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

**Summary of the discussion of the Roundtable on Disentangling Consummated Mergers:
Experiences and Challenges**

**Annex to the Summary Record of the 138th Meeting of the Competition Committee held on 22-24
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This document prepared by the OECD Secretariat is a detailed summary of the discussion of the roundtable on Disentangling Consummated Mergers: Experiences and Challenges held during the 138th meeting of the Competition Committee on 22-24 June 2022.

More information related to this discussion can be found at
<https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm>

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Summary of the discussion of the Roundtable on Disentangling Consummated Mergers – Experiences and Challenges

On 23 June 2022, the OECD Competition Committee held a roundtable to discuss experiences and challenges with the assessment of consummated mergers. The roundtable was chaired by Professor Frédéric Jenny.

The Chair introduced the topic and described how recent issues have led to the potential need of a wider application of ex-post merger review. He explained that the discussion would be structured in four parts: the existence and need for legal powers to review consummated mergers; the question of when and how the review of consummated mergers should be undertaken; the use of interim measures to facilitate the review of ex-post mergers; and finally, the design and implementation of remedies in this context.

The Chair introduced the three expert speakers who took part in the discussion: **Fiona Carlin**, partner of Baker McKenzie and the head of the EU competition and regulatory affairs practice in Brussels; Professor **Aviv Nevo**, George A. Weiss and Lydia Bravo Weiss, Professor at the University of Pennsylvania; and Professor **John Kwoka**, Neal F. Finnegan Distinguished Professor of Economics at Northeastern University. He also introduced a video by **Jonathan Kanter**, Assistant Attorney General for the Antitrust Division at the US Department of Justice, sharing his views on reviewing consummated mergers. **The Chair** thanked the Secretariat for the background paper and asked to summarise it.

The Secretariat explained that the background note reviewed the policy considerations arising in relation to designing effective remedies for consummated mergers with an anti-competitive effect, including those analysis of costs and benefits of disentangling consummated mergers. The note concluded that there are still only a few jurisdictions that have such powers and when they do exist, they have been rarely enforced. Moreover, that in recent years, a growing number of jurisdictions have adopted ex post merger reviews and others are considering them. Furthermore, that there are some important considerations that should guide authorities that assess consummated mergers, such as the effects that these ex-post investigations could have on the incentives to merge in the first place, and the fact that there might not be as much available and proportionate remedies or the cost and benefits of disentangling consummated mergers. Finally, it found that structural remedies / divestitures remain the preferable option, however, behavioural remedies are also considered.

The Chair launched the video by **Jonathan Kanter** on how the analysis of consummated mergers have been an essential part of the antitrust enforcement in the United States. He stated that although the best way to preserve competition is to prevent illegal mergers, it is imperative that competition authorities have powers to challenge consummated mergers and that those that likely harm competition should be challenged to seek remedies. In those cases, remedies would normally require a complete unwinding of the transaction through structural relief.

The existence and need for legal powers to review consummated mergers

The Chair opened the roundtable discussion and asked the Slovak Republic to explain whether there is a gap in enforcement in the jurisdiction because they do not have the power

to review consummated mergers and if the competition authority has a preference among the different alternatives to amend their competition law to give them such powers.

The Slovak Republic explained how in cases where transaction that do not meet the jurisdictional thresholds for merger notification, there can be an enforcement gap as many of them may have anti-competitive effects and are not scrutinized by the authority. As a small economy, there can be transactions where local dominant firms make transactions that are not reviewed by the authority given low turnovers in specific markets. A change in thresholds would not be a viable solution as this would cause a high burden on undertakings from other markets that do not have this issue. The Slovak Competition Authority thought about adding new notification criteria or a system where undertakings notify voluntarily, or the authority could seek for notification. In June 2022, two proposals to amend the competition law were presented. The first one was to have the possibility to ask for the notification if there was a significant threat of competition problems, but it was refused because of the legal uncertainty it would generate. The second one aimed at introducing domestic turnover thresholds in combination with a significant presence in the domestic market. This proposal was again refused by the business community.

The Chair highlighted that the problems discussed by the Slovak Republic were common to small jurisdictions and that one example was Portugal, who decided to keep thresholds based on relative market shares to avoid missing important transactions in small markets. **The Chair** turned to **Sweden** and asked to explain how they allow for voluntary notifications but also can request parties to notify their transaction even if it does not meet the thresholds. He also asked if this has worked out and how they deal with the uncertainty that this could generate or if the grounds to ask for notification are clear to the parties.

