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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Executive Summary of the Roundtable on Out of Market Efficiencies in Competition Enforcement

Annex to the Summary Record of the 141st Meeting of the Competition Committee

5-6 December 2023

This Executive Summary by the OECD Secretariat contains the key findings from the Roundtable on Out of Market Efficiencies in Competition Enforcement held by the Competition Committee on 6 December 2023.

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Executive Summary of the Roundtable on Out-of-Market Efficiencies in Competition Enforcement

By the Secretariat¹

On 6 December 2023, the Competition Committee held a roundtable to discuss out-of-market efficiencies in competition enforcement. Considering the background note, the written contributions, as well as the discussion by delegates and expert panellists, the following key points emerged:

1. The approach to out-of-market efficiencies varies across jurisdictions, with few competition authorities open to considering efficiency claims in markets different from those where competition harm occurs.

The discussion on whether and how to deal with claims of efficiencies, arising in markets that are different from those in which harm to competition occurs, focused on cases where accepting such claims could cause an otherwise prohibited merger or agreement to be accepted, or at least remedies to be modified. The discussion covered mergers and anti-competitive agreements. Abuse of dominance and vertical cases often consider harm in one market against benefits in another but rarely treat them specifically as out-of-market efficiencies.

The current interest in the topic is mainly motivated by its relevance in two situations: multi-sided markets, where anti-competitive practices have differing effects on various sides of the market; and sustainability considerations, where the question is whether harm to consumers brought about by an agreement could be balanced by broader environmental benefits for the public, including in cases where these benefits might materialise later in time.

In many jurisdictions, out-of-market efficiencies are not considered at all or may be considered only in narrowly defined circumstances. For instance, anti-competitive agreements may be exempted on the basis of efficiencies, including out-of-market efficiencies, provided that the harmed consumers receive a fair portion of those efficiencies. Even in the jurisdictions where the legal framework allows out-of-market efficiencies to some extent, these claims rarely succeed.

2. There is often a relationship between the welfare standard adopted in a jurisdiction and the approach to out-of-market efficiencies.

Jurisdictions that adopt a total welfare standard are more open to consider out-of-market efficiency claims. There are also jurisdictions that follow a consumer welfare standard, but still do accept out-of-market efficiencies. Non-welfare standards, based on protecting competition in itself rather than some overall welfare assessment, are in principle the least compatible with out-of-market claims.

The type of claims can be very broad and include, for instance, consumer safety and the general economic interest, such as benefits in terms of employment, income, import substitution, investment, environmental care and gender policies, among other effects.

¹ This executive summary does not necessarily represent the consensus view of the Working Party participants. It does however identify key points from the discussion at the Roundtable, including the views of the expert panellists and the participants' oral and written contributions.

In some jurisdictions, the competition authority may clear a merger if the companies prove that the concentration will also have pro-competitive effects on a different market. These improvements must outweigh the negative effects on the market in which the merger takes place.

3. Distinguishing between the treatment of in-market and out-of-market efficiencies depends very much on market definition. What are out of market efficiencies for a narrowly defined market can be in-market efficiencies if the market is defined more broadly.

In recent years, market boundaries have often been defined less rigidly, for the purposes of competitive assessment, than in the past and this is not compatible with a strict distinction between in-market and out-of-market for efficiency claims. Some agencies might define markets more narrowly than they used to, which may inadvertently rule out more efficiency claims simply because they are out-of-market.

The use of market definition to decide eligibility of efficiency claims can be particularly problematic in multi-sided markets. A competition authority or court treating the various sides of the market as separate markets may be unable to fully consider the links between the markets, if out-of-market efficiencies are excluded.

Market definition aside, it may also be that the efficiencies themselves arise at an aggregate level and are not easily allocated to specific markets.

In practice, these points may not be relevant in many cases though, as speakers and delegations argued that there is a lack of empirical evidence of widespread efficiencies that are sufficient to offset harm.

4. The debate on the merits of out-of-market efficiency claims is not settled and there are doubts around the procedural and institutional issues related to considering and balancing these claims.

Out-of-market efficiency claims are subject to at least the same procedural barriers as in-market claims, which are rarely accepted by competition authorities.

The additional complexity and resource costs in evaluating such claims could lead, it was argued, to more anticompetitive mergers and conduct not being investigated by resource-constrained competition authorities. Moreover, some delegations and experts made the point that balancing across markets requires weighing the welfare of different consumers and that competition authorities and courts are not well positioned to make these determinations. In contrast, in other jurisdictions the legislator hands over to the competition authority the power to balance social or environmental benefits with competition harm in other markets.

Experts and delegates debated an alternative suggestion to a strict rule against out-of-market claims. The proposal was an approach whereby anti-competitive effects and efficiencies should not be traded off either across markets or even within markets, when that would lead to exploitation of economically vulnerable groups or result in unjust reallocations of wealth. This proposal was, however, dismissed by others on the grounds that it would still involve some balancing across markets and attaching weights to the welfare of different consumer groups.

Competition authorities usually have the discretion to balance out-of-market efficiencies and non-competition objectives through their decisions on which cases to pursue. In a way, prioritising certain cases and not others implicitly recognises some efficiency gains in those cases that are not pursued.

5. Considering out-of-market efficiencies is rarely determinant to the outcome of cases, since remedies can usually be designed to address the harm caused by a merger or agreement while keeping any demonstrable benefits.

There was consensus that all jurisdictions will seek remedies that keep the efficiencies and avoid the harm. As such, out-of-market efficiencies are an issue in the rare cases when it is not possible to design a remedy that disentangles the gains from the harm, such as joint production which makes carving-out remedies challenging.

The airline industry provides an example of markets where out-of-market efficiencies may arise. In the airline market, competition is usually route-specific, particularly for overlapping routes where airlines co-operate, while the efficiencies are almost always in transit connections. When evaluating airline alliances, authorities strive to solve this potential conflict by accepting commitments to address the competition concerns while reaping the out-of-market efficiencies.

6. Sustainability agreements can create benefits that go beyond the consumers that are directly affected by the agreement, raising questions about the treatment of such benefits.

Several competition authorities have published guidelines or statements discussing environmental benefits in horizontal agreements. In many cases, such efficiencies can only be accepted if they fully compensate harmed consumers, which might occur if either the benefits arose in-market or if the harmed consumers were also the substantially the same as those benefitting, even if the benefits arise in a different market. Some competition authorities have taken a different approach, on the principle that full compensation of harmed consumers should not be required of the efficiencies produced by certain kinds of environmental agreements, especially those relating to climate change.

Turning to practical matters, out-of-market efficiencies such as environmental and social outcomes are non-monetary benefits and require analytical tools outside competition authorities' expertise, such as assessing shadow prices for pollutants or long-run discount rates.

While some competition authorities that have taken environmental benefits into account have followed a qualitative approach, there are methodologies to provide quantitative estimates of environmental benefits. These rely on well-established methodologies already used in other policy areas.