BUSINESS at OECD

Comments by the *Business at OECD* (BIAC) Competition Committee to the OECD Global Forum on Competition

Cross-Border Mergers

December 2, 2024

I. Introduction

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

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

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

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

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

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

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

II. Key Challenges to Cross-Border Mergers

A. Non-Economic Factors

1. Jurisdictional Complexity and Uncertainty

7. BIAC acknowledges and respects competition authorities' commitment to thorough merger scrutiny but stresses the necessity of a clear and predictable review process. This requires, among others, bright-line tests for establishing jurisdictional nexus as laid down in the ICN recommendations and avoiding discretionary, unpredictable "call-in" powers of the competition authorities to review a merger.

8. Most jurisdictions globally rely on monetary thresholds, such as party turnover or transaction size, to determine if a filing is necessary. Some jurisdictions have shifted to focusing on "transaction value"[3] rather than turnover, particularly for acquisitions of emerging companies in the digital economy, as "[t]he high purchase price in such takeovers is often an indication of innovative business ideas with great competitive market potential."[4] Certain jurisdictions still use market share criteria.[5]

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

[3] For example, Austria and Germany introduced such transaction value thresholds in 2017, with the transaction value triggering a notification obligation set at EUR 200m in Austria and at EUR 400m in Germany.

[4] BUNDESKARTELLAMT & BUNDESWETTBEWERBSBEHÖRDE, GUIDANCE ON TRANSACTION VALUE THRESHOLDS FOR MANDATORY PRE-MERGER NOTIFICATION (SECTION 35 (1A) GWB AND SECTION 9 (4) KARTG) ¶ 3 (Jan. 2022), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle_2022.pdf?__blob=publicationFile&v=2.

[5] In Spain, the market share threshold is set at 30%, unless the target's turnover is below EUR 10 million, in which case the threshold increases to 50%.

9. Others have adopted hard-to-predict mechanisms for companies to review transactions that fall below these thresholds but may still have competitive significance. For example, the European Commission (EC) attempted to allow Member States to refer transactions below EU and national thresholds with potential cross-border impact. However, the CJEU's ruling in *Illumina/Grail* limited the EC's authority in that regard, reinforcing that such actions would conflict with the EU Merger Regulation (EUMR) and legal certainty.[6] BIAC welcomes this clarification by the CJEU as it contributes to the legal certainty and predictability. The EC's power to review below-threshold mergers under Article 22 EUMR is restricted to cases where the referring Member State either lacks a merger control system or has jurisdiction based on its own national merger rules. Despite this, the ruling may not fully achieve the intended legal clarity, especially given the continued use of "call-in" powers by National Competition Authorities (NCAs) in some jurisdictions. Several EU Member States[7] retain the authority to review transactions that fall below their national merger thresholds, potentially leading to referrals to the EC. This practice undermines the legal certainty and predictability of the merger review process, as companies may face unexpected scrutiny despite not meeting formal notification thresholds. The use of these call-in powers could create inconsistencies in how mergers are reviewed across the EU, which critics argue jeopardizes the stability that businesses seek in planning transactions.

10. Additionally, recent cases highlight how NCAs are employing alternative tools, such as those targeting abuses of dominance or anti-competitive agreements, to scrutinize potentially problematic transactions, especially in light of the *Towercast*[8] ruling. BIAC sees this approach as problematic for two key reasons: not only does it fail to provide businesses with the certainty of whether a review will occur, but it also subjects transactions to potential review post-closing. This reintroduces the use of Article 102 (86) as a merger control tool, a practice reminiscent of the pre-EUMR era. The original purpose of the EUMR was to bring clarity and predictability to the merger review process. The *Towercast* ruling, however, risks undermining this framework by creating uncertainty and reverting to outdated methods, which is a step backward for merger regulation.

11. BIAC asserts that the exercise of regulatory authority in merger reviews must be based on a clear and well-defined jurisdictional framework to avoid undue uncertainty. This involves two key components. First is the need for a demonstrable local nexus/impact, i.e., the transaction must have a tangible and direct effect on the local market or economy. Without this, regulatory oversight risks becoming disconnected from its underlying purpose and forces companies to expend resources on reviews that do not fulfill the stated purpose of merger control review, namely, to protect consumers from harm resulting from the transaction. Instead, companies must submit their transactions for unnecessary reviews in jurisdictions with little relevance to the transaction. These non-substantive reviews can lead to two outcomes: a rubber-stamp approval of the deal after undergoing unnecessary costs and delays or regulators using the merger control process to extract remedies unrelated to competition concerns from the deal.

