a valuable tool to broaden economic and trade policy cooperation among countries. While there are various regional agreements that include measures for competition regulation, the efficiency of these agreements varies.

Box 3. The Gulf Cooperation Council

One form of Arab regional cooperation and coordination is the GCC. Given the major economic growth and investment development in the past decade, there is a significant amount of cross-border mergers and acquisitions transactions between businesses.

Despite the presence of domestic merger control regimes in each of the GCC member States, cross-border merger control may face challenges in different jurisdictions due to the lack of harmonization between competition laws and policies. This lack of consistency may result in conflicts and difficulties when dealing with cross-border merger transactions in the region, particularly in the notification process, timeframe for assessing the transaction, and the appeal process.

The GCC countries may benefit from a unified regional competition law in regulating cross-border mergers through a unified competition framework, which will harmonize domestic merger regimes. This will increase the efficiency of the GCC competition authorities in investigating transactions and promoting a fair competitive climate across the region. Currently, the GCC countries are considering and reviewing a unified competition law, which will be discussed upon its adoption.

An effective regional agreement is the European Competition Network of the European Union, which was created in 2004 and consists of the European Union competition authorities. The European Union competition regulation prescribes a minimum level of collaboration but also provides for some flexibility in the use of other forms of cooperation. For example, the European Competition Network allows members to share information, including confidential information, to enforce competition rules.

Other examples of regional agreements include the Nordic countries, the Commonwealth of Independent States, the Association of Southeast Asian Nations, the GCC (box 3), the Caribbean Community, the Common Market for Eastern and Southern Africa (COMESA) (box 4), and the Southern Common Market.

As several Arab countries have not established competition authorities or face challenges related to inadequate funding for their competition authorities, the cooperation framework can play an important role for small underfunded competition authorities by allowing them to work with larger competition authorities. As a result, they will have access to capacity building, exchange of information and expertise, and resources to conduct investigations related to mergers and cross-border mergers. The collaborative and cooperation framework will also allow competition authorities in one country to communicate and notify their counterparts in different jurisdictions regarding mergers investigations and operations.

Box 4. The Common Market for Eastern and Southern Africa

Another form of regional cooperation and coordination is the COMESA Competition Commission that is composed of 21 member States: Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia, and Zimbabwe.

COMESA has been inspired by the European Union model. The economic transformation experienced by many of its member States has underscored the necessity for competition legislation, which is considered as an important part of the COMESA framework. In view of this shift, it is more vital than ever to have a regional framework to address suspected anti-competitive practices.

Many COMESA member States have domestic merger control regimes, but these have proven to be inefficient in dealing with complex cross-border merger cases and multi-jurisdictional issues. Although it was acknowledged that tackling some of these concerns through bilateral collaboration could provide results, a regional framework was viewed as a more stable and long-term solution. COMESA competition law and policy aims to achieve harmonization between domestic competition laws and policies of member States to minimize conflicts.

According to article 55 (3) of the COMESA treaty, the regional competition law is adopted in the form of Regulations, which give COMESA the power to apply them. Part 4 of the COMESA Competition Regulations contains detailed provisions about merger control regimes and the jurisdiction of the Competition Commission in relation to notifiable mergers.

Article 26 of the Regulations stipulates that whenever assessing a merger case, the Competition Commission shall initially determine whether the merger will prevent or lessen competition in the market, considering the following factors:

- The current and future level of competition in the market
- Barriers to entry into the market
- The levels of market concentrations and historical collusion of the market
- The likelihood that the merged parties will have a dominant position in their respective markets
- The degree to which the merger will cause market expansion, technological advancements, and market growth
- The extent of vertical integration in the market
- The degree to which the merger business activities will succeed
- The impact of the merger on the level of competition in the relevant industries

The merger cases reviewed by the COMESA Competition Commission include:

- The proposed acquisition of control of MHL International Holdings Ltd by Phatisa Fund Managers 2 Limited. https://www.comesacompetition.org/wp-content/uploads/202211//Website-notice-MHL-Phatisa.pdf.
- The proposed creation of a full function joint venture involving Abu Dhabi National Oil Company, Abu Dhabi Developmental Holding Company PJSC, and Reliance Industries Limited. https://www.comesacompetition.org/wp-content/uploads/202212//Decision-Case-No-CCC-MER-082022-39-.pdf.
- The proposed acquisition of sole control by Hitachi Rail Ltd of Thales' Ground Transportation Systems Business. https://www.comesacompetition.org/wp-content/uploads/202206//CID-Decision-Hitachi-Thales.pdf.

