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Executive Summary of the roundtable on Conglomerate effects of mergers

Annex to the Summary Record of the 133rd Meeting of the Competition Committee held on 10-16 June 2020

10-16 June 2020

This Executive Summary by the OECD Secretariat contains the key findings from the discussion of the roundtable on Conglomerate effects of mergers held during the 133rd meeting of the Competition Committee on 10-16 June 2020.

More information related to this discussion can be found at
http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm

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Executive Summary of the roundtable on Conglomerate effects of mergers

By the Secretariat[1]

On 10 June 2020, the OECD Competition Committee held a meeting to discuss conglomerate effects of mergers. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the expert panellists, the following key points emerged:

1. Conglomerate mergers bring together firms that are not currently market competitors, or in a supply relationship with one another. These mergers are generally not a major focus of merger enforcement. Indeed, relatively few authorities have challenged a conglomerate merger in recent years.

Only a small proportion of conglomerate mergers are challenged. When a merger does not result in the removal of a competitor from a market or vertical integration, economic research has found that competition harm is likely to arise in specific situations. On the other hand, empirical evidence on the impact of conglomerate mergers is much more limited and there is a broad recognition that conglomerate mergers can give rise to significant efficiencies.

On the supply side, this can include harnessing economies of scope when the production process for the products is similar. In addition, conglomerate mergers can help overcome investment hold-up problems, quality control issues and pricing inefficiencies when they join together producers of complementary goods (although some have questioned whether a merger is required to achieve these effects). On the demand side, conglomerate mergers can generate efficiencies in the form of one-stop shopping, compatibility among complementary products, and, for digital markets, common user interfaces.

2. While they only arise in a minority of cases, there are situations in which conglomerate mergers could give rise to competition harms. In particular, when a conglomerate merger involves firms with market power in at least one market, there may be harm to competition if the post-merger firm has the ability and incentive to either foreclose competition or raise rivals' costs.

Some authorities focus their attention on conglomerate mergers that will have potential future vertical or horizontal impacts. In particular, a conglomerate merger may give rise to vertical concerns if it involves the producers of two inputs that are then combined to make a final product. Horizontal concerns could arise if a conglomerate merger reduces the competitive pressure on firms producing similar products to innovate, thus harming future horizontal competition.

Purely conglomerate merger theories of harm traditionally focus on the risk that the post-merger firm will bundle or tie the pre-merger firms' products together. Tying means that a firm requires its customers to purchase one or more "tied" products if they wish to purchase a "tying" product. It can be achieved through technical or contractual means. Bundling can be considered a form of tying, and occurs when a firm offers multiple products together in a single package. It can do so by either refusing to make the products available on a

[1] This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the discussion, the delegates' written submissions, and the panellists' presentations.

standalone basis, or offering the bundle at a discount. Bundling and tying theories of harm generally focus on products that are complements (meaning that they are consumed together), although in specific circumstances, harm may also arise when substitute or unrelated products are bundled or tied together.

To evaluate the risk of post-merger bundling and tying as a foreclosure strategy, agencies look at the ability and incentives of the post-merger firm to engage in such practices. The ability of the firm to bundle or tie will depend on technical feasibility, investment required (particularly for technical ties), and the presence of any offsetting buyer power. The analysis of bundling and tying incentives may be complex and controversial. In particular, economic research has involved significant debate regarding the conditions in which there will be incentives to engage in anticompetitive bundling and tying. This could include situations when the tying involves complements in markets that are not perfectly competitive. In addition, bundling and tying may be used to foreclose competition for substitute or even unrelated products if there are overlaps in consumers, and entry barriers that wold limit potential competitors' responses to these strategies (since a potential entrant would be required to offer all tied or bundled products in order to compete). Incentives to bundle and tie may also exist if it captures future sales of complementary products that are repeatedly purchased.

Finally, in a few cases, competition authorities have considered the risk that conglomerate mergers could give rise to horizontal co-ordinated effects. This is because a conglomerate merger that increases the structural symmetry among conglomerate firms in a market could increase multi-market contact – one of the contributors to collusion risk.

3. Some studies suggest that conglomerate mergers in digital markets may be relatively more likely to result in competition concerns. This is due to the inherent characteristics of these markets, and the existence of large digital conglomerates.

