

## MERGER CONTROL IN TIMES OF CRISIS

In 2020, the ICN Merger Working Group under the leadership of the Administrative Council for Economic Defense (CADE) organized a series of regional webinars to promote discussions centered on the impacts of the COVID-19 pandemic on merger review processes. The topics covered included: some practical aspects of merger assessment, substantive merger assessment, the failing firm defense, and remedies. National Competition Authorities (NCAs) and Non-Governmental Advisors (NGAs) discussed common and unique matters in six regional webinars, with the following speakers:

- **North and Central America:** chaired by the Canadian Competition Bureau (CCB) (represented by its Competition Law Officer, Tiara Kerr), with the panel of NCAs composed by the United States (with Bashiri Wilson from the US DoJ, and Maribeth Petrizzi from the US FTC), and Canada (Sangwon Lee from the CCB).
- **South America:** chaired by the Administrative Council for Economic Defense (represented by its Deputy Superintendent, Patrícia Morita Sakowski), with the panel composed by the OECD (represented by its Senior Competition Expert, Paulo Burnier), Chile's NCA Fiscalía Nacional Económica (represented by its Head of Mergers, Francisca Levin) and two NGAs (Brazilian consulting firms LCA Consultores, represented by Bernardo Gouthier Macedo, and Tendencias, represented by its CEO Elizabeth Farina).
- **Southern Africa:** chaired by the Competition Commission of South Africa (CCSA), with the panel of NCAs composed by the Zambian Competition & Consumer Protection Commission (represented by its Director of Mergers and Monopolies, Brian Lingela), the Competition Regulatory Authority of Angola (represented by its Chief Economist, Délcio Pradiné Penelas), the Competition and Consumer Authority of Botswana (represented by its Director of Mergers and Monopolies, Nomathemba Dladla) and South Africa's CCSA (represented by its Senior Analyst for Mergers and Acquisitions, Amanda Mfuphi).

- **Europe:** chaired by Spain's National Commission on Markets and Competition (represented by its Board Member, Pilar Canedo Arrillaga), with the panel of NCAs composed by Germany's Bundeskartellamt (represented by the Head of its Merger Control Department, Fabian Pape), the United Kingdom's Competition and Markets Authority (represented by its Director of Mergers, Eleni Gouliou), Ireland's Competition and Consumer Protection Commission (represented by its Director for Competition Enforcement and Mergers, Ibrahim Bah), the OECD (represented by its a member of its Competition Division, Renato Ferrandi) and an NGA of the French Competition Authority (Latham & Watkins, represented by Adrian Giraud).
- **Middle East and Northern Africa:** chaired by the Egyptian Competition Authority (represented by its Legal Researcher, Rana Khoweiled), with the panel composed by Kuwait's Competition Protection Agency (represented by the Head of the Mergers and Acquisitions Control Sector, Shahad Alsaqabi), the Competition Council of Morocco (represented by its Deputy Director of Investigation, Hicham Bouayad), the General Administration of Competition in Palestine (represented by its Director General, Jamal Abou Farha), Bahrain's Competition Promotion & Protection Authority (represented by its CEO, Fadheela Ebrahim Al Akram, and its Economist, Noor AlHuda Hameed Ali), the Tunisian Competition Council (represented by its Vice President, Fathia Hammad, and its Case Handler, Habib Essid).
- **Asia-Pacific:** chaired by Japan Fair Trade Commission (represented by its Senior Officer for Mergers and Acquisitions, Saiko Nakajima), with the panel of NCAs composed by the Competition Commission of India (represented by Adviser and head of the Competition Division, Manish Mohan Govil), the Australian Competition and Consumer Commission (represented by its Inspector, Acting Director in the Merger Investigation branch, Andy Gallagher, and Acting Director of the Remedies Unit, Sara Mirabella), the New Caledonia Competition Authority (represented by Head of merger control unit, Caroline Genevois), and NGAs of the Japan Fair Trade Commission (Professor of the University of Tokyo, Graduate Schools for Law and Politics, in charge of competition law, Tadashi Shiraishi), and Competition and Consumer Commission of

Singapore (Associate principal on the Competition & Antitrust Practice Group at Baker and McKenzie Wong & Leow, Harikumar Pillay)

The key findings from the regional webinars on each topic are summarized below:

### **Practical Aspects of Merger Assessment**

The discussions among national competition authorities across regions focused on the importance of NCAs adopting effective enforcement policies during a pandemic, highlighting the measures that allowed them to adjust to COVID-19 restrictions. In this context, NCAs from across the globe discussed the more flexible procedural mechanisms they implemented, such as electronic filing and submission of merger application forms, adjustments to the timeframes for merger review, suspension or extension of time limits for merger review, remote interviews, and meetings conducted via teleconference.

### **Substantive Merger Assessment in Times of Crisis**

Although different agencies take into account different substantive factors while conducting their investigations, when it comes to the most fundamental aspects of merger assessment, the discussions carried out during the webinars showed that the NCAs maintained the usual standards and rigour of their merger investigations. However, it is undeniable that the crisis caused by the pandemic had an impact on the agencies' work. In this regard, some agencies indicated that some changes were necessary in order to ensure mergers were properly assessed, such as the creation of online mechanisms to collect data for investigations and access market information.

### **Failing Firm Defense**

During the COVID-19 pandemic, competition authorities witnessed some market players become stronger while many others were weakened. This is certainly related to each merging parties' ability to adapt to the crisis. The discussions revealed there is a common acknowledgement among some authorities that the pandemic might increase the chances of failing firm claims, but that the standards adopted to assess those claims must not change—as the impacts of the pandemic are understood to be temporary. The webinars provided

information which showed how the failing firm defense appears more frequently in times of crisis (and rapidly fades away once the crisis is over).

### **Remedies**

The discussions regarding the implementation of remedies in merger cases during the pandemic were very fruitful due to the various approaches adopted by NCAs. Presenters in each region discussed how the design and the implementation of structural and behavioral remedies may have changed during the COVID-19 crisis. The webinars revealed that some NCAs are inclined to recognize that behavioral remedies may be preferable in times of crisis under certain circumstances. Another key finding of the webinar regards the important role of economic analysis to better design and implement remedies.