Organisation for Economic Co-operation and Development

DAF/COMP/WD(2017)83

Unclassified **English - Or. English**

1 December 2017

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Hearing on Common ownership by institutional investors and its impact on competition - Summaries of Contributions

6 December 2017

This document reproduces summaries of contributions submitted for Item 6 of the 128th meeting of the Competition Committee on 5-6 December 2017.

More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm

JT03423983

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Common ownership by institutional investors and its impact on competition
-- Summaries of Contributions --

This document contains summaries of the various written contributions received for the discussion on Common ownership by institutional investors and its impact on competition (128th meeting of the Competition Committee meeting, 5-6 December 2017). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

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Argentina

In Argentina, institutional investors became relevant players in local markets in the early 1990s, when structural reforms provided the appropriate legal framework for the development of capital markets. These reforms laid the foundations for the development of local institutional investors and stimulated the participation of foreign investors. As a consequence, the number of institutional investors and their participation in local capital markets increased throughout the years. Unfortunately, local markets in Argentina are still relatively underdeveloped, even when compared to other emerging countries in Asia and Latin America.

According to the Argentine Competition Act (Law 25,156), economic concentrations that need to be notified for proper evaluation are always, in one way or another, transactions where control of one or more firms or assets is acquired. The CNDC has concluded that the notion of merger is bound to the notion of change of control. The CNDC has determined, by means of several advisory opinions, that transactions that imply a change in the nature of control (from joint control to exclusive control or vice versa) are also deemed mergers. Hence, when analyzing the presence of institutional investors as a qualified minority in a transaction, the CNDC typically assesses the substantial influence of these players on such matters, in order to determine if a change of control took place. If so, the merger control procedure will conduct a proper evaluation of its economic effects.

The CNDC has also stated that the rights that grant common control usually refer to budget decisions, the activity of the undertaking, investments, the appointment of directors and, in general, all issues that allow shareholders to influence the competitive strategy of the firm. In this manner, the CNDC established that holding one or more of such veto rights is sufficient to confer control. However, as long as the veto rights do not affect the firm’s commercial policies and competitive strategy, they will not be deemed sufficient to exert control of a firm.

The CNDC could take into account in their analysis the influence of minority shareholders in key decisions that would play a decisive role in the commercial policy of a firm, even in merger cases where substantial influence has not been identified or in antitrust cases where there are collusive theories of harm. The existence of common ownership, especially when institutional investors hold positions in multiple firms of the same market, is a recognized collusion facilitator factor that has to be considered. Common ownership has the potential to increase the likelihood of collusion.

In sum, the CNDC follows the principle of “economic reality” in order to identify the real controllers of a firm and the kind of control that is exerted. Therefore, institutional investors with substantial influence in enterprises force the CNDC to conduct an exhaustive analysis in these matters. Likewise, in cases where minority shareholders have no substantial influence at all, it becomes important to inquire if such passive control could represent a collusive conduct.

Brazil

Brazilian capital markets have experienced a significant increase in the engagement of institutional investors (including investment funds), despite the fact that companies with family control and intertwined are still dominant in the country. In this sense, one must question whether institutional investors are promoting a pro-competitive environment when applying funds in Brazilian companies. Additionally, one may raise the following competitive concern: are institutional investors in Brazil making systematic minority stock purchases in competitors? Are those situations on the radar of the Brazilian watchdog? From the empirical research carried out by these authors, it was possible to assess that the concern with minority interests in competitors has already been addressed by Cade in at least two cases. The concern with common ownership by institutional investors, however, has not yet been analyzed by the Brazilian antitrust authority, although it has been discussed on the background in one case. Thus, although there is still a long path ahead, there is an important direction that the discussion is necessary and that it is possible that the anti-competitive effects of the minority interests of these agents are not sufficiently addressed.

*Chile**

On August 30, 2016, Law No. 20.945 amended the Chilean competition law (or "DL 211"). Among other things, the law introduced two innovations regarding the structural links between competing companies. On one side, an express prohibition of interlocking in article 3 letter d) of DL 211; and, on the other hand, a system of mandatory notification on acquisitions of minority interests in the ownership of competitors, in its articles 4 bis (and also 4 transitory).

Regarding interlocking directorates, the law prohibits the participation of a person in relevant executive positions or as a director, in two or more undertakings that compete with each other, if the business group to which the undertakings belongs, has annual incomes for sales, services or other activities, over USD 4,3 million approximately.