The characteristics of digital markets may increase the risks of traditional conglomerate merger theories of harm. Economies of scale, low marginal costs, economies of scope, feedback loops and network effects are common. While these characteristics can be a source of merger efficiencies, they can also generate incentives for the post-merger firm to tie and bundle. In other words, each represents a departure from the conditions of the single monopoly profit concept. Further, tying may be easier for firms to implement, given that limitations to interoperability (or withholding information that would enable interoperability) are generally feasible from a technical perspective and often part of creating a product "ecosystem."

In the special case where products are provided to consumers at a price of zero, as is common in many platform markets, dominant platforms may use bundling when it is not possible to lower prices in the market they are entering. In other words, bundling can make strategies to foreclose competition with subsidies from a monopoly market possible, even if the competing firms in the target market are charging a price of zero.

In addition, several new conglomerate merger theories of harm have been specifically tailored to digital markets. For example, envelopment refers to a strategy by a platform with dominance in one market to enter another platform market (whether the platforms are complements, substitutes, or unrelated) by bundling or tying the two platform products. As a result of network effects (from the dominant platform's existing user base) and economies of scope (due to shared technology and data), the competing platforms in the second market would be unable to compete. Network effects and economies of scope are generally crucial for the success of the strategy – without an overlapping user base (or potential user base), or at least substantial efficiencies in product development, the bundle or tie is not likely to be profitable. A variant of this strategy involves using a zero priced products to obtain consumer data collection consent that can be used to build up a user base in a related market. This strategy could prevent competitive threats from emerging in the origin market by denying potential entrants the ability to build up users and data in the related market.

Beyond these concerns, there are a range of concerns associated with certain conglomerate mergers that cannot be easily addressed through merger control, but which competition authorities may nonetheless wish to consider. Specifically, some have expressed concerns that post-merger firms with market power in several related markets could give rise to systemic risks, broaden the distortionary impact of subsidies or other state support, and concentrate lobbying and public advocacy power.

4. Competition authorities seeking to assess conglomerate mergers face several challenges, given that the risk of harm may be rare but, in some cases, very large. Further, the scoping of information requests and analysis may be complex given that the products in question will have no horizontal or vertical relationship.

In order to determine whether preliminary information gathering and analysis of a merger should take into account potential conglomerate effects (for those jurisdictions that do assess these affects), authorities can use certain preliminary indicators. In particular conglomerate harms are not likely to emerge unless at least one of the merging firms has strong market power, and the other market or markets feature significant entry barriers, economies of scale or network effects.

If these conditions do exist, additional risk factors could be assessed; including: (i) whether the products are complements and there are alternative uses or repeated purchases of one of the products; (ii) whether the products are weak substitutes or unrelated but feature substantial overlaps in consumers; (iii) whether bundling in tying is common in the markets and technically feasible; and (iv) whether there is a significant likelihood that one of the markets involved in the merger could be used as a stepping stone to challenge the merging firms' market power in another market.

When investigating conglomerate mergers, authorities face significant challenges in gathering evidence. They face the risk of increasing burdens on case handlers as well as merging parties with unfocused information requests. Thus, authorities can target their efforts, at least initially, on understanding the rationale for the merger, particularly the role of economies of scope, demand-side efficiencies, bundled discounts, and applying firm assets and know-how into new markets.

Authorities are also grappling with the question of whether it is more appropriate to address conglomerate concerns with ex-post enforcement, given that these merger theories relate to the risk of anticompetitive conduct. However, assessing conglomerate theories of harm in merger review can help prevent competition harm before it has manifested in a market – harm that could be difficult to undo if it leads to the exit of competitors, for example.

Finally, authorities face the challenge of selecting appropriate remedies to conglomerate concerns. Behavioural remedies may be one way to deal with at least some conglomerate merger concerns while preserving the efficiencies of such mergers. In particular, if there is a concern related to tying and bundling, a behavioural remedy could focus on preventing the use of such strategies. Indeed, several authorities have used behavioural remedies in conglomerate mergers, particularly when addressing concerns without a vertical or horizontal dimension. Other authorities have a clear preference for structural remedies or merger prohibitions when competition concerns arise. This preference is due to the challenges with administering behavioural remedies, as well as concerns about their effectiveness, although it could make conglomerate concerns more difficult to address – given the uncertainties associated with conglomerate theories of harm, authorities may choose to approve conglomerate mergers when their only alternative is prohibition.