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# Antitrust and Developing Economies in an Era of Crises

# Webinar #1: Growing Cross-Border Challenges and New Life for Public Interests and Industrial Policy

**Webinar - 27 October 2020***

**This webinar was organized as part of the 7th Antitrust and Developing Economies in an Era of Crisis series by Concurrences.**

## Panel Discussion

The moderator, **Professor Daniel Rubinfeld** (NYU Law), introduced the panelists and opened the discussion by asking the panelists to speak about the impact of Covid-19 on the merger policy in their respective countries.

**Gönenç Gürkaynak** (ELIG Gürkaynak Attorneys-at-Law) said that despite the pandemic, the Turkish Competition Authority has continued processing merger applications under its regular timelines. Though it has become a bit difficult to reach case handlers at the Competition Authority by phone due to remote working, the authority has not extended review more than 60 days past the original date of filing even in the worst-case scenario.

Mr. Gürkaynak also observed that the competition authority has engaged in more price-sensitive enforcement, and has started looking at the retail sector more closely, especially in hygiene products or in staple food products. However, the Turkish Competition Authority understands that many of the entities involved are not being opportunistic, but are rather trying to adjust to the new economic climate. In the interest of collective defense in an industry, perhaps there might be sometimes some discussion as to whether these parties should have gone for a structural M&A transaction rather than a partial integration — i.e., an understanding between them — but so far, Mr. Gürkaynak said there is no hard evidence of a surge in that kind of partial integration or any concerted practice or agreement that needs enforcement action by authority.

**James Hodge** (South Africa Competition Commission) informed that South Africa went under a five-week lockdown at the end of March with only the operation of essential businesses. He noted that this had a severe economic effect in the beginning, but only for a limited time. The Commission had recommended that only urgent merger matters be filed during the hard lockdown, which gave the Commission a reprieve. Contrary to Mr. Hodge's expectation, a flood


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of mergers due to failing firms were not filed during the initial period. Some were filed, but Mr. Hodge said they were already failing or teetering away prior to Covid-19. One was a clothing retail chain that had been in and out of business rescue for years, and another was in the food chain, which had continued to operate throughout the hard lockdown.

Mr. Hodge thought that the exemptions to the banking sector and the retail property sector to allow for collective negotiations around payment holidays, retail tenants' debt relief for businesses, subdued the initial concern that businesses would not be able to remain open. There were also government programs and aids to help businesses. He also believes that because the hard lockdown was lifted after five weeks and the economy, to a certain extent, is back to normal in South Africa, business risk has resulted in reorganization of creditors but not really in merger activity.

**"BUT AS FAR AS COVID-19 IS CONCERNED, WHOEVER WOULD BE ASKING FOR A MORATORIUM ON MERGER CONTROL WOULD PROBABLY BE USING COVID-19 AS AN EXCUSE BECAUSE IT DOES NOT HAVE THAT KIND OF AN INHERENT DYNAMIC THAT WARRANTS THAT KIND OF THINKING."**

**GÖNENÇ GÜRKAYNAK**

Additionally, Mr. Hodge mentioned that the Commission saw very little merger activity for about three months, but activity picked up to about 50 percent, reaching historic levels. Moving forward, Mr. Hodge expects to see more failing firms, since government interventions are typically short term in nature. He thought that that is where the Commission potentially has a strong reason to look at mergers in a public interest context. He explained that South Africa has a public interest provision in its merger control law that covers aspects like employment retention, promotion of SMEs, promotion of transformation in addressing historical inequities in the economy, as well as enabling sectors to survive, maintaining the stability of sectors, and encouraging sectors to become internationally competitive.

**Willard Mwemba** (COMESA) stated that COMESA is in a slightly unique position because it is a supranational competition authority, similar to the European Union. Mr. Mwemba explained that the COMESA Competition Regulations provide that when parties decide to merge, they must notify the authority within 30 days of arriving at that decision. If they do not, they may be fined up to a maximum of 10 percent of their annual turnover in the common market. The Commission may also refuse to recognize the merger if it has already been consummated within those 30 days. Covid-19 has complicated this process because companies that have employees working from home may be unable to meet the 30-day filing deadline. In order to address this issue, the Commission carefully looked at the language of the law and distinguished between "complete" and "incomplete" notifications. A complete notification would be when the parties have the ability to provide all the documents that the Commission asked for during the filing process. An incomplete notification is where some of these things are missing.

