Organisation for Economic Co-operation and Development

DAF/COMP/WD(2020)12

Unclassified English - Or. English

28 May 2020

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Conglomerate effects of mergers – Note by BIAC

10 June 2020

This document reproduces a written contribution from BIAC submitted for Item 1 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.
More documents related to this discussion can be found at
http://www.oecd.org/daf/competition/conglomerate-effects-of-mergers.htm

Please contact Mr James MANCINI if you have questions about this document.
[Email: James.MANCINI@oecd.org]

JT03462216

BIAC

Business at OECD appreciates the opportunity to submit these comments to the OECD in connection with the OECD's Roundtable on Conglomerate Effects in Mergers.

1. Introduction

1. In recent years we have seen an increase in conglomerate theories of harm, especially by competition authorities in Europe. A conglomerate merger occurs when the parties to the transaction do not compete or supply each other (which means that there are not horizontal or vertical antitrust concerns). However, the parties are active in two closely related markets—for example, they supply complementary products (products that are used together) or products that belong to the same product range.

2. In most cases, conglomerate mergers create synergies that allow parties to the transaction to produce or distribute products or services more efficiently. As such, these type of deals are generally pro-competitive. But some competition authorities are concerned that they might produce exclusionary effects when the post-merger entity is capable of leveraging its power on one market in which it has a market power into another different market by using various strategies such as tying or bundling. The European Commission has specifically stated that "[t]he main concern in the context of conglomerate mergers is that of foreclosure."[1] Specifically, the concern is that, post-merger, the combined firm may engage in tying, bundling, or other equivalent conduct that results in foreclosure and harm to the competitive process. These theories mostly depend on the assumption that the firm, post-merger, will engage in violations of competition laws independent from the merger itself.

3. Conglomerate mergers are a very controversial area of law. The International Competition Network (ICN) has been able to agree on common principles of interpretation in several areas of merger control but, in relation to conglomerate mergers, views differ within the ICN.

4. *Business at OECD* submits that the concept and principles of exclusionary conduct are well understood and fully capable of enforcement outside of the merger context. Therefore, conduct such as anticompetitive tying and bundling should be dealt with post-merger by using traditional antitrust enforcement tools rather than using the merger laws to police non-merger areas of competition law. Scrutiny of mergers on the basis of a conglomerate theory should be limited to those cases where (1) the merger would lead to a high probability of anticompetitive harm to competition due to foreclosure; (2) the inherent synergies of the transaction are accounted for and are outweighed by the scope and probability of the harm; and (3) ex-post enforcement would not be possible or could not be effective.

[1] Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 7, ¶ 93.

2. Anticompetitive Theories of Harm

5. The main concern for competition authorities is the risk of foreclosure by tying or bundling. Post-merger an entity may in theory be able to "force" its customers to purchase together different products by making the supply of one product conditional on the customer purchasing another product or ranges of products. Rivals in competing products could then be excluded, enabling the merged entity to increase prices in the future.

6. Other types of foreclosure are possible but are not always anticompetitive. A highly controversial theory, for example, relates to "portfolio" or "range" effects. The combination of complementary products may enable the merged entity to change its pricing strategy. For instance, post-merger an entity may have the ability to offer packages of products which are more attractive for distributors or customers, who may prefer to buy the goods that they need from one company rather than provisioning from different sources, (possibly foreclosing rivals with a more limited portfolio of products). More specifically, if the company acquires, post-merger, a significant variety of products, it could in theory have the ability to foreclose competitors without needing to make its products more competitive as it can gain a portfolio or range advantage over them.[2]

7. As the U.S. Department of Justice (DOJ) has explained, the concern with portfolio or range effects theories is that they "place[] the interests of competitors ahead of those of consumers and will lead to blocking or deterring pro-competitive, efficiency-enhancing mergers."[3] More specifically, the danger is that the pursuit of such theories:

> *will lead antitrust regulators to disapprove efficiency-enhancing mergers on the basis of highly speculative and unprovable theories of competitive harm. Without a high standard of proof, range effects theory runs the risk of becoming an ill-defined, catch-all theory that allows antitrust regulators to challenge virtually any merger on the basis of vague fears of "dominance." Such an arbitrary policy stands both to increase uncertainty about antitrust enforcement and potentially deter a large class of efficient mergers. It would represent a step backward in the evolution of antitrust policy, which has generally been moving towards more clearly defined, economics-based enforcement criteria. It also risks converting competition authorities into complaint bureaus for disgruntled competitors who find it easier to seek protection from government regulators than to compete in the market.*[4]