12. The second component is the need for clear and understandable thresholds that determine when a review is triggered. These thresholds should be transparent and easily interpreted to allow businesses to predict whether their transactions fall within the scope of review, thus avoiding unexpected regulatory intervention. Without both a clear local nexus and clear and understandable thresholds, BIAC believes that transactions are exposed to unjustified regulatory uncertainty, which disrupts business planning and undermines the integrity of the merger control process.

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[6] Joined Cases C-611/22 P & C-625/22 P, Illumina, Inc. v. Comm'n, ECLI:EU:C:2024:677 (Sept 3, 2024).

[7] Italy, Hungary, Denmark, Latvia, Lithuania, Slovenia, Sweden, and Ireland.

[8] Case C-449/21, Towercast, ECLI:EU:C:2023:207 (Mar. 16, 2023).

2. Digitalization and Data Protection

13. Competition authorities are increasingly paying closer attention to cross-border mergers in the digital industry, as those potentially could raise significant concerns about killer acquisitions and compliance with data protection regimes.

14. In the digital sphere, there are small start-up targets that may be very innovative and seen as credible competition to larger incumbents but may not yet generate sufficient turnover to warrant a competitive merger review based on such a threshold. In response, competition authorities have been developing alternative tools to assess these deals. However, without clarity merging parties are required to engage in a crystal ball gazing exercise that is inherently complicated and unpredictable.

15. The Digital Markets Act (DMA)[9] aims to address this in a way by requiring large tech companies, defined as "gatekeepers," to inform[10] the EC of any planned acquisitions, even those that are below the traditional merger notification thresholds. Additionally, the DMA grants the EC the authority to block future acquisitions if the gatekeepers consistently violate its substantive rules.[11] This provides an additional means to assert jurisdiction over large tech deals.[12] But it also introduces an additional source of burden and uncertainty for the businesses in terms of timing and review necessity. This mechanism can result in duplicated merger procedures when one group of NCAs refers a merger to the EC, while others choose not to participate in the referral.[13] Such instances can undermine the one-stop-shop principle established by the EUMR and pose challenges to maintaining consistency in merger reviews across the EU.[14]

16. Digitalization and the use of data also pose challenges in terms of appropriate and consistent theories of harm. Horizontal, vertical, and conglomerate theories of harm are constantly being adjusted to suit the unique characteristics of digital platform markets. Competition authorities must have a deep understanding of how these markets operate and the competitive dynamics within them to effectively refine the theories of harm they examine. While this is essential in any market, the potentially strong network

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9 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [DMA], 2022 O.J. (L 265) 1.

10 Article 14 DMA may be viewed as a part of the merger control puzzle. Gatekeepers need to inform the EC about any merger they envisage, as foreseen in Article 14 DMA. The EC then informs the national competition authorities of this, as is also foreseen in Article 14 DMA. The NCA can then refer said merger to the EC based on Article 22 EUMR, enabling the EC to establish its jurisdiction over the merger for those countries that referred it. *See* Viktoria H.S.E. Robertson, The Future of Digital Mergers in a Post-DMA World (Mar. 17, 2023), https://commission.europa.eu/document/download/c3b0db11-0c61-4c73-bfc1-f152d94c1b47_en?filename=Morning-4-5-Robertson.pdf

11 Article 18 of the DMA can be viewed as a form of ex ante prohibition, as it aims to prevent certain transactions from taking place before they are even initiated. In doing so, the EC indirectly asserts jurisdiction over deals that may otherwise not be subject to formal notification under existing merger control rules, ensuring that non-compliant behavior is curtailed before it can further distort the market.

12 The Brussels effect of the DMA has influenced jurisdictions both within and beyond the EU to implement, or consider implementing, similar regulations. For example, Türkiye has introduced draft amendments to its Competition Law and has also adopted a technology undertaking exception to address killer acquisitions. As a result, a greater number of transactions are now being scrutinized under Türkiye's merger control regime. *See* Fevzi M Toksoy, Bahadir Balki & Hanna Stakheyeva, *Are You a "Technology Undertaking" within the Scope of Merger Control in Turkey?* (July 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-july/are-you-a-technology-undertaking-within-the-scope-of-merger/?login.

13 *See, e.g.,* Press Release, European Comm'n, Mergers: Commission opens in-depth investigation into proposed acquisition of Kustomer by Facebook (Aug. 1, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4021.

14 OECD, Digital Merger Control: Adapting Theories of Harm – Note by Viktoria Robertson, at 8, DAF/COMP/WD(2023)59 (June 27, 2023), https://one.oecd.org/document/DAF/COMP/WD(2023)59/en/pdf.

effects and the flexible use of data in digital platform markets make this insight especially critical in these environments.[15]

17. While BIAC accepts that there will invariably be an element of uncertainty as theories of harm are developed and refined, it strongly encourages competition authorities, in this context, to cooperate on the thought process behind these theories of harm and, crucially, to be as open and transparent as possible on their evolving thinking, in order to maximize the up-front certainty and predictability of merger reviews.

