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Ex-Post Assessment of Merger Remedies – Contribution from BIAC

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Ex-Post Assessment of Merger Remedies

- Contribution from BIAC -

1. Introduction

1. *Business at OECD* (BIAC) appreciates the opportunity to make this written contribution to the hearing on the *ex post* assessment of merger remedies.

2. Vigilant enforcement by competition authorities worldwide to address anticompetitive mergers remains a recognised priority. Equally, bolstering enforcement with effective tools to optimize the efficacy of vigilant enforcement must be supported. Accordingly, the periodic review by competition agencies of merger remedies imposed in the past aimed at improving decision making in future cases is principally welcomed by business. While the *ex post* review of merger remedies can be a valuable tool to assess the efficacy of previous merger decisions, any such review by agencies in this regard should be underpinned and guided by principles of transparency, certainty, and predictability.¹

3. *Ex post* merger remedy assessments typically aim to:

*determine whether these remedies have reached the objectives expected by the [competition authority] when it imposed them, what has determined their success, and if a different remedy could have been more effective in reaching these objectives. These studies only look at the remedies and do not try to determine whether the clearance of the merger had been appropriate or not. Hence, they do not evaluate how competition in the market has been affected by the merger, but they simply consider what specific impact each remedy has had.*²

4. Where *ex post* assessments of merger remedies are undertaken in the most effective manner, such measures can yield benefits both to competition authorities and businesses. The *ex post* review of remedies can, for instance, enable the development of analytical tools to identify whether remedial action is necessary for a particular transaction as well as what remedy is most appropriate (based on past experiences).³

¹ See Jan Broulík, *Predictability: A Mistreated Virtue of Competition Law*, 00 J. OF ANTITRUST ENFORCEMENT 1, 2, 16 (2023) (articulating the value that predictability and legal certainty presents in competition law matters).

² OECD, Reference Guide on Ex-Post Evaluation of Competition Agencies' Enforcement Decisions 35 (Apr. 2016), <https://www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf>. These remedies may take the form of either structural or behavioral remedies. In this respect:

- Structural remedies refer to the permanent change in a market structure; and
- Behavioral remedies refer to the temporary modification or constraint of the behavior of the merging firms.
- Structural or divestiture remedies can in many instances result in firms selling off parts of the businesses already acquired and/or developed. Given the time and resources invested in integrating and streamlining new acquisitions and businesses, such remedies can be highly disruptive and expensive.

³ OECD, Impact of Evaluation of Merger Decisions, DAF/COMP(2011)24, at 143 (Sept. 18, 2012), <https://www.oecd.org/daf/competition/Impactevaluationofmergerdecisions2011.pdf>. See also Competition & Mkts Auth., Merger Remedy Evaluations: Report on Case Study Research 6 (June

5. Indeed, the OECD's Background Note emphasizes this point:

*In addition to providing insights to improve several aspects of merger remedy decision making and implementation, ex-post studies have the potential to improve stakeholder relations by allowing interactions with stakeholders outside of an active case. Ex-post assessments can also improve agency reputation, by demonstrating accountability and increased transparency, although it must also be acknowledged that there are risks to short-term reputation if the findings of the review publicise errors. Nonetheless, openly striving to be accountable and improve practices is a positive measure that can be communicated to stakeholders and will likely make the authority seem more transparent.*⁴

6. Merger reviews, the potential imposition of remedies, and any subsequent assessments thereof by competition authorities should be conducted in a manner that provides businesses with certainty in relation to the process that the respective agency will follow. While *ex post* reviews of merger remedies can limit agencies' ability to prevent future anticompetitive harms, such reviews do have the potential to impose costs to businesses.⁵ In this regard, it is important that activities of individual competition regimes result in, *inter alia*, the lowest possible implementation costs to businesses, particularly those that operate across a number of jurisdictions and are susceptible to multiple merger regimes.⁶

7. The *ex post* review of merger remedies involves competition authorities assessing previous decisions in order to improve the quality of future decisions.⁷ This is adequately achieved when such assessments are defined against clear parameters, undertaken in an objective manner, and are concluded within a finite period and in a reasonable proximate time period following the implementation of a merger.