8. Another theory, the so-called entrenchment theory, is that the merger will create economies of scale and scope that other firms will not be able to match and/or that the merged firm will gain a decisive advantage over its competitors by virtue of its greater size and financial resources. In other words, as the DOJ described it, under the entrenchment theory, mergers may be "condemned if they strengthen[] an already dominant firm through greater efficiencies or [give] the acquired firm access to a broader line of products or greater

---

[2] An example is the Guinness/Grand Metropolitan merger in 1997 where the merging parties had to divest the distribution of Bacardi's rum in Greece in order to address the concerns that the European Commission had about the possibility of the new entity of tying a number of strong brands across several types of alcoholic drinks offered by bars other outlets. For example, the merged entity could use his strength in leading brands in order to induce bars to list brands in the same or another category.

[3] OECD, *Portfolio Effects in Conglomerate Mergers—Note by the United States Department of Justice* 213-38, 213 (Jan. 24, 2002), *available at* http://www.oecd.org/competition/mergers/1818237.pdf [hereinafter *U.S. Portfolio Effects Note*].

[4] *Id.* at 214-15.

financial resources, thereby making life harder for smaller rivals.[5]" The obvious concern with this theory of harm is that it penalizes pro-competitive efficiency-enhancing conduct and assumes rivals would not be able to compete.

9. For a discussion of the proper analysis of vertical conduct under traditional foreclosure analysis, see *Business at OECD's* prior comments on Vertical Mergers in the Technology, Media and Telecom Sector and Vertical Mergers.[6]

3. Substantive analysis and evidentiary threshold

10. In merger control, the substantive assessment of the transaction involves an analysis of the current market situation but also of the market situation that would arise if the concentration were to proceed. The second part of the assessment, the prospective analysis, entails determining several possible futures and gathering information about probabilities in relation to those futures. Given to the uncertainties related to this analysis, a prospective analysis needs to be executed with due care.

11. In conglomerate mergers, the prospective analysis raises several specific issues such as the evidentiary threshold that is needed before blocking a merger or imposing remedies.

12. As the European Court of Justice stated in its judgement in *Tetra Laval*:

> *The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition means that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.*[7]

13. Such prospective analysis, by its very nature, requires competition authorities to apply a heighten evidentiary threshold when deciding that a deal might raise conglomerate concerns. Such evidentiary analysis is likely to be based on economic assessments. That means two different things: 1) competition authorities must base their analysis on sound and well-accepted principles and not on novel and untested theories; and 2) agencies must have the appropriate expertise to carry out complex economic and legal analyses.

14. Moreover, the analysis should require the investigating agency to establish that the post-merger conduct and harm are more than just speculative. A decision based on a theorem that an acquiring party could wilfully violate the competition laws should not be

[5] *Id*. at 213.

[6] *Business at OECD*, Discussion Points Presented by Business at OECD Competition Committee to the OECD Competition Committee regarding Vertical Mergers in the Technology, Media and Telecom Sector (June 7, 2019), *available at* http://biac.org/wp-content/uploads/2019/06/CC_Vertical-Mergers-in-Techonology_2019-05-28_FINAL3.pdf; BIAC, Discussion Points Presented by Business at OECD (BIAC) Competition Committee to the OECD Competition Committee to the Roundtable on Vertical Mergers (Feb. 22, 2007), *available at* http://biac.org/wp-content/uploads/2014/05/BIAC_Comments_on_Vertical_Mergers_FINAL_2007-02-09.pdf.

[7] Case C-12/03 P, Comm'n v. Tetra Laval BV, 2005 E.C.R. I-00987, ¶ 44.

credited in the absence of evidence that either establishes the party's intent to do so post-merger or a past track record of exploitation of the dominant position that is central to the proposed merger.

4. Efficiencies

15. Conglomerate mergers, unlike certain horizontal and vertical mergers, do not raise conventional competition concerns. In fact, conglomerate mergers typically will give rise to efficiencies. Even when possible concerns are raised by competition authorities, they should be balanced by the identifiable efficiencies brought about by the merger. The European Commission itself, in its guidelines, states that conglomerate mergers "provide substantial scope for efficiencies," brought by the "integration of complementary activities or products within a single firm."[8]

16. Efficiencies related to production, marketing, and distribution functions can be significant in mergers involving portfolio effects because common ownership of products exhibiting strong demand-side linkages creates suppliers who can efficiently provide a more complete range of products. Conglomerate mergers can also induce economies of scope that reduce the merging producers' costs as products might be sold together rather than separately leading to significant savings. In addition, where negotiations are costly, a conglomerate merger can reduce customer transaction costs by creating a supplier capable of providing a full range of products;[9] it might provide a one-stop shop. For companies in difficulties, a merger with a stronger firm may be necessary for their financial rescue and a conglomerate merger may enable the merged entity to reduce its capital cost. In many instances, tying and bundling can increase output.