3. National Security Concerns and FDI/FSR Screenings

18. An increasing number of countries are adopting national security reviews for foreign investments, adding a layer of regulation to cross-border mergers.[16] Traditionally, these reviews have been common in a handful of developed economies, but many other countries, including emerging markets, are now introducing laws that regulate FDI based on public order and national security concerns beyond competition law. While these regulations are typically limited to sensitive sectors such as defense, aerospace, and critical technology or infrastructure, there is little to no consistency across jurisdictions and many are also broadly worded, capturing deals indiscriminately. Review processes are often lengthy, largely opaque, and subject to political influence, so it is difficult for businesses to predict timelines or outcomes with any degree of precision. Faced with these variables, the risk of government disapproval or possible mitigation measures significantly influences cross-border merger uncertainty.

19. In the context of rising geopolitical tensions governments are intensifying their scrutiny of cross-border mergers to mitigate national security risks. In the EU, the concept of "national security" in this context can involve several regulatory mechanisms, such as intervention under Article 21(4) of the EUMR,[17] Article 346 TFEU,[18] consideration of national security concerns as part of a merger control regime, and/or intervention under a separate FDI regime.[19]

20. FDI Screening Regulation[20] and FSR[21] add further complexity to the regulatory process, which businesses need to navigate in addition to merger control reviews. Each operates under different legal frameworks and focuses on different concerns: FDI screening focuses on protecting national security, public order, or strategic industries from potentially harmful foreign investments; the FSR addresses the impact of foreign subsidies that might distort competition within the EU internal market; and the EUMR assesses the impact of mergers and acquisitions on competition within the EU market. While the FSR and the EU merger control regimes have similar to some extent the timetable and information-gathering processes, the clearance processes for each remain distinct.

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15 *Id.* at 20.

16 Hyeon-Young Ro, Disguised Protectionism: Competition Laws and National Security Policies as Barriers to Cross-border M&As, at 9 (Aug. 15, 2021), https://hyeonyoungro.github.io/assets/pdf/Disguised-Protectionism_Ro.pdf.

17 This provision allows EU Member States to take measures to protect legitimate interests not specifically addressed by the regulation, as long as these measures are compatible with the general principles and other provisions of EU law. Public security, media plurality, and prudential rules are explicitly recognized as legitimate interests.

18 This provision allows EU Member States to prioritize national security in certain circumstances, exempting them from the general provisions of the Treaties.

19 Kyriakos Fountoukakos, Veronica Roberts & Ruth Allen, *Chapter 9: Addressing national security concerns in the merger context*, *in* RESEARCH HANDBOOK ON THE LAW AND ECONOMICS OF COMPETITION ENFORCEMENT (Ioannis Kokkoris & Claudia Lemus, eds., 2022).

20 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, 2019 O.J. (L 79I) 1.

21 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, 2022 O.J. (L 330) 1.

21. As for the FDI reviews, they are national, i.e., companies have to deal with up to 27 different regimes which in some cases not even grant exceptions for intra-EU transactions, further complicating the process for cross-border mergers.[22] As a result, businesses must not only comply with the merger control formalities but also navigate varying national FDI requirements, which introduce additional uncertainty and regulatory hurdles. Synchronizing the timelines for the regimes may not always be feasible, and certain transactions may require notification under one regime but not the other.[23] The complexity is multiplied outside the EU. Considering the growing influence of national security reviews on mergers, there is a need for greater clarity on how governments decide whether a merger poses national security risks. Most developed countries have dedicated agencies overseeing these transactions.[24]

22. In conclusion, alongside competition laws, national security reviews and FDI/FSR screenings now represent significant regulatory hurdles for cross-border transactions, with increasingly rigorous review and approval processes creating major entry barriers for foreign investors.

B. Increased Scrutiny and Deal Mortality

23. A growing number of deals are being frustrated, at least in part, due to concerns over their impact on innovation, often linked to the elimination of emerging competitors or future competition. For example, the Adobe and Figma merger was abandoned after objections from the European Commission and the CMA. Despite significant efforts to differentiate their businesses, products, and markets, the companies ultimately determined that regulatory approval was unattainable.[25] Similarly, Sanofi withdrew from a licensing agreement for a Maze drug after the FTC raised concerns that the deal would eliminate a potential competitor.[26] *Amazon/iRobot* was cleared at Phase 1 (CMA) but abandoned at EU Phase 2 because of the "[u]ndue and disproportionate regulatory hurdles."[27] These are some of the recent examples of the ongoing trend of heightened regulatory scrutiny affecting M&A strategies, particularly of technology and online platform companies.