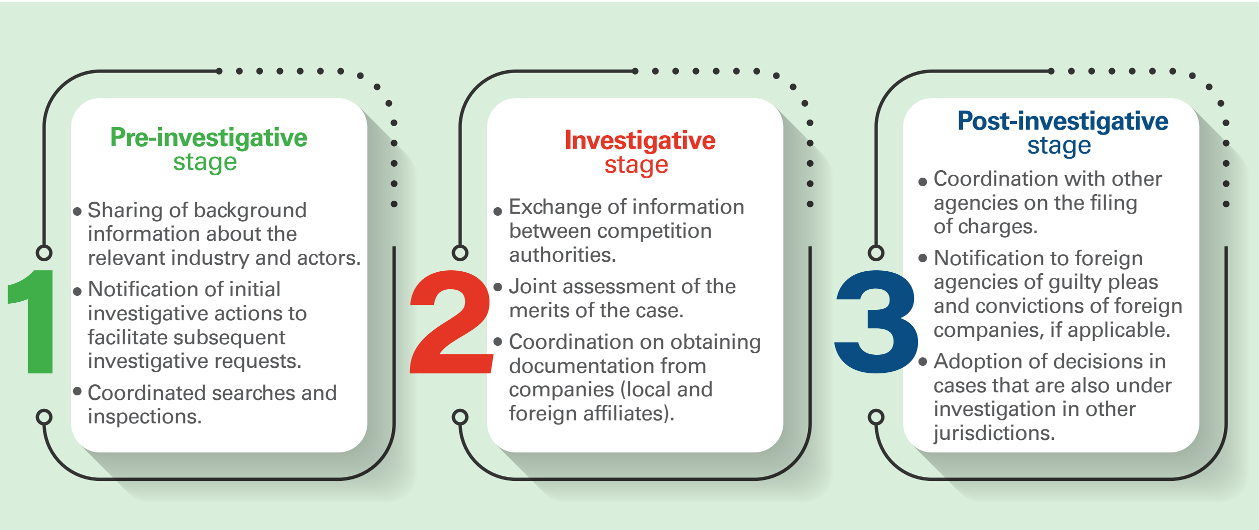
Source: Based on the COMESA Competition Regulations, available at https://comesacompetition.org/regulations/.

Regional competition agreements can face several challenges, including a lack of political support to provide adequate resources to competition authorities, a lack of human and financial resources at the regional level, and insufficient institutional design, which can impede competition authorities' effectiveness, thus creating a discouraging environment for coordination and cooperation. Cooperation may be difficult when there is a conflict of interest between competition authorities in different countries, such as when a proposed merger may have different implications for competition in different countries, or when the court refuses to enforce a foreign decision.

Despite these challenges, regional competition agreements have a wide variety of benefits as they enhance the enforcement of competition laws, leading to better protection of consumer welfare, and better detection of anti-competitive conducts such as cross-border mergers and price fixing. The benefits of cooperation among competition agencies include sharing information, where an authority can inform others of the presence of anti-competitive behaviours in its jurisdiction. Moreover, cooperation allows competition agencies to share best practices, gain access to evidence located outside their own territories, and facilitate a more efficient investigation process in cross-border mergers cases across three different stages, as shown in figure 3.

