Introduction

Mergers and Acquisitions\(^1\) has gained significant attention during the second half of the 20th century, and while the mergers between corporations that are not mainly based or operating within the same territory or jurisdiction (hereinafter cross-border mergers) constitute less than 50 percent of the total announced mergers across the globe,\(^2\) those cross-border mergers are literally considered a very significant category of transactions in the world economy, because they constitute more than 50 percent of the foreign direct investments (hereinafter FDI).\(^3\)

On the other hand, during the last century, not only the legal literature, but also the literature in many fields along with government efforts on all levels, were all mainly devoted to the debate of trade liberalization in general, and specifically to the case of the expected gains from using international agreements as a tool to remove trade barriers. Meanwhile, all parties have paid little attention to profound questions about identifying the impediments with which they are faced and the other possible options that might maximize general welfare, which are cross-border merger and acquisition transactions.

As an example to show how huge that kind of cross-border transactions are, on April 12, 2000 the European Commission (hereinafter EC) announced that it would not block the cross-border merger transaction between the British corporation Vodafone Airtouch and the German corporation Mannesmann, and the value of the transaction was approximately 180 billion US dollars.\(^4\) In the same context, it was also reported that the volume of the transactions done in the Middle East region, as

\(^1\) “Mergers” will be used to indicate mergers, consolidation, and acquisitions. For a more accurate definition, types, and classifications, see infra p.75.


Cross-border mergers and acquisitions

the fourth active acquirer in the world, exceeded 106 billion US dollars in 2007.5

Furthermore, during the last decade of the 20th century, an important and regularly active category of players in the field of cross-border mergers appeared. In fact, they are not new players, but they started to be increasingly key players; those players are the “Sovereign Wealth Funds” (hereinafter SWF), which are simply state-owned investment funds. In that context, it has been reported that in 2007 the total value of cross-border mergers worldwide exceeded 48.5 billion US dollars,6 and the overall SWF investments across the globe were estimated to be 6.5 trillion US dollars by the end of May 2014, and that increase is expected to continue.7

Based on the important nature of the mergers transactions, many states tailored special bundles of laws and regulations to control those transactions. Those laws and regulations might be considered, in fact, as a stumbling block that faces the successful and efficient completion of a merger transaction in general and cross-border mergers specifically. The uniqueness of the cross-border mergers is due to the fact that those kind of transactions are not only subject to certain national law, but are subject to different laws in different jurisdictions, and those different laws might be contradictory, or even if are similar, they might be interpreted differently.

The core subject of this book will be to clearly identify and address how those laws and regulations are considered as impediments faced by mergers in general and cross-border mergers specifically. The discussion will not be limited to those impediments that are imposed by the state or the different regulatory authorities, but will also include additional layers added by other parties, such as the professional service providers, of which legal advisors are a good example. Moreover, the book will mainly focus on one fundamental impediment—the merger control laws—because merger control is typically one of the most complicated and influential impediments that hinders cross-border mergers.

Despite the fact that a handful of jurisdictions were adopting merger control laws during the development of merger control history i.e. during the 20th century, it has been reported that by 2010 more than 110

5 Mohammed, A Story of Two Halves, supra note 2, at 15.
6 Sonia Kalsi, Sovereign Wealth Funds, in INTERNATIONAL MERGERS & ACQUISITIONS: CREATING VALUE IN AN INCREASINGLY COMPLEX CORPORATE ENVIRONMENT at 16, 17 (Financier Worldwide Booz & Company ed. 2008).
7 For more details and a full profile of all the SWF across the globe see https://www.swfinstitute.org (last visited December 1, 2017).
Introduction

jurisdictions had adopted merger control systems. Meanwhile, this book will try to identify the drawbacks of the merger control laws only in three selected jurisdictions, namely the United States of America (hereinafter US), the European Union (hereinafter EU), and Egypt.

It should be noted that the main reasons behind the selection of the three systems specifically is that the US merger control laws were the first adopted merger control system in the world. In addition to that, both the US and the EU jurisdictions are the most dynamic and active jurisdictions in that field. Moreover, the extraterritorial jurisdictional dimension of the application of the merger control, which uniquely characterizes both the US and the EU systems, is a significant reason, and more importantly both of the two systems are heavily imitated in many other jurisdictions around the globe.

Furthermore, the Egyptian system was also selected because Egypt is a leading country in the Middle East and North Africa (hereinafter MENA) region, and the Egyptian system is generally a typical model of the merger control systems that are adopted in most of the countries in the MENA region. Furthermore, the Egyptian laws are widely copied in almost all of the Arab countries. Moreover, both the US and EU systems are premerger review systems, while the Egyptian system is a post-merger notification system, which are typically the two types or forms of merger control.

Likewise, the Egyptian legal system is considered to be a civil law system and on the other hand the US system is a common law system, and it will be more constructive to compare the US system as a common law model and the Egyptian system as a civil law model. In addition to identifying the drawbacks, the second core issue of this book will be examining some selected reforming proposals to overcome those drawbacks. This will be done by addressing the question of the possibility of adopting a new system that might facilitate mergers generally and cross-border mergers specifically and enhance the current situation.

