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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Call for Country Contributions --

4-5 April 2017, Managua, Nicaragua

The attached document is circulated in preparation for the discussion under Session II of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua. Delegates are requested to send written contributions for that session to the Secretariat by 10 March 2017 at the latest. Advance notice of contributions before or by Thursday 23 February 2017 would be useful.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session II **Merger Control in Latin America and the Caribbean - Recent Developments and Trends**

CALL FOR COUNTRY CONTRIBUTIONS

Introduction

1. This request for contributions is circulated in preparation for the discussion to be held at the 2017 Latin American and Caribbean Competition Forum (LACCF) on the topic of “**Merger Control in Latin America and the Caribbean – Recent Developments and Trends**”.
2. You are invited to prepare and submit a concise and synthetic written contribution for this session. In this call for contributions, we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this is neither prescriptive nor exhaustive. You are free to raise other relevant issues that reflect on your experiences.
3. To assist the OECD Secretariat in planning the session, please inform us by **23 February 2017** if you intend to submit a contribution. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [Angelique.Servin@oecd.org] and copied to Lynn Robertson [Lynn.Robertson@oecd.org] by **10 March 2017 at the latest**. Country contributions will be circulated to participants through the LACCF website www.oecd.org/competition/latinamerica/ and www.laccf2017nicaragua.com/. Furthermore, if you would like to circulate other relevant material, such as your Merger Guidelines or relevant decisions on cross border mergers, please submit a copy to the Secretariat before **10 March 2017**.
4. A Secretariat Paper will be distributed in advance of the meeting and can be used as a starting point for discussions in this session. The Annex identifies a number of relevant topics for discussion and suggested reading material. The list can inform the preparation of contributions but should not limit the debate nor the contributions of the issues discussed in this letter.

Background and Suggested Topics for Discussion

5. Although most mergers are beneficial to competition, they may create or strengthen the ability or incentive of firms to exercise market power post-merger, either unilaterally or collectively. The possibility that a merger may result in price increases, economic inefficiencies, deplete the quality of products or reduce consumers' choices, is the reason why mergers of a certain size are subject to review by competition authorities.

6. Most jurisdictions with a competition law in Latin America and the Caribbean have adopted some kind of merger control system. However the experiences with merger control vary significantly across the region. Some jurisdictions have developed a formal merger control system and have gained by now significant experience with enforcing it. A number of jurisdiction still don't have a merger control system in place, and others have just adopted legislation in this area but have no (or very limited) experiences in this area.

7. Differences do not only relate to the uneven stages of development of the merger control systems across countries in the region, but they also concern the specific features of the national merger control systems. This is the case, for example, of the types of transactions which are covered by the merger control system; the jurisdictional criteria to establish the jurisdiction of a competition authority; the legal tests used to assess whether a transaction may have anti-competitive effects; the economic tools used to measure the effects of the transaction on competition; and the means used to remedy any possible anticompetitive effect of the transaction.

8. This purpose of this session is to analyze recent developments in merger control in Latin American and the Caribbean. The session will address the changes that jurisdictions in the region have experienced both in terms of their legal rules and with regards to the analysis they undertake when assessing the competitive effects of a transaction. Particular attention will be paid to: the reasons jurisdictions had to introduce pre-merger control; the legal tests applied by each jurisdiction to determine the effects of a merger; the criteria used to impose remedies when feasible; and the manner in which they address cross-border transactions that require coordination with other Competition Authorities.

9. Beyond reviewing in general the recent trends in the development of merger control in the region, the roundtable discussion will focus on two issues in particular.

- First, *the use of merger remedies by competition authorities*. When a competition authority establishes that a merger has anticompetitive effects, the transaction will normally be prohibited unless there are remedies that isolate or eliminate the anticompetitive effects created by the transaction.

Remedies may be *structural, behavioral* or a *mix of both*. They are structural when aimed at restoring or maintaining the competitive structure of the market, or behavioral when aimed at influencing the way in which the merged entity will behave in the market. Structural remedies are usually preferred by authorities because they tend to be a "one off" solution to restore or maintain competition in the market, whilst behavioral remedies demand ongoing monitoring of their compliance by the authority. Delegations are invited to discuss their experiences with the design, implementation and monitoring of remedies and the challenges that remedies raise for them.

When there are no remedies available to maintain or restore competition, the Authority will either sue to block the merger (if the legal regime is one in which the Authority acts as claimant before a Court of Law) or will unilaterally block the transaction (if the legal regime is one of Administrative law). However, there are no hard and fast rules to determining what constitutes

sufficient harm to either prohibit or allow the merger to proceed with remedies. Based on case studies across Latin America and the Caribbean, this session will discuss the standard that agencies apply to prohibit an anti-competitive merger or to approve it subject to conditions, and the decision making process that agencies go through when making such determination.

- Second, ***the challenges raised by increased cross-border merger activity***. In the past years, the number of multi-jurisdictional merger transactions that need to be reviewed by different Competition Authorities has increased significantly. A growing number of mergers have market effects in different jurisdictions, and are subjected to parallel reviews by multiple agencies. The issue has become especially sensitive in the past ten years when several jurisdictions have introduced pre-merger review regimes.

Differences in criteria for notifying mergers, in tests for determining whether a transaction has anticompetitive effects, or in the approach that Authorities take *vis-à-vis* remedies are now becoming a key challenge in a more globalised economy. This is something that has increased the need for more coordinated action between competition authorities. Delegations are invited to present their experiences with cross-border merger enforcement and to discuss the challenges that regional or global deals raise when it comes to coordinate the outcome of the investigations or the design of effective remedies across borders.

ANNEX

SUGGESTED ISSUES FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

Please note this is a not a questionnaire. Questions are provided to guide your contribution.

1. Please provide a brief description of your merger review regime, its background and its development over time. Please focus your submission particularly on recent developments and/or changes and the reasons behind them.
2. Please describe the economic and legal tests applied in your jurisdiction to determine whether a transaction has anticompetitive effects or not. If recent developments on this issue have occurred in your jurisdiction, please do expand on them.
3. Please discuss the criteria followed by your jurisdiction when imposing merger remedies, either structural, behavioral or both. Do discuss the challenges your jurisdiction faces when negotiating or imposing remedies. Practical case examples are highly appreciated.
4. Please discuss whether your jurisdiction has analysed multijurisdictional mergers and whether the approach undertaken by the Authority changes depending on whether the transaction is local or international. Cite any relevant multijurisdictional case that your authority has analysed and the lessons it learned from such experience.
5. Please discuss the importance of coordinating the outcome of a merger with other Competition Authorities when addressing cross-border transactions. Concrete case examples are highly appreciated.
6. Please discuss the influence that the decision taken in another jurisdiction has on the outcome of the case in your jurisdiction.

SUGGESTED READING LIST

- Interamerican Development Bank IDB – Organization for Economic Cooperation and Development OECD, “Merger Control Laws and Procedures in Latin America and the Caribbean”, 2005. Available at <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38835612.pdf>.
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- OECD Geographic Market Definition across National Borders, 2016. Available at, <http://www.oecd.org/daf/competition/geographic-market-definition.htm>.
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- OECD Public Interest Considerations in Merger Control, 2016. Available At, <http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm>.
- OECD Jurisdictional Nexus in Merger Control Regimes, 2016. Available At, <http://www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm>.
- UNCTAD, International Cooperation in merger cases as a tool for effective enforcement of competition law, (2015), Available at, http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8d4_en.pdf.