Minority participation acquisitions must be notified if a company or entity that is part of its business group – by itself or through third parties –, directly or indirectly acquires more than 10% of the capital of a competing company, and both companies – the acquiring and the acquired – or the business groups to which they belong, each in the last calendar year have annual revenues for sales, services or other related activities exceed the limit established in the law.[1]

Minority participations by institutional investors are not covered by the above-mentioned obligation, unless that - by themselves or jointly with third parties- they maintain control over one of the competitors, or they had investments in another institutional investor. Nevertheless, institutional investors may also be investigated under the general infraction, which can be found in the first paragraph of art. 3 DL 211, on a case by case basis, to assess the effects and risks that they generate to competition on a particular market.

The Acquisition of Golden Cross Hive by Private Fund / LarrainVial (Rol FNE F1-2013) involved interlocking problems and the presence of minority interests among two competitors in the market of institutional health providers. The analysis of competition was addressed considering the existence of crossed financial interests between competing companies and the possibility of the agent to influence the decision making of some of them, which could eventually give rise to unilateral or coordinated behavior. The Chilean Competition Authority concluded that the presence of the link between the two competitors generated a negative influence on the incentives to compete by both players, a risk that was not sufficiently compensated by the efficiencies. Finally, the acquiring agent decided to dispose of its shares in both companies, thereby eliminating the potentially harmful nature of the operation.

[1] A threshold of 100,000 Unidades de Fomento, approximately USD 4.2 million, at October 30, 2017.

Germany

German merger control law contains provisions that address the acquisition of minority shareholdings. Furthermore, minority shareholdings may be subject to review under provisions addressing anticompetitive agreements. German law does not contain specific rules on common ownership by institutional investors. However, in certain circumstances, the simultaneous ownership of shares in competing firms by institutional investors may raise competition concerns. The German Monopolies Commission dealt with this issue in its Main Report in 2016. As a major contribution to the debate in Germany, the contribution summarizes the main findings of the Monopolies Commission on the competitive importance of institutional investors and proposes some possible solutions.

Mexico

According to the Mexican legislation framework, an entity with purely investment purposes is defined as that which acquires on behalf of their investors or partners, with limited rights, securities or participation in other economic agents for the sole purpose of obtaining returns for their investors, without having *de iure* or *de facto* control nor the intention to participate, manage or influence, directly or indirectly in the administration, operation, strategy or commercial policies of the economic agent.

In Mexico, common ownership by institutional investors has been relevant in the analysis of merger cases, in which the IFT has developed criteria regarding this particular issue. The IFT's Board of Commissioners has analyzed several cases where common ownership by institutional investors has been a potential concern, mainly related to coordination effects. The analysis determines the existence of "significant influence", based on a definition set forth by the Board and considers several elements that are evaluated on a case-by-case basis. Four relevant cases are presented:

- Acquisitions of DirecTV, GSF Telecom and Nextel México by AT&T;
- Acquisition of Level 3 Communications, Inc. by CenturyLink, Inc.;
- Acquisition of passive infrastructure from Axtel by MATC Digital; and
- Acquisition of TVI by Grupo Televisa (GTV).

Portugal*

Although currently common ownership/minority shareholdings are not an element conferring jurisdiction over a merger, they are nevertheless encompassed in the competitive assessment of a duly notified merger, pursuant to the Portuguese Competition Act. The Horizontal Merger Guidelines of the Portuguese Competition Authority – Autoridade da Concorrência (AdC) and the Merger Notification Form account for minority shareholdings, setting the grounds for addressing common ownership.

The Merger Notification Form specifically requests information on minority shareholdings in order to include, among others, situations of common ownership. This information might now be reinforced due to the recent publication of Law No. 89/2017. This Law transposes into national law Chapter III of Directive (EU) 2015/849, 20 May, approving the legal framework of the Central Register of Beneficial Ownership (CRBO). The CRBO will act as database under the Registry and Notary Institute, and will encompass the identification details of natural persons who own property (including non-controlling stakes) or have effective control over a company or other legal entity, either directly or through a third party. The main objective of the CRBO is to organize and keep up-to-date the identification and information regarding the beneficial owners of the covered entities in order to enhance transparency in business relationships and compliance with the duties for the prevention and combat of money laundering and terrorist financing.

In the merger control remit, the AdC has no experience record of assessing common ownership in competing firms by institutional investors in concentrated markets. However, there is experience in analyzing the issue of common ownership in acquisitions by companies other than institutional investors.