Sweden explained that their merger regime provides some scope for assessing consummated mergers if the total turnover threshold is met but not the individual turnover threshold, as the parties may voluntarily notify the merger and the authority has the power to order parties to notify it if there are particular grounds to do so. While in their guidelines, it is well explained what this means, e.g., situations where an already strong undertaking acquires small competitors one by one or for a strong undertaking in a concentrated market acquires a newly established undertaking that could possibly challenge the position of the acquirer in the future, the list of grounds is non-exhaustive. Although the authority has proven that the use of this power is very limited and the analysis very strict, further guidance on how the authority orders notification is expected in the future. One thing the authority has been looking at is whether further strategies can be put in place to identify potentially problematic mergers.

The Chair gave the floor to **Lithuania** to explain how the powers to review consummated mergers have been useful to them, as a small country, and how their approach differs from the review of ex-ante merger control.

Lithuania described how a legislative change in the past allowed the authority to review mergers ex post, although most of the transactions they review are still in an ex-ante context. This has allowed the authority to review so-called “killer acquisitions”, as well as transactions in small markets with high local impact. Regarding the specifics of ex-post analysis, it gives the opportunity to review data that otherwise may not be available. Instead of a speculative exercise, it is possible to investigate price rises that happened after the merger was consummated. However, some challenges come with this. The later the analysis starts, the more risk that the authority is not able to collect the necessary information and that the company would be so integrated that it would be difficult to unscramble the egg in case of a negative decision.

The Chair asked **BIAC**, whose contribution included some recommendations as to how competition authorities should exercise their discretion to review non-notifiable consummated mergers, to describe those recommendations and whether there is data to support their argument on how the use of those powers could disincentivize merger activity.

BIAC expressed its support to merger regimes that are built on predictability and legal certainty. In these sense, ex-post reviews must strike an appropriate balance between catching a great number of anti-competitive mergers and not disincentivising firms from engaging in pro-competitive or neutral transactions. **BIAC** has three main recommendations in this regard. First, that the review and disentanglement of notifiable consummated mergers should be limited to cases where the transaction was never properly notified or where the notification was significantly misleading or erroneous. Second, agencies must establish that the anti-competitive market effects are a direct result of that merger, not due to any other natural shift in market dynamics or developments. And third, authorities also need to demonstrate that the potential benefits of breaking up the consummated transaction outweigh the potential harms. Besides, the review should only occur within a limited time window and must have clear criteria to evaluate when those mergers may be reviewed, how and which remedial tools could be used. In instances where a merger has been implemented for a significant period, structural remedies become unfeasible and near impossible to implement due to the degree of integration between the firms.

The Chair gave the floor to **Belgium**.

Belgium explained that they had a very similar situation to that of Lithuania. The complainant asked the competition authority to order the disentanglement of a merger that was not notifiable based on the rules of abuse of dominance. In this case, the court decided that it could only be done if there was evidence of an abuse distinct from the mere concentric effect of the transaction and, thus, decided not to order the divestiture.

The question of when and how the review of consummated mergers should be undertaken

The Chair asked **Fiona Carlin** what the challenges of ex-post merger reviews are.

Fiona Carlin highlighted how, in her opinion, problems regarding higher profits and lower businesses dynamisms cannot be attributed to lax merger scrutiny and that there is compelling evidence that ex-ante merger control laws and existing analytical tools are not up to the task of preserving both competition and innovation. Even the United States, where the discussion is broadest, experience has shown the difficulties of unscrambling the eggs and cases where this has been possible are outliers. There is a concern that different recent legislative changes, for example in the European Union, Germany, Austria, and Turkey are adding layers of complexity for doing business. For a great many deals that raise no material of substantive problem, the regulatory complexity, the time, and money spent on taking all the regulatory boxes, is becoming disproportionate.

The Chair gave the floor to **Germany** who asked for the floor.

Germany mentioned the recent introduction of value-based thresholds and explained how this has helped them to review a handful of cases per year that otherwise would have scaped their scrutiny. Although there are still challenges on how to assess their effects, in cases such as acquisitions in the digital sector, the instrument has proven useful, and they are still open to discussions about their substantive test.

The Chair asked the United States and the United Kingdom, simultaneously, to discuss on the time frame to review consummated mergers and how useful it is to review them many years after their consummation.

The **United States** explained how, as a rule, they prefer to review mergers, who were small enough not to be scrutinized before or whose anti-competitive effects became evident later, as quick as possible after consummation. First, to stop the harm that they might be causing in the marketplace, second, to be able to take action and, third, because the faster the relief, the less of a chance the markets that issue undergo structural changes, that could lead to longer-term harm. Timing also has an impact on the amount of evidence needed to be collected, the measures they ask for during the investigation and the timing for litigation.