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[22] According to the FDI Regulation, the decision on whether to set up a screening mechanism or to screen a particular foreign direct investment remains the sole responsibility of the Member State concerned.

[23] *EU Foreign Subsidies Regulation, Increased Risk on M&A Transactions*, CLIFFORD CHANCE (July 18, 2023), https://www.cliffordchance.com/insights/thought_leadership/across-the-board/articles/2023/07/eu-foreign-subsidies-regulation-increased-risk-on-m-and-a-transactions.html. Additionally, unlike the EUMR process, the foreign subsidies regime does not allow for early commitments to address the EC's concerns. This is likely to result in timeline extensions and increased costs in cases where subsidy concerns may arise.

[24] For example, a good model of reference is the U.S. Committee on Foreign Investment in the United States (CFIUS), which is the interagency body responsible for reviewing CBM&As that fall under the "covered transactions" defined in its regulations. *See The Committee on Foreign Investment in the United States (CFIUS)*, DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfiusv. Established in 1975, CFIUS has expanded its role over the years, particularly in response to increased Chinese mergers in the U.S. The Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) further broadened CFIUS's authority by expanding the definition of "critical technology" and extending the review period from 30-45 days to an additional 15 days.

[25] Dylan Field, *Figma and Adobe are Abandoning Our Proposed Merger*, FIGMA (Dec. 18, 2023), https://www.figma.com/blog/figma-adobe-abandon-proposed-merger/ (It's not the outcome we had hoped for, but despite thousands of hours spent with regulators around the world detailing differences between our businesses, our products, and the markets we serve, we no longer see a path toward regulatory approval of the deal.").

[26] Press Release, Sanofi, Statement on FTC challenge to proposed license agreement with Maze Therapeutics (Dec. 11, 2023), https://www.sanofi.com/en/media-room/press-releases/2023/2023-12-11-21-08-20-2794272.

[27] Press Release, Amazon, Amazon and iRobot Agree to Terminate Pending Acquisition (Jan. 29, 2024), https://press.aboutamazon.com/2024/1/amazon-and-irobot-agree-to-terminate-pending-acquisition.

24. Looking ahead, merging parties are facing increased procedural complexity in various jurisdictions. For example, the U.S. adopted revised merger guidelines in December 2023.[28] These new guidelines lower the threshold for presuming the illegality of horizontal mergers, setting it at a 30% market share, despite a lack of precedent for doing so.[29] They also focus on theoretical harms like serial acquisitions, partial ownership, minority interests, and transactions that could further expand dominant players. Additionally, the guidelines outline how the DOJ and FTC will evaluate vertical mergers and the potential impact of deals on labor markets. In support of these revisions, the revised HSR form requires merging parties to produce far more extensive and detailed information about market dynamics and internal analyses, including ordinary course documents.[30] In June 2024, amendments to Canada's Competition Act introduced a similar structural presumption regarding mergers. Specifically, a merger is presumed to substantially lessen or prevent competition if it results in a combined market share exceeding 30% or if the Herfindahl-Hirschman Index (HHI) increases by more than 100 points and the post-merger HHI exceeds 1,800.[31]

III. Practical Impact of Such Challenges on Businesses

25. In the current environment of increased regulatory scrutiny and potential for diverging outcomes, businesses engaging in cross-border M&A, both large and small, must conduct a thorough preliminary analysis, including FDI and taking time to understand any differences in local market conditions as well as the likely approaches of the competition authorities, including the potential for "call-in power" despite not meeting the relevant thresholds. Even seemingly straightforward deals often necessitate multiple filings and experience significant delays before closing, without a corresponding benefit to those objectives the laws are meant to protect.

26. The proliferation of regulatory review tools requires businesses to develop and implement new strategies to successfully manage a complex and fragmented regulatory landscape.[32] To successfully carry out cross-border transactions, dealmakers need to grasp the intricacies of various regulatory screening frameworks, and, perhaps more crucially, the political motivations and enforcement priorities of national and regional regulators, right from the early stages of deal planning and structuring.

27. Considerable effort and cost are required to (i) identify where filings will be necessary; (ii) estimate review durations; and (iii) anticipate key concerns. While business recognizes the need for agencies to screen for and prevent anticompetitive mergers, predictability is crucial for competitively benign mergers to undertake a reasonable filing strategy, so it is common to prioritize filings based on the expected length of the review and the jurisdictions most likely to raise substantive issues.

28. The expanded jurisdictional "net" (due to call-in powers) requires that the usual multijurisdictional filing analysis for cross-border mergers now not only assesses whether mandatory filing thresholds are triggered but also examines whether the deal and the parties involved have characteristics that might attract

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[28] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf.