Russian Federation

In accordance with Article 28 of the Federal Law dated July 26, 2006 No. 135-FZ “On Protection of Competition” the following transactions are conducted with prior consent of the Federal Antimonopoly Service (the FAS Russia):

- acquisition of more than 25%, 50% or 75% of voting shares of a joint-stock company;
- acquisition of 1/3, 50% or 2/3 of shares of authorized capital of LLC.

Acquisitions of stocks (shares) within the mentioned thresholds could be conducted without prior consent of competition authority.

Thus, deals for the acquisition of shares held by minority shareholders, as a rule, are outside the scope of antimonopoly regulation. However, recently consideration of transactions of economic concentration, the acquirer of which is an institutional investor, has become more frequent for the FAS Russia. As the practice of the FAS Russia shows, many transactions with institutional investors are global, represent horizontal and (or) vertical mergers that require the approval of the Competition Authorities in a number of jurisdictions, including Russia.

In the process of considering the deals of economic concentration the FAS Russia did not have sufficient data to unequivocally answer the question of whether common ownership leads to negative consequences, such as price increase in the industries under consideration. One of the objective reasons hindering the comprehensive analysis of the transactions, should be mentioned the weak interaction between Competition Authorities in different jurisdictions, as well as the lack of mechanisms to fully monitor the relevant transactions.

In addition to antimonopoly control, the FAS Russia is a federal executive body empowered to control over implementation of foreign investment in business entities of strategic importance for the country's national defense and state security (hereinafter - strategic entities). As for the control of transactions of institutional investors that entail the acquisition of minority owners in case of acquisition of more than 5% of a strategic company, a foreign investor shall notify the transaction. This mechanism allows the FAS Russia to monitor corporate changes taking place in the structure of management of strategic entities, related, inter alia, to the acquisition of minority owners.

*Slovenia**

The Slovenian market is dominated by domestic investors. The major domestic institutional investors are government pension and state's capital asset management funds (SSH[2] and KAD), which are a sort of sovereign wealth funds. The situation in Slovenia may be quite specific in comparison with other countries because the state holds stakes in most undertakings present on the market.

In the meaning of the competition law SSH and KAD are part of a single economic unit. The direct or indirect extent of government ownership and control in different companies is a sum of the government investments and the investments of the two largest state funds in the same companies. Together via their ownership interests they own at least a blocking minority in many undertakings on the market; sometimes these undertakings are active in the same relevant markets.

The SCPA has recently dealt with a merger case involving the problem of common minority shareholding existence. The parties to the transaction had pre-existing structural links to competitors of the target company. The merger raised potential anticompetitive unilateral and coordination effects.

However, the legislation does not give to the Slovenian Competition Protection Agency (SCPA) the competence to review the minority shareholding. Its effect on the competition can be assessed only when it receives a merger that involves a pre-existing minority shareholding in a competitor. Since the theories of harm associated with the acquisitions of minority shareholdings are similar to those arising in the acquisition of control (horizontal and vertical), the application of the significant impediment of effective competition that is used in merger control should be more appropriate that the tests applied in 101 and 102 TFEU.

Finally, remedies as also other, non-competition limitations can be adopted to eliminate the competition concerns. These limitations can provide that investors invest only in one competing company and thus that investments are diversified across all industries.

Institutional investors could have an option to refrain from exercising their voting rights when they decide to make horizontal investments, but this option for many reasons can be less desirable and efficient than refraining from making investments in competing firms.

[2] SSH is the Slovenian Sovereign Holding, KAD is a fully state owned pension fund, Kapitalska druzba.

Ukraine

The activity of institutional investors plays a significant role in the functioning of the economy of any country. Institutional investors act as financial intermediaries, whose main task is to accumulate long-term capital and its efficient placement. For the economy of our country, institutional investors are quite new institutions whose activities are developing.

As of the end of 2016, the number of investment funds in Ukraine was 2,223.

As of 01.01.2017, on the Ukrainian stock market, asset management activity of institutional investors was carried out by 300 professional participants. During 2016, 16 securities licenses were revoked by the securities market regulator for the conduct of professional asset management activities of institutional investors. Investment funds in Ukraine can be of two types: corporate and unit investment funds. According to official data for 2016, total registered securities issued by institutional investors totaling UAH 466.37 billion / EUR 16.53 billion.

Due to the growth of the euro against the Ukrainian hryvnia at the end of 2014 the increase in the volume of institutional investors` registered securities issuance in UAH in the period from 2014 to 2016 shows a decline in the indicated values in euro.