Meanwhile, in order to assess the selected reforming proposals, a deep understanding is required of how the merger control laws were developed to their present state. And for the purposes of gaining a better understanding of the merger control systems, this book will try to answer and address some introductory questions or subtopics. Those subtopics are considered as points of departure and are namely: What is the history

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8 Julie Nicole Clarke, The International Regulation of Transnational Mergers (Queensland University of Technology. 2010).

of the corporation as an idea and how was the corporation originated and for what purposes? How was the relation between the corporations and the state started and what are its developments? What is the history of mergers? How do trusts lead to the antitrust laws?10

The answer to those questions require one to discuss some of the benchmarks throughout the history of the corporation; those benchmarks might be considered as a prompt that led to the change, and to the development and proliferation of the corporation idea itself. This will include a brief history of some corporations, namely the East India Company, which some named the mother of modern corporations, and the South Sea Company as it was the main cause for the biggest financial crisis during the early developments and that obviously led to a change in the relation between the state and corporations.

Generally speaking, the discussions of those breakthroughs are mainly to address the role of the state in regulating corporations and its development in the western jurisdictions during the early ages. In addition to that, the discussions will address the role of feudalism in the relation between the corporations and the state, and how it opened the door for that relation to be developed in the future. The book will examine how the relation started by the state granting monopolies and incorporation rights, followed by the corporation offering for the state to make use of these rights as financing tools to ensure approval for continuation. Consequently, how the power of the state was lessened to help the corporation rescue the economy and contribute to the industrial revolution, and then, when corporations gained some power, the state started a new era by reregulating the corporations again, and how that did not succeed and led to two trends respectively, privatization and then deregulation.

To sum up, this book will try to address the core issues in addition to the aforementioned points of departure, in a constructive way, and in a chronological order, starting with the history, then the current situation, and the expected future under the reforming proposals at the end. Thus, the book will be mainly divided into three chapters: The first chapter will be primarily designated for demystification of mergers and a historical overview, while examining the history of (1) the corporation, (2) mergers, (3) antitrust laws, and (4) the relation between the state and the corporation.

10 The term “antitrust” is used interchangeably with others terms, for example: antimonopoly, protection against unfair competition and many others; hereinafter the term “antitrust” will be used instead of all the other similar terms whenever possible.
Furthermore, regarding the discussions of demystification of mergers, that part will first address the definition and classifications of mergers, in addition to examining some other corporate restructuring options and growth alternatives such as joint ventures (hereinafter JV), licensing, franchising, etc., and it will also address the typical details of merger transactions, starting from the preparation before the transaction up to the post-closing stage of the transaction. The discussion of the merger transaction dynamics will be mainly to illustrate how the merger transactions are complicated by nature, even if the transaction was not controlled by the state or is subject to different laws in different jurisdictions.

Moreover, scrutinizing the merger dynamics is crucial because a solid understanding of the merger dynamics is a prerequisite to delving into the impediments to the merger process. In that regard, it is undoubtedly true that scrutinizing every single step in the merger dynamics is a prerequisite to understanding the remaining steps, in addition to that, scrutinizing the merger dynamics will undoubtedly be a very helpful tool in understanding how the impediments could be removed or at least should be mitigated.

Subsequently, the second chapter of the book will be divided into three main parts. The first part will mainly focus on identifying the most popular incentives that drive the parties to enter into a merger transaction. The second part will be devoted to examining the mergers’ efficiencies, on both of the two dimensions or perspectives i.e. the success and failure factors of the transaction from the perspective of the merging parties and from the perspective of its impact on the national and global economy. That discussion will be mainly to examine whether the mergers are worthy enough to put efforts in amending or reforming the current laws and regulations.

The third part of the second chapter will be divided into two subtopics; the first one will identify dozens of impediments that the parties of the mergers might face, as an introduction to the second subtopic. The second subtopic will mainly examine the merger control systems in detail, to show how far those systems are considered impediments that cross-border mergers face. The examination of the merger control systems will include an overview of the law in the aforementioned selected jurisdictions i.e. the US, the EU, and Egypt.

The third and last chapter of the book will be mainly devoted to developing and examining seven proposals to reform the current situation of the multijurisdictional merger control systems, which hinder cross-border mergers. In the introductory part of that chapter, assessment criteria will be designed and tailored specifically to assess the impact of each of the reforming proposals on the current situation, and that will be followed by a discussion to address each one of the proposals, whereby each will be described first and then tested under the same assessment criteria.
Some of the reform proposals that will be examined in the third chapter are totally new, and others have previously been discussed but are enhanced and accordingly will be more efficient. These include (1) bilateral cooperation agreements, (2) international merger control rules, (3) supranational premerger control institution, (4) jurisdictional rules, (5) common online filing system, (6) multilevel monitoring system, and (7) merger deregulation.