The **United Kingdom** described how their voluntary non-suspensory system has some practical implications that include the CMA reviewing consummated mergers every year. As the CMA can only review transactions within 4 months of their completion, it is relevant for them to identify those in a timely manner. In practice it also means that in most cases, transactions warranting review will have completed a relatively short time prior to the commencement of the review. Moreover, when the CMA opens an investigation, it will usually impose an interim measure to stop integration. As they only have a short window to decide whether the review is merited, it is important to proactively monitor M&A activity in the market. The CMA has a mergers intelligence team which can source information on mergers daily and present potential candidates for investigation into the mergers' intelligence committee, which meets weekly. Four months in practice is very tight between identifying the merger, understanding a little bit about how the market operates, and deciding to call-in.

The Chair noted that **Hungary**, when reviewing consummated mergers, considers primarily the potential effects and the market situation at the end of the procedure, regardless of whether intervention would have been needed at the time of the implementation of the merger. This means that a merger could be prohibited because after years of being implemented, the prospective on this merger has changed.

Hungary confirmed that the Hungarian Competition Authority considers primarily the potential effects and the market situation at the time of its decision rather than at the time of the implementation. The main consideration behind this is that the goal of the merger investigation is not an ex-post examination of market behaviour, because there are other legal tools for that, and rather the aim is to examine what kind of potential effects the merger can have on the future market courses and what effects can the remedies have in case they are needed. In this sense, the authority analyses pre- and post-merger data to conclude on the effects of the transaction in the market.

The Chair asked Brazil to present its experience with the Nestlé/Garoto case, which after more than 16 years of litigation has not yet ended. In the meantime, the market structure has changed and this has had an impact on the authority's view and decisions regarding the transaction.

Brazil explained how the case started and how CADE have made different settlements with the parties, first, to keep their operations separate until the analysis was done, and second, and most recently, to make partial disinvestments to solve the competitive concerns identified. To reach the latter, CADE analysed if the market for chocolate confectionary had changed with time and concluded that brand-preferences were still relevant, making it impossible for new entrants to come.

The Chair asked **Australia** if they rely on information that is collected ex-post and how do they assess if the information is useful or if they should rely only on information at the time the merger was announced to decide on it.

Australia explained that, given their prosecutorial voluntary notification system, they treat post-merger reviews as enforcement investigation and use their enforcement powers to gather evidence. However, there are some real practical barriers to analysing the effects of the transaction post-merger. One thing is that third parties are less willing to cooperate. Another one is that the authority needs to go to court to have the court order divestiture and courts aren't necessarily willing to do that. Furthermore, firms that are being investigated, in an enforcement context, have an incentive to ensure that there isn't evidence that might support anti-competitive effects being found. In this sense, they might, for example, delay price rises pending the conclusion of our investigation, or they may take a range of other strategic positions that make it more difficult for the authority.

The Chair pointed out that **Lithuania**, in its submission, described the EC media case, where the acquisition of information of what took place after the merger was useful to decide whether the transaction was originally one that the authority would object to.

Lithuania explained that the EC media case was a merger to monopoly, so the authority ordered a notification when it found out about it. At the time, the authority did a prospective analysis where it found that prices were going up anywhere between 20 and 100% depending on the product and that despite the price rise, customers did not switch as there were not many options available. After the analysis, the merger was blocked.

The Chair gave the floor to **Mexico** to describe the Nestlé/Nestec case where the authority used econometrics to assess whether the transaction was threatening competition and to answer whether in the analysis, the authority questioned the validity of the data given potential strategic decisions on the part of the companies.

Mexico's Competition Authority (COFECE) expressed that the main difficulty in consummated mergers investigations was the access to support the finding of a breach in the competition law. In the case of Nestlé/Nestec transaction, the companies, both the parties and its competitors, were extremely uncooperative to give information. At the end, COFECE was able to gather the data and analysed what happened during and after the merger, comparing the structure of the market and the prices. The case was closed as COFECE did not find evidence that the transaction was anti-competitive, however, the companies were fined in a parallel procedure for non-compliance with the authority's orders.

The use of interim measures to facilitate the review of ex-post mergers

The Chair moved to the third topic on interim measures and asked the **United Kingdom** to describe the importance of interim measures as a tool when reviewing mergers ex-post.

The United Kingdom indicated that to protect their ability to address competition concerns from completed transactions and to maintain the competitive structure of markets during the investigations, interim measures can be used to prevent further integration between the merging parties, but also to unwind integration that has occurred prior to the start of the merger investigation. The CMA would typically require merging parties to hold their own business separate and to not make any action that could somehow impair their ability to compete independently. The CMA also have strong tools to monitor, discover and penalize any breaches to interim measures. One common tool is to require a monitoring trustee to ensure compliance. A penalty of up to 5% of the total turnover can be imposed for non-compliance.

The Chair gave the floor to the **United States** to explain their use of hold-separate agreements.