[29] *Id*. at 3.

[30] BIAC notes, however, that the ICN recommends that first phase merger filings should only gather sufficient information to determine whether a second phase investigation is necessary and that parties should not be required to translate documents. *See* INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES §§ V.A and V.C (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[31] Competition Act, RSC 1985, c. C-34, § 92(3) (Can.).

[32] Beyond *Borders: A Guide for Navigating the European Regulatory Landscape*, COOLEY M&A (June 10, 2024), https://cooleyma.com/2024/06/10/beyond-borders-a-guide-for-navigating-the-european-regulatory-landscape/.

the attention of regulators. The results of this assessment should be incorporated into the risk allocation clauses of the transaction documents.

29. Data protection issues can also influence the success of a cross-border merger, making it essential for parties to address this aspect too. This involves evaluating the target's data protection compliance, identifying potential data breaches or security weaknesses, and assessing the risks and liabilities tied to the target's data. Neglecting to address these data protection concerns may lead to financial and legal penalties, significant reputational harm, and a loss of customer trust.

30. Cross-border dealmakers must closely navigate evolving trends in merger reviews. Transactions involving parties with competing or potentially competing products, particularly in sectors like technology and life sciences, need to account for the possibility that regulators may assess the competitive effects over a long-term horizon, potentially extending several years into the future. This often involves a detailed review of the parties' internal documents, especially those concerning the deal's rationale or the buyer's future plans in the relevant sector.

31. This regulatory burden is invariably more easily borne in the context of multi-billion mega-deals, where the parties may well have the patience and resources to navigate the complexities. It also, however, acts as a significant drag on smaller deals.

IV. What Leads to Divergent Outcomes in Cross-Border Merger Reviews

32. Cross-border mergers undergo simultaneous investigations across multiple jurisdictions. These parallel reviews can lead to the potential for differing or even contradictory outcomes[33] due to varying competitive dynamics and substantive divergences. While acknowledging that competitive dynamics can vary across jurisdictions, when this is not obviously the case, regulatory scrutiny may be (i) resulting in a bias in favor of large corporations with the resources to manage this complexity; and (ii) driven, in fact, by the most assertive enforcers or those with the authority and discretion to block deals under their legislation.

33. Parallel merger reviews and differing outcomes present several challenges, particularly the shift of global regulatory influence to the most aggressive jurisdiction. If one regulator blocks a merger that has been approved elsewhere, it essentially gains veto power over the entire transaction worldwide. Where the competitive effects do not vary across jurisdictions, this veto is especially problematic because it only operates in one direction, favoring the prohibition of deals that might be viewed as efficient and pro-competitive in other regions.[34]

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[33] The *Sabre/Farelogix* case exemplified how antitrust authorities in different jurisdictions can arrive at conflicting outcomes based on their own market assessments and legal standards. The U.S. court found no significant competitive harm, while the CMA blocked the deal, concerned about its impact on innovation and competition, despite arguably little to no jurisdictional nexus to the UK. This divergence led to uncertainty for businesses involved in cross-border mergers, illustrating the challenges of navigating differing regulatory frameworks. *See* United States v. Sabre Corp., No. CV 19-1548-LPS, 2020 WL 1855433 (D. Del. Apr. 7, 2020); and Competition & Mkts. Auth., Anticipated acquisition by Sabre Corporation of Farelogix Inc. – Final Report (Apr. 9, 2020), https://assets.publishing.service.gov.uk/media/5e8f17e4d3bf7f4120cb1881/Final_Report_-_Sabre_Farelogix.pdf.

[34] Karen M. Lent & Kenneth B. Schwartz, *Divergence in Parallel Merger Reviews: How, Why, Where Do We Go From Here?*, N.Y. L.J. (July 12, 2023), https://www.law.com/newyorklawjournal/2023/07/11/divergence-in-parallel-merger-reviews-how-why-and-where-do-we-go-from-here/.

34. While it is challenging to identify a single factor as the root cause of divergent outcomes in any particular case, a few factors emerge as particularly significant: variations in market definition,[35] differences in theories of harm,[36] and differing approaches to remedies.[37]

35. Indeed, in some cases, authorities may reach different conclusions about whether a deal raises concerns, which may be due to varying market conditions across jurisdictions, and different positions on relevant market definition. The revised notice on market definition in the EU[38] brings hope for a more harmonized approach between the EC and NCAs. While it aims to foster better cooperation within the EU, its influence remains largely limited to the region and does not necessarily drive global convergence in market definition methodologies. Some jurisdictions outside the EU may refer to the EU notice as a reference point, but this is unlikely to result in widespread harmonization globally. Ultimately, while the notice may improve consistency within the EU, it falls short of achieving broader international harmonization in market definition methodologies. The EC continues to focus on proper market definition in its decisions. However, some other authorities, like the CMA, have taken a different approach, especially in fast-moving sectors, suggesting that market definition need not be separate from competitive effects analysis or require a highly specific market description.