8. It has been suggested that the scope of ex-post analyses be extended to include non-price effects, such as innovation, quality, and product diversity.⁸ However, in our view, price effects are likely to prove a clearer and more accurate means of quantifying the effects

18, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811252/Merger_remedy_evaluations_2019.pdf.

⁴ OECD, Ex-post Assessment of Merger Remedies – Background Note 14 (2023), <http://www.oecd.org/daf/competition/ex-post-assessment-of-merger-remedies-2023.pdf> (citations omitted).

⁵ It is worth noting, as an example, that the State Aid Modernization of 2012-2016 led to a number of *ex post* evaluations in the domain of state aid. However, it has remained unclear how the results of such evaluations will/have been used to improve future state aid schemes.

⁶ See William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 COMPETITION POLICY INT'L 129, 132 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/assessing-quality-competition-policy-case-horizontal-merger-enforcement/2009horizontalmerger.pdf (addressing the criteria for the effective assessment of merger decisions as 1) whether the merger policy has improved economic performance by reducing the price or improving the quality of goods or services; 2) whether the individual competition systems minimize unnecessary implementation costs within and across jurisdictions; and 3) whether the competition system is committed to a process of continuous reassessment and improvement).

⁷ OECD, Impact of Evaluation of Merger Decisions, *supra* note 3, at 13.

⁸ Fabienne Ilzkovitz, *Ex-Post Economic Evaluation of Competition Policy: The EU Experience*, VoxEU –CEPR (Aug. 27, 2020), <https://cepr.org/voxeu/columns/ex-post-economic-evaluation-competition-policy-eu-experience>.

of merger remedies, especially given the scope for arbitrage when it comes to assessing non-price effects. Where, however, *ex post* reviews extend to non-price effects, there must be objectivity in the determination of such factors and transparency in the way such reviews will be conducted.

9. The OECD roundtable on the impact of evaluation of merger decisions provided the following guidance to competition authorities when conducting *ex post* merger assessments:

- Reviews should be conducted on a “regular, pre-determined basis, using wide representative samples of merger decisions.”⁹
- The methodology utilized by the agency should be “sufficiently flexible to take into account the differing priorities of and resources available to any given competition agency” and should be “consistent over time (allowing for fine tuning and incremental improvement).”¹⁰
- Authorities should give consideration to “the use of independent assessments of past merger decisions, as opposed to competition agencies relying solely on self-evaluation.”¹¹

10. BIAC agrees with this approach and emphasizes that it is equally important for the agency to make the results of each assessment publicly available to ensure transparency and certainty.¹²

2. Overview of Proposed Benefits to the *Ex Post* Review of Merger Remedies

11. BIAC supports the OECD’s *Reference Guide on Ex Post Evaluation of Competition Agencies’ Enforcement Decisions* which identifies the following as being the key benefits associated with the *ex post* review of merger remedies:¹³

- learning from past experiences and improving subsequent decision making;
- determining whether a specific decision was correct;
- testing assumptions and expectations;
- improving analytical tools and economic theories;
- better understanding competition enforcement in specific sectors; and
- gathering evidence on the actual impact of specific cases.¹⁴

⁹ OECD, Impact of Evaluation of Merger Decisions, *supra* note 3, at 148.

¹⁰ *Id.*

¹¹ *Id.*

¹² See OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 27.

¹³ OECD, Reference Guide on Ex-Post Evaluation, *supra* note 2, at 7-10.

¹⁴ Per the Call for Contributions on the Roundtable on this topic, in conducting *ex post* merger remedy assessments, competition agencies will look at mergers retrospectively with the aim of determining whether the remedy imposed on merging parties succeeded in rectifying competition harms that the relevant agency predicted during its *ex-ante* assessment of the merger.

12. Evidently, *ex post* review of merger remedies are welcomed where these result in the improvement of continued decision making of competition authorities. The *ex post* evaluation of previous merger remedies can, therefore, be regarded as an important element of a competition agency's quality assurance efforts.