Another form of regional cooperation between competition authorities is the European Competition Commission (ECC). The review process of a cross-border merger can be illustrated by the case of Daimler-Benz AG and Chrysler Corporation, two significant car manufacturers (box 5). The ECC was responsible for reviewing the potential impacts of this cross-border merger on competition within the European market.[3]

Figure 3. Investigation stages



Source: ESCWA compilation based on UNCTAD (2011). Review of the experience gained so far in enforcement cooperation, including at the regional level. https://unctad.org/system/files/official-document/ciclpd10_en.pdf.

Box 5. Daimler-Benz AG and Chrysler Corporation merger assessment

In 1998, the ECC was informed of a proposed merger between Daimler-Benz AG and Chrysler Corporation. The notification was made in accordance with Article 4 of Council Regulation (EEC) No. 4064/89, and the merger was in accordance with Article 3 (1) (a) of the Council Regulation.

The parties and the operation:

1. Daimler-Benz AG, a German corporation that engages in many industries, such as car manufacturing, automotive electronics, diesel engines production, defence systems, trading, and real estate management.

2. Chrysler, a United States-based corporation, known in Europe for its Jeep and Chrysler brands.

3. The business agreement, signed in 1998, states that Daimler-Benz and Chrysler will merge their businesses and all relevant activities into a new German company called "Daimler Chrysler Aktiengesellschaft", where the new company shares will be distributed among current shareholders. Article 3 (1) (a) of the Council Regulation defines this merger as a concentration.

Community dimension

In 1997, the combined revenue of the involved merging parties exceeded 5 billion European Currency Units (ECU), and the aggregate community-wide turnover of each company exceeded ECU 250 million. The operation, therefore, had a community dimension.

Assessment

The ECC conducted a competitive assessment of the merger to study its impact on competition in the European Union markets. The assessment was conducted using various tools and techniques, such as market definition and shares, and the level of concentration. The ECC considered the impact of this merger on relevant industries and examined the potential benefits of the merger, including innovation and more efficient markets. It also conducted an assessment of the impact of this merger on prices, consumer welfare and choice, creation of barriers to entry, and the engagement in anti-competitive practices.

Decision

The ECC concluded that the overlap between Daimler-Benz and Chrysler was limited, and that the merger would have a limited impact on market concentration, would not be harmful for competition in the relevant markets, and would not create barriers to market entry and dominant positions. Therefore, the ECC decided not to oppose the merger and declared it compatible with the common market and the European Economic Area agreement.

Source: European Competition Commission, regulation (EEC) No 4064/89 Merger Procedure. https://ec.europa.eu/competition/mergers/cases/decisions/m1204_en.pdf

Conclusion

The growing number of cross-border mergers and acquisitions necessitates an effective competition policy so that Governments can have a merger control framework to regulate and control anti-competitive behaviours originating from local and cross-border merger cases. It is also critical to have an adequate structure for cooperation and coordination among competition authorities in various jurisdictions. Despite the challenges outlined in this background note, international and regional cooperation among competition authorities brings several advantages, including the exchange of information, the sharing of experiences and best practices, and cross-border notifications of anti-competitive practices, thus leading to more efficient enforcement of competition policy and, as a result, lower market power and better consumer choices. Many countries, particularly developing ones, still lack competition enforcement and merger regimes. The OECD proposed some recommendations to promote and improve the effectiveness of cross-border merger regulations framework, such as enhancing transparency and predictability; advocating for greater cooperation and coordination among competition authorities for an increased efficiency in cross-border cases; and adopting best practices to ensure compliance.

Endnotes

1 Organization for Economic Cooperation and Development (OECD) (2014). Factsheet on how competition policy affects macro-economic outcomes. https://www.oecd.org/daf/competition/2014-competition-factsheet-iv-en.pdf.

2 OECD (2021). OECD-ICN report on international cooperation in competition enforcement. https://www.oecd.org/daf/competition/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf.

3 European Competition Commission, Regulation (EEC) No 4064/89 Merger Procedure. https://ec.europa.eu/competition/mergers/cases/decisions/m1204_en.pdf.

23-00367