36. The EC blocked the *Booking/eTraveli* deal,[39] while the CMA cleared it at phase 1, citing eTraveli's modest market position in the U.K.[40] The *eBay/Adevinta* merger clearly demonstrates that when the same merger is reviewed across different jurisdictions, the analysis and outcomes are heavily influenced by the specific dynamics of the relevant markets.[41] In this instance, one competition authority found no issues, while two others raised concerns and required different remedies based on local market conditions. Although many undertakings operate across borders, it's important to recognize that some may have limited

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[35] In the *Wabco-ZF* transaction, the DOJ concentrated on the parties' involvement in the North American steering components market and, in January 2020, approved the deal on the condition that Wabco divest that portion of the business. In contrast, the EC accepted the parties' argument that there was no overlap in that same product market within the EU and granted unconditional approval for the merger. *See* Press Release, Dep't of Justice, Antitrust Div., Justice Department Requires ZF and WABCO to Divest WABCO's Steering Components Business to Proceed With Merger (Jan. 23, 2020), https://www.justice.gov/opa/pr/justice-department-requires-zf-and-wabco-divest-wabcos-steering-components-business-proceed; and Press Release, European Comm'n, Mergers: Commission approves ZF's acquisition of Wabco (Jan. 22, 2020), https://ec.europa.eu/commission/presscorner/detail/en/ip_20_112.

[36] In 2020, the U.S. granted unconditional approval for the *NVIDIA-Mellanox* acquisition, while both the EC and China closely examined potential conglomerate effects.

[37] Lent & Schwartz, *supra* note 34.

[38] Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2023/6789), 2024 O.J. (C 2024/1645) 1.

[39] Press Release, European Comm'n, Mergers: Commission prohibits proposed acquisition of eTraveli by Booking (Sept. 24, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4573.

[40] *Booking Holdings Inc / eTraveli Group AB Merger Inquiry*, COMPETITION & MKTS. AUTH., https://www.gov.uk/cma-cases/booking-holdings-inc-slash-etraveli-group-ab-merger-inquiry#full-publication-update-history.

[41] The *eBay/Adevinta* merger was reviewed simultaneously in Austria, Germany, and the UK during 2020-2021. In Germany, the merger was unconditionally approved in November 2020. However, both the Austrian Federal Competition Authority and the UK Competition & Markets Authority expressed concerns over horizontal theories of harm, which the parties addressed through commitments. *See* Bundeswettbewerbsbehörde, eBay/Adevinta, Case No. BWB/Z-5141, Z-5142, Z-5420 and Z-5421 (June 18, 2021); and Competition & Mkts. Auth., Adevinta/eBay Classifieds Group, Case No. ME/6897/20 (Feb. 16, 2021); and Press Release, Bundeskartellamt, Bundeskartellamt Clears Merger Between eBay Classifieds Group and Adevinta (Nov. 24, 2020), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2020/24_11_2020_Ebay_Adevinta.html.

geographic reach or varying levels of success in different regions. These differences must be considered both in the competition authorities' substantive analysis and in the commitments they accept.[42]

37. Regulators often apply different theories of harm, resulting in divergent outcomes. One area of particular variation is how competition authorities assess conglomerate effects, where merging parties are not direct competitors but operate in adjacent markets. The relevance of conglomerate theories of harm seems to be growing (particularly with the rise of digital mergers). The recent *Greek Delivery Hero*[43] merger illustrates that conglomerate effects alone can be significant enough to require commitments from digital platforms seeking to make acquisitions.[44] Similarly, the EC and CMA's investigations into *Microsoft/Activision*[45] and *Amazon/iRobot* have focused on theories of harm where there is no direct competitive overlap between the parties. Also, based on a novel "ecosystems" theory of harm, the EC blocked Booking.com's proposed acquisition of Etraveli, concluding that the deal would allow Booking.com to expand its ecosystem, ultimately strengthening its dominant position in online hotel and travel services.[46]

38. Cross-border dealmakers must navigate evolving trends in theories of harm, despite a study showing that traditional theories of harm remain central to merger assessments. In national European merger cases, 44% of the cases examined relied solely on horizontal theories of harm. In comparison, only 7% of cases focused exclusively on vertical theories of harm, and 3% dealt only with conglomerate theories.[47] In cases involving multiple theories of harm, the most common combination was horizontal and vertical theories (26% of cases), while just 4% addressed all three types of harm.[48]