The United States finds that tools such as hold-separate agreements, which are similar to the interim measures described by the United Kingdom, are useful in cases where it is still possible to intervene prior to the full integration of the businesses. The authorities have a legal power to ask a court to impose a hold separate agreement and, where possible, seek a negotiator to hold separate. The essential elements of such a hold separate agreement would be first, to get the parties to refrain from further integration of the assets and second, to assure that there is no dissipation of the assets, no actions are taken that will interfere with the ability to get an effective divestiture if that is finally determined to be the legal and optimal resolution. As monitoring these orders is complex for the authorities, they would normally seek for the appointment of a monitor trustee paid by the parties. These post consummation reviews have costs, but they can be used, with discretion, properly.

The Chair asked the **United Kingdom** and the **United States** whether they must render a decision withing a time limit on the merger itself when they use interim measures and how long was it.

The United Kingdom replied that they have four months to refer the case to phase 2 after the transaction was completed and made public. Posteriorly, phase 2 was 24 weeks maximum. **The United States** answered that there is no reference, as such cases are rare, but that as a general principle they would finish the proceeding as quickly as possible.

The design and implementation of remedies in ex-post merger reviews

The Chair turned to the last part of the discussion on remedies in ex-post merger reviews. He gave the floor to **John Kwoka** to comment on this.

John Kwoka started his presentation by stating that, in his view, optimal policy must have a balance between ex-ante and ex-post abilities to take action with respect to mergers. A recent paper written with Tomasso Valetti found that break ups were relatively common, quite feasible and sometimes, in fact, necessary. The paper provides different types of evidence about feasibility of break ups and lessons from actual examples and events. The first one had to with companies engaging in self breakups almost as frequently as they engage in mergers. The second one was that, regarding policy-initiated break ups, there is sufficient evidence on highly regulated industries such as public utilities, where break ups were ordered to split vertically integrated firms. In addition, the paper reviewed the United States' experience with consummated mergers, finding that they were also common. It also presents actions taken against dominant companies as another example where there have been structural remedies. In conclusion, break ups are relatively frequent, duly feasible but not unduly costly, they certainly are not necessarily destructive. Authorities often arrive at break-up strategies after unsuccessful efforts to avoid them, by implementing behavioural remedies. Finally, the most common break up strategies focus on fault lines, essentially reversing past mergers. Break ups should not be avoided without consideration of their benefits as well as their costs.

The Chair asked **Aviv Nevo** to react to the previous intervention and explain what difficulties he saw on the implementation of structural remedies.

Aviv Nevo stated that in his views, the review of consummated mergers should be a tool available to competition authorities and that the discussion lies on how to use it. In cases where small unreported mergers might have anti-competitive effects, it is appropriate to conduct ex-post evaluation. Where authorities should be careful to use these powers is when they use them to correct past mistakes or when they want to replace ex-ante analysis due to underenforcement. This is because these circumstances are the ones that raise uncertainty. In an ex-ante regime, the policy will still make mistakes. Some harmful mergers will go through, and some efficient mergers will be blocked. Beyond this, there

are practical difficulties with the ex-post assessment. One of them is the issue on how to define the ‘but for’ world for the transaction. There is also the scrutiny problem. As firms know they are being watched, they behave differently. Another problem might be establishing the causal effect or the variables to look at to analyse the effects and how to balance different dynamics of the competitive variables. Another key topic is if break up is feasible. It is probably more feasible than one might think or than one is led to believe by talking to the business community, but at the same time, it is going to be very difficult from a management perspective. The thread of a break-up might actually be a better solution than actually trying to push things forward.

The Chair asked **Mexico**’s about its experience involving structural remedies.

Mexico’s Federal Institute of Telecommunications (IFT) agreed with the fact that structural remedies in an ex-ante context could be difficult to implement when companies are already integrated. However, if companies are still not integrated, the use of this type of remedies as a tool becomes easy. This was the case of Telmex/Dish transaction where Telmex gave up its rights to the call option agreement for the shares of Dish voluntarily after the IFT’s investigation. However, one of the issues the IFT has faced with remedies in an ex-post context is that measures take considerably more time in comparison with the regular ex-ante evaluation.

The Chair gave the floor back to **Fiona Carlin** to comment on the imposition of structural remedies and to offer her final comments.

Fiona Carlin referenced that corporations indeed do reorganisations all the time, supporting the argument that those structural divestitures are doable, although costly. However, she highlighted that the remedies from a merger investigation come with different incentives and are forced by the regulators, sometimes without considering their proportionality, which should be a key factor.

The Chair concluded the session and noted that, on one hand, there are clear cases where there is a need to examine mergers ex-post and that in those jurisdictions where competition authorities have the powers to do so, the reviews usually happen in a short period of time after the merger has taken place. On the other hand, that there is an open discussion on proportionality and the criteria under which authorities use this tool. There is no clear view on the possibility or difficulty to use ex post data to assess the merger which had been notified. Finally, he concluded that, in general, authorities agree on the need for proportionality, and that there can and should be a reasonable use of the provisions to review consummated mergers.