3. Overview of the Challenges Posed by the Ex Post Review of Merger Remedies

13. While there are a number of benefits associated with the *ex post* review of merger remedies, the challenges involved in such assessments also present a certain risk to business.

3.1. Cumulative Impacts on Costs

14. Merger control generally envisages (i) the assessment of a transaction prior to its implementation (*ex ante* enforcement), (ii) the imposition of remedies where there is reason to believe that a transaction might result in competition concerns, and (iii) the monitoring of such remedies within a delineated time period.

15. The above processes impose significant cost and resource constraints on businesses, particularly in multi-jurisdictional transactions and transactions which may be assessed by newer, less established competition agencies (whose review processes may be less established and therefore predictable).¹⁵

16. The additional costs created by *ex post* merger reviews has also been recognised in the OECD's Background Note. It is noted that the costs to stakeholders involved in *ex post* assessments are uncertain and cannot be accurately estimated. Such costs ultimately depend on the level of complexity of the respective remedy under review¹⁶ as well as the objectives and underlying goals of the relevant assessment. Assessments which are undertaken with broad objectives (for example, assessments which are aimed at considering the impact of remedies on competition effects and non-competition effects) are likely to result in increased costs to business as opposed to assessments which are undertaken on a narrow set of objectives.

17. Additionally, the costs of *ex post* merger assessments can extend beyond financial costs and may even lead to reputational damage to businesses as it can be difficult to distinguish *ex post* assessment of mergers and enforcement undertaken by an agency.¹⁷ These costs will be substantial, particularly where, due to other challenges associated with *ex post* review, the *ex post* review studies remain ineffective.¹⁸

¹⁵ Int'l Competition Network, Mergers Working Group, Report on the Costs and Burdens of Multijurisdictional Merger Review (Nov. 2004), <https://centrodec.files.wordpress.com/2015/07/report-on-the-costs-and-burdens-of-multijurisdictional-merger-review-2004.pdf>.

¹⁶ See OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 14.

¹⁷ *Id.*

¹⁸ *Id.* at 14-15.

18. The *ex post* review of merger remedies not only places financial and capacity constraints on businesses, but also on the relevant competition agency itself. The risk here is that resources can be diverted away from *ex ante* enforcement.¹⁹

3.2. Risk of Subjectivity in Identifying Sectors for Review and the Role of Third Parties in the Assessment Process

19. The OECD's *Reference Guide* highlights the following characteristics of *ex post* merger review of remedies:

*An ex-post evaluation involves a qualitative and, where possible, quantitative assessment of the actual effects that the decision has had on the relevant market. To perform such an assessment it is necessary to have quantitative data and qualitative information on the market at the time when the decision was made and on how the market has evolved afterwards.*²⁰

20. There is an inherent risk that competition authorities divert focus in enforcement towards specific sectors, resulting in the concentration of *ex post* reviews being conducted in that particular sector. The selection of cases for the *ex post* review of merger remedies will, generally, result in trade-offs as a result of having to select cases of a truly representative basis (ensuring maximum objectivity in selection), on the one hand, and accounting for e.g., data availability, sector mix, and/or particularly insightful cases, on the other.²¹

21. There are a number of factors which may influence an agency's selection process for *ex post* reviews, including timing, availability of data, and sensitivities or ongoing enforcement and a particular interest in a merger or sector.²² The consequence of certain sectors being more heavily regulated than other sectors from an antitrust perspective contributes towards the existing uncertainties for businesses in more heavily regulated sectors.

22. Broadly, there are two types of *ex post* reviews of merger remedies conducted by competition authorities:²³

- The first type is an immediate follow-up, conducted shortly after the merger remedy is implemented, to determine whether the implementation of the remedy was completed correctly in line with the instruction provided by the relevant agency. A competition authority may also, *inter alia*, consider informal interviews with the purchaser of divested businesses, the merging parties, and/or other market participants.