39. Finally, jurisdictions also vary in their approach to remedies, as seen in *Meta/Giphy*, where similar competition concerns led to different remedies being considered appropriate.[49] The design, implementation and timing of remedies pose increasingly complex problems for merging parties, driven in large part, in BIAC's experience, by growing rigidity and red lines developed by authorities, sometimes in published guidance but sometimes only divulged to merging parties in the heat of a review. For example:

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[42] A review of over 3,000 EC merger cases shows that fewer than 3 percent referenced the hypothetical monopolist test, highlighting a gap between theory and practice that risks inconsistent decision-making. While there are ongoing questions about how to define markets in zero-price digital sectors, the basic principles of market definition should not be abandoned. A more balanced approach would align theory with practice, recognizing that market definition provides a general guideline, not a definitive answer. *See* Jorge Padilla, Joe Perkins & Salvatore Piccolo, *Chapter 3: Market Definition in Merger Control Revisited*, *in* RESEARCH HANDBOOK ON GLOBAL MERGER CONTROL (Ioannis Kokkoris & Nicholas Levy, eds., 2023).

[43] Press Release, Hellenic Competition Comm'n, The HCC approves Delivery Hero's acquisition of four companies subject to commitments (Apr. 20, 2022), https://epant.gr/en/enimerosi/press-releases/item/2189-press-release-the-hellenic-competition-commission-approves-delivery-hero-s-acquisition-of-four-companies-subject-to-commitments.html.

[44] OECD, Note by Viktoria Robertson, *supra* note 14, at 19.

[45] *Microsoft/Activision* illustrates notable differences in cross-border parallel merger reviews. The EC approved the proposed merger with a 10-year licensing requirement, while the UK's Competition and Markets Authority required further divestitures as part of its approval. Concurrently, the U.S. Federal Trade Commission (FTC) challenged the merger, though it lost the preliminary injunction and has since appealed the decision. This approach by the FTC is seen by some as an assertive enforcement stance, especially in the context of a cross-border merger already conditionally approved by other major competition authorities.

[46] Although Booking.com appealed the decision, the parties abandoned the merger in favor of renewing an existing partnership.

[47] OECD, Note by Viktoria Robertson, *supra* note 14, ¶ 23.

[48] *Id.*

[49] *Id*. ¶¶ 38-39, 47.

- Some jurisdictions[50] have no clear and established mechanism for the offering of remedies at certain stages of the review, which complicates multi-jurisdictional coordination.

- The global landscape on the acceptability (both whether and when) of structural, behavioral and hybrid remedies is extremely complicated.

- Varying approaches to purchaser's suitability and the need for "upfront purchases" also complicate remedy coordination.

- There are also wide variations in respect of the timing of remedy offers and their implementation, with some jurisdictions moving towards "fix it first" remedies[51] and different regulators being prepared to accept complex remedies at the end of the first phase but others only being prepared to do so after a more in-depth investigation.[52]

40. The existence of such discrepancies and the challenges they pose for successfully navigating merger control reviews underscores the urgent need for a more harmonized approach to mergers reviewed across multiple jurisdictions. This issue is particularly pressing for digital platforms due to their transnational nature, requiring not only consistent substantive assessments but also aligned remedies to address competition concerns effectively. In the *Microsoft/Activision Blizzard*, for example, the EC accepted licensing commitments to approve the deal, whereas the CMA and the FTC rejected the same commitments.[53]

V. Practical Guidance for Competition Authorities

41. Cross-border mergers can impose a substantial burden (in terms of cost, time and resources required) on competition authorities and merging parties. It is important to address this burden without "limiting the effectiveness of [] merger [control] laws."[54] Cross-border merger control should be built on principles of consistency and predictability. To achieve this, it is essential to have clear, well-defined rules for determining jurisdiction[55] and regulatory intervention, alongside transparent communication about decisions, theories of harm, market definition and remedies.

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50 For example, Germany and Israel.

51 Even the notion of what "fix it first" means can vary between jurisdictions.

52 Some cases see competition authorities reaching the same decision, but after different levels of scrutiny, e.g., conditional clearance of *Sika/MBCC*. In this case, the EC cleared the deal after a Phase 1 review, while the CMA required a more in-depth investigation. Such scenarios highlight the importance of coordinating investigation timelines across jurisdictions. *See* Press Release, European Comm'n, Mergers: Commission clears the acquisition of MBCC by Sika, subject to conditions (Feb. 7, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_598; and *Sika AG / MBCC Group Merger Inquiry*, COMPETITION & MKTS. AUTH., https://www.gov.uk/cma-cases/sika-ag-slash-mbcc-group-merger-inquiry.