On the securities market, there was a decline in the volume of institutional investors` securities trading, which in 2016 reached 70.39 billion UAH / 2.48 billion euros, which is less by 31.45% (in UAH) compared to the indicator in 2014.

Non-state pension funds are another type of institutional investors. Asset management companies manage the assets of non-state pension funds on the basis of a remuneration contract provided for under the terms of such an agreement. According to official statistics, today in Ukraine there are 64 registered non-state pension funds, of which 8 are corporate and 3 are professional.

According to rough estimates today, shares and bonds of enterprises in assets of non-venture institutional investors make up 21.6%, of which 18.11% are shares, 3.49% are bonds of enterprises.

The largest specific weight in the assets of non-venture institutional investors is taken by shares of enterprises in the processing industry, financial services and fuel and energy industry at the level of 7.24%, 5.82% and 2.11% respectively.

Non-venture institutional investors mostly hold the bonds of transport enterprises, courier services (3.11%), financial sector enterprises (0.21%) and construction (0.1%).

To analyze the impact of joint ownership on markets, the Antimonopoly Committee of Ukraine applies the following instruments:

- study the peculiarities of the establishment and functioning of institutional investors;
- consultations with regulators of financial services markets (National Commission on Securities and Stock Market, National Commission, which carries out state regulation in the field of financial services markets);

- research on applications for concentration, which participants are institutional investors and companies that carry out activities in their favor.

For the Antimonopoly Committee of Ukraine it is quite difficult to trace the presence of institutional investors in the relevant sector of the economy in order to prevent the concentration of this sector by certain institutional investors.

Investigating the impact of the appropriate concentration on the market poses some difficulties, due to the peculiarities of the relations between asset management companies and institutional investors, according to which the asset management company, on the basis of the contract, provides asset management services to the relevant institutional investor.

United Kingdom

The UK submission explores the potential effects on competition that may arise from common shareholdings, that is, holdings by large institutional investors in downstream competitors.

The emerging literature identifies the potential effect of common shareholdings on competition, either through affecting unilateral horizontal incentives to compete or through incentivising collusive behaviour. Some studies have shown that common shareholdings, as measured by the modified Herfindahl-Hirschman Index (MHHI), is associated with higher prices in certain sectors in the US. If this result is found to hold, it would raise interesting questions for competition authorities.

In this submission, we provide a brief overview of the studies and identify some areas where further work is required, including the need to test the robustness of the quantitative indicators used in the studies and, crucially, work to explore the mechanism through which any competitive harm might arise. We conclude with evidence on the extent of common ownership in the UK in two key financial sectors – retail banking and insurance.

*United States**

The U.S. antitrust agencies have not litigated a case involving common ownership by a single institutional investor.

Minority acquisitions solely for the purpose of investment of 10 percent or less of the outstanding voting securities of the issuer are exempt from premerger notification under the Hart-Scott-Rodino Act. In addition, certain institutional investors can acquire 15 percent or less of an issuer's voting securities, if solely for investment, without filing premerger notification. The agencies adopted a higher threshold for investments by institutional investors because, for a variety of reasons applicable at the time, it was understood that most of these entities did not participate in or affect the management of the companies whose stock they bought.

If an institutional investor were to orchestrate an anticompetitive agreement between two direct competitors, both competitors and the investor could be liable for a per se violation of the antitrust law. Similarly, passing competitively sensitive information between competitors through an institutional investor could expose the companies and the investor to liability.

Only a few papers on the effects of common ownership directly examine the mechanisms through which common ownership may affect the conduct of firm managers. One such paper hypothesizes that common owners may prefer to compensate managers of companies they own with incentive schemes based on an entire industry's performance in order to encourage a softening of competition. Other research, however, emphasizes that the specific characteristics of institutional investment are not conducive – or are even antithetical – to coordinated intervention by these firms in the product markets of companies that they own. We note that the new research does not explore the disparate incentives and frictions that complicate the analysis of institutional ownership and its effects on operating companies.

Institutional investors hold trillions of dollars in assets, and so requiring institutional investors to divest holdings could have unintended real-world costs on capital markets, businesses and consumers by making it more difficult to diversify risk. Accordingly, any antitrust enforcement or policy effort in this area should be pursued only if an inquiry reveals compelling evidence of the anticompetitive effects of common ownership by institutional investors in concentrated industries.

Given the ongoing academic research and debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors. Any such enforcement by the U.S. antitrust agencies would address actual or predicted harm to competition from a particular transaction, would not be predicated on general relationships suggested by academic papers, and would seek to avoid outcomes that would unnecessarily chill procompetitive investment.