COMESA notified companies to inform the Commission immediately when they intend to merge, and that that communication will be construed as the beginning of the notification process. At the end of the 30-day period if the parties have not been able to submit all their information, they would not be penalized because it will be taken that they had engaged the Authority on this merger notification, and it would be considered an incomplete notification. Mr. Mwemba personally thought it would have been best to get rid of the 30-day notification requirement, as it serves no practical purpose.

The Commission faced another problem with the legal requirement for the merging parties to make an electronic submission as well as a submission of the original copy of notification document signed by a public notary, a a commissioner of a court, or any other similar person with such authority. Due to the difficulties of obtaining signatures during this time and the delays that it would cause, COMESA has been allowing parties

**"I THINK SOME FIRMS MAY HAVE GONE INTO BUSINESS RESCUE, BUT, BECAUSE THE HARD LOCKDOWN DIDN'T LAST AND THE ECONOMY AND NORMALITY HAVE RETURNED TO SOME EXTENT, THAT BUSINESS RISK HAS JUST RESULTED IN REORGANIZATION OF CREDITORS AND NOT REALLY IN MERGER ACTIVITY."**

**JAMES HODGE**

to submit the hard-copy with the actual, physical signatures later, as long as the parties make an electronic submission on time.

The Commission expected a significant decline in the number of mergers it would receive between March, but when it took an audit for the period March-to-date last year and the period March-to-date this year, it found that the number has relatively remained the same. However, Mr. Mwemba cautioned against stating that the authority is seeing a decline in the number of mergers because the long-run repercussions of the pandemic have yet to be seen. With a recession likely to loom in Africa, Mr. Mwemba believes there might be fewer mergers as companies and undertakings adopt a "wait and see" approach. Regardless of whether there will be a recession and fewer mergers as a result of failing firms, Mr. Mwemba was concerned that there would be an increase in market concentration, which may stifle competition and lead to even more of an economic decline through a vicious cycle.

As for opportunities, Mr. Mwemba observed that pandemic has encouraged more investment in IT equipment.

**Vitaly Pruzhansky** (RBB Economics) said that he has not seen many changes in the day-to-day work in Russia, but observed that the main change was in enforcement priorities. For example, the security of supply, which was of lesser importance before, has become a higher priority.

He also believes that the government will now more often invoke the Strategic Investment Act and the Foreign Investment Act to control foreign investment in strategic areas and to keep critical technologies under the control of Russian companies, which may lead to a longer merger review process. However, the Competition Authority may be more lenient towards mergers that allow companies to stay afloat when they experience financial difficulty. In this regard, efficiency arguments become important — not only efficiencies in the narrow sense, like reduction in marginal costs that help to mitigate post-merger incentives to raise prices, but a broader concept of efficiencies, including fixed-cost savings, sharing of technologies or know-how, or even broader public policy goals, such as employment or investment. Mr. Pruzhansky informed that in contrast to the United States or the European Union, the Russian Authority is less skeptical about efficiencies.

**"THE WORLD IS CHANGING, WE ARE BECOMING MORE ELECTRONIC, SO SOME OF THOSE ARE THE THINGS WE NEED TO RELOOK AT AND TAKE AN AUDIT. THESE ARE SOME OF THE THINGS THAT HAVE OPENED OUR EYES DURING THE COVID-19 PANDEMIC PERIOD."**

**WILLARD MWEMBA**

He also informed that Russia does not have merger-specific guidelines, but rather has some internal guidance on competitive assessment based on the same economic principles as the same economic principles as the European Notice on Market Definition. The guidelines are treated very seriously by the Federal Antimonopoly Service of the Russian Federation (FAS) because the Russian courts have quashed cases precisely because the relevant markets were not defined correctly. However, after being confronted with large, complex global deals such as Bayer/Monsanto, the Authority has started working on a merger-specific guideline, which will be published soon. The document will make explicit distinctions between different types of mergers and theories of harm and although it will not contain a detailed description of unilateral effects, it nevertheless will introduce the notion of close competitors.

As for the role that economics plays, Mr. Pruzhansky said that economic evidence plays a vital role in assessing mergers because it is difficult to rely on precedents. He explained that the FAS publishes its merger decisions, but they are usually not informative in terms of how the market was define, or which theories of harm were assessed. As a result, merging parties oftentimes cannot rely on ready templates and must conduct from scratch a proper competitive assessment of the industry in question.

