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

**Executive Summary 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
June 2022**

23 June 2022

This Executive Summary by the OECD Secretariat contains the key findings from 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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Executive Summary of the Roundtable on Disentangling Consummated Mergers – Experiences and Challenges

By the Secretariat*

On 23 June 2022, the OECD Competition Committee held a meeting to discuss experiences and challenges on the assessment of consummated mergers. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by delegates and the expert panelists, the following key points emerged:

1. Whether competition authorities should be granted powers to review consummated mergers has recently been discussed in several jurisdictions. agencies with such powers report that they have proven to be quite useful.

Only few jurisdictions with a mandatory notification system for mergers have the power to review consummated mergers and to impose remedies in cases such mergers result in a significant lessening of competition. However, recently a number of jurisdictions have considered whether there is a gap in their merger regimes that could be potentially filled with powers to review consummated mergers. Reviewing consummated mergers is an intrinsic characteristic of voluntary notification systems, which allows parties to close a transaction without prior clearance from the competition authority.

A number of factors have fueled the debate on ex post review of consummated mergers. Studies that detected high levels of concentration in key sectors of the economy, such as financial markets, media, airlines, and telecommunications industries. Similar calls were made for acquisitions of small targets by large digital platforms in the digital / technology sector. In some jurisdictions, the public opinion, the press, as well as competition scholars called for regulators to reverse some of these so-called killer acquisitions, proposing that they had contributed to the strengthening of market power of the large digital platforms to the detriment of consumers. Ex post evaluations of individual merger decisions and retrospective studies have also pointed the fingers at the inability of remedies to restore competition, questioning whether certain approved mergers have resulted in consumer harm.

2. In cases where consummated mergers can be reviewed, criteria used by agencies to prioritise and perform their investigations, as well as an analysis of the implications for business of the competition authorities' powers to investigate consummated mergers are fundamental. Business have called on competition authorities that have powers to review consummated mergers to develop clear guidance for their review.

When competition authorities have the powers to review consummated mergers, there are important considerations, which should guide their use of such powers. Given that the review of consummated mergers might bring legal uncertainty and costs to the merging parties, competition authorities should make clear the criteria they will use to identify the transactions to assess ex post and the criteria they will apply to assess these mergers. This should include the types of anti-competitive harms that an agency may seek to address through a review, what remedial tools it may employ and the time available for such review.

* 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 panelists' presentations.

Moreover, the authorities should consider when deciding whether to review a consummated merger that such exercise could have implications for businesses, for instance a deterrent effect on mergers or innovation. This impact needs to be included in the competition authority's evaluation criteria to prioritise and perform its investigations.

3. Differences between the way jurisdictions assess consummated mergers arise with respect to the timeframe considered and the use of post-merger data. There is consensus on the fact that the less time passes between the closing of the transaction and its review, the less challenging the assessment would be.

Investigations of consummated mergers, as opposed to ex ante merger control, offer the possibility to rely on hindsight from the market response to the merger in order to assess the actual competitive effects of the transaction. In this respect, ex post analysis increases the availability of actual evidence of the competitive effects caused in the market. This makes it easier for authorities to establish the theories of harm and, in case of an ex-post merger investigation, the optimal design of the required remedies.

Information is crucial for the effectiveness of merger control given the need to correctly establish the impact of a transaction on consumers. Therefore, the ability to access such information after the completion of the merger facilitates the competition authorities' task significantly, including the design of effective remedies.

The less time that passes between the transaction and its review, the less troublesome the assessment would be. In one hand, as less exogenous factors would affect the assessment of the transaction's effect in the market and, in the other, as structural remedies might be easier to implement.

4. To address the risks of the passage of time and the risk that future divestitures become impossible or too costly compared to their benefits, some jurisdictions have implemented specific measures.

A hold separate order or interim measures, for example, keep the "eggs unscrambled" pending a final decision from the competition authority. This preserves the assets to be divested and maintains interim competition while the review of a consummated merger is done.

These measures have proven to be critical in the competition authorities' ability to impose effective remedies in consummated transaction and maintaining the competitive structure of the market during the merger investigation.

5. Important questions arise in relation to designing effective remedies for consummated mergers with an anti-competitive effect. While challenges occur when designing remedies in this context, structural remedies/divestitures remain the preferred option, though behavioural remedies are also considered.

Competition authorities have different experiences on imposing remedies in consummated mergers investigations. While some cases have presented significant challenges in the implementation of the remedies, others have proven that imposing structural remedies in this context is feasible. Furthermore, companies' breakups in other contexts are common and have shown that they can be feasible and effective, meaning that they can also be part of the alternatives used by competition authorities in the review of consummated mergers.

Moreover, when structural remedies are not a viable solution to the concerns identified, competition authorities have also considered behavioural remedies. In both scenarios, the design of remedies in an ex-post context allows authorities to rely on the hindsight from the market response to the merger and access information on how the merged entity operated after the consummation of the transaction. This implies that remedies can be

planned with more precision and in a more comprehensive way to avoid high monitoring costs and circumvention.