¹⁹ See Menesh Patel, *A Proposal to Invigorate Ex Post Merger Policy*, COMPETITION POLICY INT'L (June 6, 2021), https://www.pymnts.com/cpi_posts/a-proposal-to-invigorate-ex-post-merger-policy/.

²⁰ OECD, *Reference Guide on Ex-Post Evaluation*, *supra* note 2, at 17 (emphasis added).

²¹ If the participation of market players in such studies is to be voluntary, data availability could pose a very significant constraint on the scope of assessments in some industries.

²² See OECD, *Ex-post Assessment of Merger Remedies – Background Note*, *supra* note 4, at 18.

²³ Int'l Competition Network, *Merger Remedies Guide* 28 (2016), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

- The second type of review, which is more periodical, is more formal and envisages a comprehensive study of remedies in different merger cases and the competition authority's remedy process. In this regard, the competition authority can interview the merging parties, the purchaser, other potential purchasers, competitors, customers, and suppliers as well as the trustees involved. Moreover, information about the market can also be requested from the merging parties and other market participants.

23. In addition, there is a risk that *ex post* reviews might also include assessments which result in the modification of existing merger remedies. In such instances, this would significantly increase the degree of uncertainty that businesses may face and would necessitate that these types of *ex post* merger remedy reviews be subject to a finite period of review.

24. BIAC recommends that reviews be guided (and indeed limited) by the purposes of improving future merger remedy decisions rather than imposing further remedies on the relevant merged entity. In this regard, in conducting studies into qualitative elements, a competition agency might seek to gather information from all relevant stakeholders, who might be the primary source of information for the purposes of the review.²⁴ The *ex post* review of merger remedies must, however, avoid relying solely on third parties (i.e., competitors, suppliers and customers) who might have an incentive to submit exaggerated and/or inaccurate evidence as to the efficacy of a particular remedy.

25. To further mitigate against the risk of *ex post* reviews leading to over-enforcement, and to ensure a greater degree of objectivity, BIAC recommends that competition authorities do not conduct these *ex post* reviews themselves but rather by an independent outsourced party (particularly where specialized expertise is required for the relevant *ex post* assessment).²⁵ Where competition authorities do conduct these *ex post* reviews themselves, the process regarding the collection of evidence and decision making ought to be transparent.

26. The OECD has previously noted that a toolkit for the *ex post* evaluation of merger decisions should not propose a one-size-fits-all approach and that it should rather include appropriate methodologies and examples for competition authorities to follow.²⁶ *Ex post* review of merger remedies should be qualified by best practice guidance involving a set criterion, which is transparent and clear to business. Consultations with the impacted companies on the scope and relevant parameters in the context of a specific *ex post* review would also be welcomed. While it is clear that *ex post* assessments can impose a significant financial burden on businesses, having set guidance on the relevant criteria and instances in which an *ex post* review may be conducted will assist in creating certainty for businesses and would enable relevant stakeholders to prepare systems for data collection in order to decrease the burden placed on them.²⁷

²⁴ See OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 23.

²⁵ *Id.* at 21.

²⁶ OECD, Impact of Evaluation of Merger Decisions, *supra* note 3, at 15.

²⁷ See OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 30.

3.3. Time Window for *Ex post* Review

27. To ensure that merged entities have clarity and certainty in relation to *ex post* reviews, competition authorities should only be provided with a limited period within which to conduct an *ex post* review of imposed merger remedies. By ensuring predictability and certainty in the process, such delineated time windows should be applicable to the *ex post* reviews that are conducted shortly after the implementation of a particular merger (i.e., those canvassed in the first type of review in para 22 above). Time limitations on *ex post* review are particularly important for multinational mergers that have been assessed and pronounced on by various competition agencies under their respective competition regimes.

28. There are also challenges associated with determining an appropriate time window within which competition agencies ought to conduct *ex post* reviews; to obtain accurate data for an *ex post* assessment, an agency would need to conduct a review after the relevant remedies have become effective (often only taking place sometime after the agency's merger decision).²⁸ This must, however, be considered against the increased complexity associated with conducting an *ex post* review long after the merger was concluded.