**"THE COVID-19 CRISIS HAS BROUGHT TO THE FORE SOME ELEMENTS OF MERGER ASSESSMENT HAVE ALWAYS BEEN THERE BUT PROBABLY WERE CONSIDERED OF LESSER IMPORTANCE — FOR INSTANCE, SECURITY OF SUPPLY IS BECOMING MORE RELEVANT NOW."**

**VITALY PRUZHANSKY**

**Angela Zhang** (The University of Hong Kong) commented that there were not many changes in the merger review process in China since the start of the pandemic. Ms. Zhang observed that the review process actually became faster after everything moved online. She said that some of the more simpler transactions were able to be cleared on average within two weeks, and noted that the prenotification process has also been much shorter compared to the first quarter of 2019. She notified the audience that the State Administration for Market Regulation (SAMR), the merger review authority in China, established a "green channel" for mergers that are in specific sectors that are in the battle against Covid-19, like pharmaceuticals and medical equipment. As for sectors that are severely affected by the pandemic, such as the catering and tourism industries, the SAMR will expedite review.

**The moderator** added that he has not seen much change in the merger review process in the United States. He mentioned that the U.S. might see legislative changes that may affect mergers, depending on the outcome of the election. Professor Rubinfeld then asked whether some of the big mergers, such as Bayer/Monsanto and Siemens/Alstom, have affected the panelists' view as to whether the respective competition authorities in their respective country or countries should or must support national champions.

**Mr. Gürkaynak** replied that the focus of the debate in Turkey does not turn so much on national champions, but rather on the geographic market definition. He stated that some of these businesses are pan-European, beyond national boundaries, and the Turkish players are not really in the relevant market and are not germane to the entire competition law landscape or the distribution of meaningful market shares. Increasingly, certain private parties are defending mergers by arguing that the geographic market is not the Republic of Turkey. Mr. Gürkaynak thought that the Turkish Competition Authority should give them a break because the parties face competition with global competitors that have been able to prosper through certain periods of a warm attitude towards their artificial growth. The Turkish firms should also be allowed to grow to even out the playing field.

**Mr. Hodge** stated that South Africa has in its merger control process, a public interest provision, which is built around the ability for local industries to compete in international markets, but in practice, it has not been a feature of its merger control. Although merging parties occasionally raise the point that they need the merger to "face off Google or Facebook," it does not have much weight. However, the public interest provision ensures that investment does not deindustrialize and take away public interest benefits from South Africa. For example, mine acquisitions that do not result in beneficiation are resisted. Mr. Hodge has seen a major refinery turn down a Chinese buyer in favor of Glencore because of the willingness to invest in upgrading the refinery and the expanding supply. Mr. Hodge thought post-Covid-19, the use of the public interest provision may change in an effort to rebuild some parts of the economy that have been hit hard.

With respect to global mergers, Mr. Hodge said that the challenge has been around global coordination on remedies. For example, the Google/Fitbit merger had to be re-filed because it was filed much earlier in South Africa than in others, which would make difficult a cross-jurisdictional discussion of remedies. These discussions are further complicated by the fact that conditions imposed by some jurisdictions may have no validity in other jurisdictions.

**Mr. Mwemba** stated that the COMESA Competition Regulations do not contain provisions that express an industrial policy or national champions, since different countries have different views and strategies towards the creation of such national champions. However, he noted that it is a topic that is being discussed by its member states.

Mr. Mwemba also mentioned that COMESA cleared the Bayer/Monsanto merger unconditionally in 2017, but was criticized for its decision by some members of the East African Community. He explained that the Commission reached its decision based on the large number of players in the market, including DuPont, BASF, Arysta, and Dow, and from the common market point of view, Bayer and Monsanto were not significant players. However, he agreed with Mr. Gürkaynak that the geographical scope and law of some of the global mergers are not limited to one country. He recognized that the Commission may have overlooked issues like Big Data, and overlooked some of these pharmas through those digital markets in which Bayer and Monsanto are doing very well. He noted that this is something that the Commission will be working on in the future.

**Mr. Pruzhansky** said that the Russian government or its Competition Authority does not shy away from intervening in sectors of the economy where they think is appropriate. He also thought that industrial policy considerations are mainly implemented via remedies.

