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Executive Summary of the Hearing on the Relationship between FDI Screening and Merger Control Reviews

Annex to the Summary Record of the 139th meeting of the Competition Committee

30 November 2022

This Executive Summary by the OECD Secretariat contains the key findings from the Hearing on the Relationship between FDI Screening and Merger Control Reviews held by the Competition Committee on 30 November 2022.

More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-fdi-screening-and-merger-control-reviews.htm

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Executive Summary of the Hearing on The Relationship between FDI Screening and Merger Control Reviews

By the Secretariat[1]

On 30 November 2022, the Competition Committee held a hearing to discuss The Relationship between FDI Screening and Merger Control Reviews. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion by the delegates and the expert panellists, the following key points emerged:

1. While merger control regimes are well established, regulatory initiatives introducing, expanding or substantially strengthening FDI screening have recently proliferated and grown in scope across advanced economies.

Based on OECD Competition Trends data, over the last 30 years, the number of OECD+5 jurisdictions (including OECD member States plus Brazil, Bulgaria, Croatia, Peru, and Romania) with a merger control regime in place grew from 20 to 43. This has led to thousands of notifications of transactions for review by competition authorities. As regards FDI regimes, for over 70 years, the general trend across OECD countries has been liberalisation of international investment which allowed foreign investments to expand and act as a key driver of globalisation. However, over the past 30 years, the number of OECD+5 that had an operational investment screening mechanism in place grew from five to 24, of which 23 covered several or all sectors of their economies.

The increment in FDI control mechanisms, especially on **national security grounds**, is explained by several factors, including the technological revolution; the shift to a multi-polar, contested, and more competitive international environment; and the increased use of tools of economic statecraft to gain power in the international system.

2. FDI screening reviews and merger control reviews are generally procedurally and institutionally separate, they pursue different goals and may not be necessarily triggered by the same corporate transactions.

FDI screening and merger control mechanisms can sometimes pursue aligned objectives and can overlap or affect each other, for instance as regards timelines or the development of remedies. For example, recent merger decisions have confirmed how both review mechanisms have concerns regarding **single-supplier risks** and thus how competition and essential security goals can be aligned.

However, in general, the two regimes pursue different goals. While merger control seeks to enhance consumer welfare and market efficiency, FDI screening generally aims at safeguarding essential security interests. Also, as regards triggering conditions, while most OECD jurisdictions use criteria based on the firm's turnover to identify transactions of sufficient weight and with a sufficient close nexus to require a notification before the competent authority, FDI screening regimes use more complex and varied parameters, typically referring to characteristics of the asset under acquisition (e.g., industry sector, physical location, sensitive technology), of the acquirer (e.g., foreignness, specific

[1] This executive summary does not necessarily represent the consensus view of the Competition Committee participants. It does however identify key points from the discussion, including the views of the expert panellists and the participants' oral and written contributions.

nationality or residency of the acquirer, state ownership of the acquirer), and of the transaction (e.g., whether it leads to a controlling or other significant stakes).

Apart from single-supplier risks being a common concern to the two mechanisms and possibly resulting in aligned goals of both reviews, other circumstances may give rise to **challenges in the interaction** between essential security interests (e.g., where the implicit or explicit exclusion of certain would-be acquirers leads to less competitive markets), and merger control reviews (which aim to prohibit mergers significantly lessening competition and clearing transactions that result in efficiencies).

3. The separation of FDI screening and merger control reviews is critical to ensure that they are both properly institutionalised, resourced and staffed, and achieve their respective goals.

In certain countries there are no specific institutions in charge of FDI screening, and competition authorities assess both the competition dimension and the national security dimension (**single authority model**). National security issues often come into merger control reviews in the form of public interest concerns. Most recently, several jurisdictions have moved to a **parallel review model**, in which competition and national security concerns are assessed by different bodies in separate proceedings under distinct rulesets.