29. Uncertainty can result in instances where the appropriate time window within which to conduct an *ex post* review is determined on a case to case and between different sectors. Accordingly, BIAC would support a time window for the conclusion of the respective review of between three to ten years post-implementation of a merger.²⁹

30. While agencies may argue that limiting the time period within which a merger may be subject to *ex post* review prevents agencies from addressing longer-term anti-competitive effects, in many jurisdictions, this may be adequately addressed by conducting market studies and/or imposing sanctions and/or remedies on firms engaging in prohibited conduct. Accordingly, these are the appropriate *ex post* tools where anti-competitive conduct is identified in an *ex post* review.

3.4. A Higher Standard of Review for *Ex post* Merger Reviews

31. In conducting *ex post* merger remedy assessments, qualitative measures and economic models are commonly used. Merger decisions can also be evaluated with less-resource intensive approaches where there are similar mergers occurring in the same markets over a period of time.³⁰

32. Accordingly, an *ex post* assessment of merger remedies allows for the investigation of whether the economic arguments applied by the antitrust authorities to evaluate the competitive effects of mergers have performed well in predicting the price and market share effects of the mergers.³¹

33. It remains difficult to predict whether alternative or no remedies would alter the outcomes of mergers which have been approved subject to remedies. As such, competition agencies would have to undergo a significant counterfactual analysis to determine whether

²⁸ *Id.* at 19.

²⁹ *Id.*

³⁰ *Id.* at 14.

³¹ Nina Leheyda, Patrick Beschorner & Kai Hüscherlath, *Ex-post Assessment of Merger Effects: The Case of Pfizer and Pharmacia 4* (ZEW – Centre for Eur. Econ. Rsch., Working Paper No. 11-035, 2003), <https://ssrn.com/abstract=1852389>.

specific remedies were necessary to off-set anti-competitive effects that are estimated to have resulted from a merger. This poses a challenge to the review of mergers *ex post*.

34. The *ex post* review of merger remedies must be limited to the review of factual and objective quantitative data and qualitative information regarding the effect of a particular merger remedy on the pricing/competitive landscape in a particular market. While certain competition agencies have conducted reviews without basing these on quantitative methods, BIAC stresses the necessity for the use of quantitative elements in order to improve the accuracy and effectiveness of an *ex post* review.³²

35. Additionally, competition agencies must be guarded against using *ex post* assessments as a means of gathering information for their enforcement efforts.³³

36. Accordingly, guidance and clarity on the relevant parameters and purpose for an assessment remain vital for business.³⁴

4. Conclusion

37. The *ex post* review of merger remedies is a valuable tool that can assist competition agencies to validate their assessments and thus improve the efficacy of their future merger related decision making.³⁵ In addition, the results of *ex post* reviews can provide benefits to businesses by providing more clarity on why certain remedies might be imposed by a relevant agency thus ensuring adequate guidance for third parties on merger remedies following the respective review.³⁶ Increased certainty, transparency and predictability are clearly beneficial to business and agency alike.

38. It is, however, that the *ex post* review of merger remedies is forward looking in its purpose: it must be limited to the analysis of the efficacy of merger remedies so as to improve future decision making and not be (ab)used to revisit and indeed revise merger remedies previously imposed. To limit the burden on businesses, it is crucial that the *ex post* review is done in a timely and transparent manner, and in accordance with objective pre-determined principles to limit the uncertainty that such reviews are liable to give rise to. In this respect, the *ex post* review of merger reviews should avoid relying on non-objective factors, such as public interest considerations and other non-competition factors, as these pose additional uncertainties to business and to the standard for analysis.

³² OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 24.

³³ *Id.* at 31.

³⁴ *Id.*

³⁵ OECD, Impact of Evaluation of Merger Decisions, *supra* note 3, at 175.

³⁶ OECD, Ex-post Assessment of Merger Remedies – Background Note, *supra* note 4, at 28.