53 *See* Press Release, European Comm'n, Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions (May 14, 2023), https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705; *Microsoft / Activision Blizzard Merger Inquiry*, COMPETITION & MKTS. AUTH., https://www.gov.uk/cma-cases/microsoft-slash-activision-blizzard-merger-inquiry; and Press Release, Fed. Trade Comm'n, FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc. (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc.

54 OECD Recommendation of the Council on Merger Review, OECD/LEGAL/0333 (Mar. 22, 2005), https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0333.

55 The principle of asserting jurisdiction only when there is a material nexus to the reviewing jurisdiction is central to merger control, as reflected in both the ICN's 2018 Recommended Practices for Merger Notification and Review Procedures and the executive summary for the 2016 OECD roundtable on jurisdictional nexus in merger control. The establishment of the ICN in 2001 underscored the importance of these principles, aiming to promote predictability and legal certainty in cross-border mergers and reduce the risk of system frictions and conflicting decisions.

42. Improved international collaboration and alignment of rules are crucial to achieving these objectives. Cooperation and coordination among competition authorities on mergers of common interest can enhance the review process's efficiency and effectiveness, leading to more consistent or at least non-conflicting outcomes while minimizing transaction costs.

43. This is especially important for information exchanges. The ability of competition authorities to share confidential information with foreign counterparts can be highly beneficial, though most authorities can only do so if the merging parties voluntarily waive confidentiality rights, given the legal restrictions in place. Competition authorities should encourage transaction parties to facilitate voluntary confidentiality waivers, without penalizing parties that choose not to waive their rights. At the same time safeguards to ensure the proper handling of confidential information shared between competition authorities must be improved. Moreover, transaction parties will waive their rights more readily if they can be confident that the authorities will coordinate efficiently, not only to discuss substantive issues but also with a view to overcoming procedural hurdles, such as aligning on remedy requirements.

44. In conclusion, BIAC emphasizes the need for cross-border merger review processes to be certain, transparent, and efficient, in accordance with the OECD's Recommendation on Merger Review. This may be possible if competition authorities:

- Only assert jurisdiction over cross-border mergers with a strong connection to their jurisdiction.
- Use clear, objective criteria to determine when a merger must be notified or, in countries without mandatory notification or residual call in powers, when it qualifies for review.
- Set reasonable information requirements for effective merger review.
- Ensure that mergers with minimal competitive concerns are processed through an expedited review.
- Conduct merger reviews and make decisions within a reasonable, clear timeframe.
- Avoid contradictory remedies for businesses and work towards aligned remedies.

VI. Conclusion

45. The evolving landscape of cross-border mergers requires a delicate balance between national regulatory frameworks and the global nature of modern business transactions. The increasing complexity of managing parallel reviews across jurisdictions, coupled with varying approaches to market definition, theories of harm, and remedies, underscores the need for more streamlined and harmonized merger control processes. As regulators continue to grapple with these challenges, clear, consistent, and predictable frameworks are essential to providing legal certainty for businesses and promoting an environment that fosters innovation, entrepreneurship, and economic growth.

46. BIAC advocates for the following to address the challenges of cross-border mergers:

- *Harmonization of Merger Control Regimes*: BIAC calls for clearer, bright-line rules for jurisdictional nexus and substantive review of cross-border mergers. Harmonization of market definitions and theories of harm is necessary to reduce inconsistent outcomes.
- *Enhanced International Cooperation*: Cooperation and coordination among competition authorities should be strengthened, particularly regarding establishing jurisdictional nexus, timing of notifications, coordinated review periods, theories of harm, and the alignment of remedies. This would ensure that

cross-border mergers are reviewed more consistently and efficiently, minimizing transaction costs, and reducing the risk of conflicting outcomes.

- *Material nexus principle:* The principle of asserting jurisdiction only where there is a material nexus to the reviewing jurisdiction should be a cornerstone of merger control. This fundamental principle supports predictability and legal certainty in cross-border mergers by ensuring that competition authorities intervene only when there is a substantive connection to their jurisdiction. Such an approach minimizes the risks of conflicting decisions and system frictions, aligning global enforcement practices and fostering consistency in merger reviews.

- *Focus on Predictability and Transparency*: Transparent decision-making, open discussions on theories of harm, and clearer communication of regulatory concerns are crucial for fostering predictability. BIAC emphasizes that businesses must be provided with certainty throughout the merger review process.

- *Balanced and Proportionate Remedies*: Remedies should be practical and proportionate, taking into account the global nature of the transaction. BIAC stresses the importance of avoiding overly burdensome or contradictory remedies across jurisdictions, which can lead to fragmented enforcement.