Mr. Pruzhansky explained that the FAS conducted an in-depth investigation of the *Bayer/Monsanto* merger and consulted with other government bodies and third parties to assess the deal. Although the combined shares of the merged entity were modest in most of the market, the FAS claimed that the combination of the complementary technological and research capabilities of the parties could be harmful and potentially raise barriers to entry. To address these concerns, the FAS imposed remedies that involved a transfer of technologies to Russian firms, particularly in those areas where Russia depended on the input of genetic material or data. The FAS stated that it wanted to encourage international companies to create and support local Russian rivals, hoping that one day the Russian companies may become important international competitors. The authority finally cleared the deal after two years of investigation.

In China, **Ms. Zhang** explained that Article 27 of the Anti-Monopoly Law explicitly states that the merger should be assessed taking into account the impact of the transaction on the national and economic development, along with a number of other factors. However, because of the ambiguity around the other factors in the statute, Ms. Zhang said that it is unclear how they should be weighed.

In the early years of enforcement, large Chinese merger transactions involving State-owned firms, such as the China Telecom/China Unicom case, were not notified to the authorities, but that they should have been notified. In recent years, although such transactions have been notified, no remedies have been imposed on such transactions. For example, the merger between South China Rail and North China Rail obtained unconditional clearance even though the merged entity would own 80 percent of the market in China. Ms. Zhang expressed that the overall bureaucratic structure of the government limits the Chinese Antitrust Authority from intervening in those cases. She also explained that other sector regulators could get involved in a merger review, which could shape the ultimate outcome of the merger process.

## Questions and Answers

One attendee directed his question to Mr. Mwemba, asking which entities or individuals are investing in IT, and whether COMESA considers industrial policy if they involve acquisitions under COMESA's review. Mr. Mwemba replied that the IT investments are made by both the private sector and the governments in the common market, and it has been accelerated by government policies put in place to ensure that the cost of acquiring technological equipment is afford able. As for COMESA, Mr. Mwemba said that the Commission has made policies and budgeted for investments in technology for uses such as online notification of mergers, online case management systems, and the like.

**"IT TURNS OUT THAT, OVERALL, AFTER WE HAD SEEN WHAT HAPPENED IN THE FIRST SIX MONTHS OF 2020, WE DO NOT REALLY SEE MANY CHANGES IN TERMS OF THE MERGER REVIEW PROCESS. IN FACT, IF THERE IS ANY CHANGE, WE ACTUALLY OBSERVE THAT THEY HAVE BECOME FASTER."**

**ANGELA ZHANG**

Another attendee asked: "When public interests in mergers is applied, what part is applied to promote the competitiveness of your countries' firms and what part is applied to ease the hardships of those who may be adversely affected by big mergers, such as jobs? What different tradeoffs does your jurisdiction make? How do you see the tradeoffs?"

**Mr. Mwemba** thought that COMESA's analysis and approach to the "public interest" provision of the Competition Regulation means something that results in or promotes competitiveness. The Commission looks to the definition of competition in the Regulations, which talks about "the striving or potential striving of two or more persons engaged in the production, distribution, supply, purchase, or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lowering prices, and improved choice for consumers." Mr. Mwemba made clear that creating new job opportunities or saving jobs does not strictly fall under the "public interest" provision of the Regulations. However, any transaction that leads to significant reduction of employment opportunities will be taken as against public interest.

**Mr. Hodge** commented that "public interest" has increasingly become about "localization" — ensuring that there is no offshoring, especially with respect to foreign investors. He noted that the Glencore/Chevron refinery case was the first instance of a public interest condition requesting export promotion but without targets because it is a difficult element. However, what has been a feature is the extent of investment required in the facilities and production domestically. The PepsiCo/Pioneer merger required $5.5 billion, and Chevron won $6 billion, which presumably would build a degree of competitiveness as one upgrades the production facilities in the process.

**Mr. Pruzhansky** commented that in Russia, industrial policy is almost always about creating national champions and making Russian companies more competitive, as shown in the Bayer/Monsanto merger.

A third attendee asked, in light of a law enacted by the Philippines Congress putting a one to two year moratorium on merger review, whether such statutes are appropriate during the pandemic. **Mr. Gürkaynak** did not think the pandemic warranted such drastic measures, but he encouraged thinking deeply about how we could integrate sustainability goals in competition law.