On the one hand, the pursuit of (most often) different policy objectives in a single review may not be desirable, and may possibly lead to internal conflicts, or be inefficient, especially if considering that essential security concerns may arise even when competition concerns are not at stake and vice versa. Furthermore, competition authorities may lack the expertise or the democratic legitimacy to rule on essential security threats, especially when the notion of essential security covers additional strategic interests beyond the defence sector, as it is often the case today. These considerations have prompted some jurisdictions to establish separate responsible bodies enforcing distinct rulesets. There seems to be today a **consensual trend towards specialisation and establishment of dedicated authorities conducting parallel reviews**.

On the other hand, conducting distinct proceedings may add a further layer of burden and complexity on businesses that need to notify separate filings and undergo separate reviews, requests for information and remedies negotiations with potential implications on deal execution. It may also create a risk of misaligned decisions, especially as regards the design of remedies. This makes it necessary to identify circumstances in which some form of co-ordination between the authorities in charge of different reviews may be desirable, including on the exchange of information, timelines of review and design of remedies.

4. The introduction, expansion, or strengthening of FDI screening mechanisms raises the question of whether and how they interact and if they should be co-ordinated with merger reviews of the same transactions. Overlaps and challenges may indeed arise.

So far, the issues arising from alleged misalignment between the two review mechanisms have been rare, but in the future, there may be more intersections creating potential risks. FDI screening involves indeed an ever-growing number of sectors and essential interests beyond defence, including critical infrastructure, natural resources, data, communication assets or healthcare, which may result in more cases where trade-offs could arise, thus drawing attention to potential merits of identifying forms of co-ordination.

On the one hand, enhanced FDI screening may result in preventing pro-competitive acquisitions when firms' investments are not determined by purely commercial motivations but rather reflect the political agenda of a foreign government. Domestic entities, especially competitors, may also take steps to have foreign takeovers blocked in the interests of reducing competition or of clearing the way for their own acquisition. Furthermore, given

the priority that is accorded to essential security interests, the risk is that essential security interests will likely prevail over competition concerns or, if integrated in the same proceedings as public interest exceptions, will influence competition enforcement and introduce some form of political element in the final decision.

On the other hand, there may be instances of insolvency of a company (e.g., a firm in the defence industry) that can only be resolved by an acquisition from another company in the same industry. In such a case, an anticompetitive takeover might be positive from a national security perspective.

More broadly, regardless of possible misalignment, the increase in the complexity and volume of FDI reviews, especially on national security grounds, means that increased cooperation and secure information sharing with competition regimes will be necessary. However, **whether co-operation should go as far as co-ordinating parallel reviews depends on a case-by-case assessment**, as national security reasons may require a higher degree of autonomy and confidentiality of classified information, making it inappropriate to align reviews or have recourse to exchange mechanisms.

5. The design of remedies and mitigation measures under FDI screening and merger control may require close co-operation to ensure that they are effective and do not undermine each other.

Rather than blocking transactions, authorities under both review mechanisms often have recourse to remedies or mitigation arrangements addressing the concerns identified in the assessment. While these instruments are widely known in merger control, less information is available on arrangements adopted under FDI screening mechanisms, as their content is rarely made public.

The share of transactions in which mitigation measures under FDI screening have been applied as a fraction of the number of reviewed transactions remains relatively small, and the existence and contents of the mitigation measures is almost always kept confidential. Formal rules on the scope, content, conditions, and duration of application of mitigation arrangements under FDI screening are rare. Thus, the predictability (in terms of timeline and substance) of mitigation measures under FDI screening regime is still lower than under merger control rules, which can make it challenging to design commitments consistently.

Competent bodies should seek their respective views. Competition authorities should provide their views on the economic effects of proposed rejection of any foreign acquisition. Negative decisions may lead to a form of protectionism, harming competition, innovation, and efficiency. Some jurisdictions have already established different forms of co-operation between competition authorities and FDI screening bodies, concerning both procedural and substantive aspects, as well as formal mechanisms whenever trade-offs and needs for balancing of different interests may arise.