17. In light of these substantial benefits, competition authorities should be very wary when assessing hypothetical anticompetitive effects and give due consideration to the procompetitive effects.

18. The discussion is certainly of great interest at this time. Because of the development of digital markets and the discussion about "killer acquisitions" in digital markets, start-up acquisitions can create synergies by combining the innovative ideas of a start up with the skills and resources of the established firm. Competition law concerns on the part of the authority focus on acquisitions that protect growth in the platform's core market, eliminate potential challengers early on, or raise barriers to entry by strengthening network effects (in particular through the aggregation of data) across markets. In their view, this is made worse when there is a systematic pattern of acquisitions to protect an established position from dynamic competition across services. We will not elaborate on this topic as it will be discussed in a separate session at the OECD.

5. Remedies

19. In order to address any competition concerns an authority has in the context of a merger, the parties can offer remedies. The main requirements for a remedy to be accepted are clearly set out in the remedies notice of the European Commission and the case law of

[8] Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2008 O.J. (C 265) 6, ¶ 13.

[9] Eliana Garcés & Daniel Gaynor, *Conglomerate Mergers: Developments and a Call for Caution*, 10 J. EUR. COMPETITION L. & PRAC. 457, 461 (2019).

the European courts: a remedy must entirely remove the competition concerns raised by the merger, be comprehensive and effective from all points of view, and be capable of being implemented effectively within a short period of time.[10]

20. To achieve these goals, the Commission and other authorities have a clear preference for structural remedies, that is remedies that change the structure of the market, normally through the divestiture of a business. Divestitures do not require long-term monitoring. Behavioural remedies, on the other hand, concern the future conduct of the merging parties which they commit to and might require monitoring to ensure compliance.

21. While anticompetitive horizontal mergers will be more likely to require a divestment, conglomerate mergers more often lend themselves to non-divestiture remedies. In Europe, we have seen a wide range of behavioural remedies to address various concerns in conglomerate mergers such as concerns in relation to:

- Interoperability: Providing the same level of interoperability between the merging parties' products and competitors' product;[11]
- Intellectual property rights: Assessment of whether the merging parties could benefit from complementary IP rights that would reinforce their market position addressed by and obligation not to acquire certain patents[12] or an extension of licenses;[13]
- Network effects;[14] and

[10] Commission Notice on Remedies Acceptable Under Council Regulation (EC) No 139/2004 and Under Commission Regulation (EC) No 802/2004, 2008 O.J. (C 267) 1, ¶ 9; Case T-282/02, Cementbouw v. Comm'n, 2006 E.C.R. II-319, ¶ 307; Case T-210/01, Gen. Elec. v. Comm'n, 2005 E.C.R. II-5575, ¶ 52; Case T-87/05, EDP v. Comm'n, 2005 E.C.R. II-3745, ¶105.

[11] In *Broadcom/Brocade*, the concern was the potential degradation of interoperability between the merged entity's switch chip and interface cards. Broadcom committed to cooperating closely and in a timely manner with competing interface card suppliers to achieve for them the same level of interoperability. Case M.8314—Broadcom v. Brocade, Comm'n Decision (May 12, 2017) (summary at 2017 O.J. (C 222) 2), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8314_662_3.pdf.

[12] In *Qualcomm/NXP Semiconductors*, the Commission accepted commitments to not acquire certain standard essential patents and to enforce/grant worldwide royalties for other SEPs to ensure rivals would be able to compete fairly. Case M.8306—Qualcomm v. NXP Semiconductors, Comm'n Decision (Jan. 18, 2018) (summary at 2018 O.J. (C113) 79), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8306_3479_3.pdf.

[13] In *Dentsply/Sirona*, the concern was that Dentsply's rivals would be excluded from accessing Sirona's dental equipment. The remedy was for Sirona to extend existing licensing agreements with Dentsply's competitors for 10 years. Case M.7822—Dentsply v. Sirona, Comm'n Decision (Feb. 25, 2016), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m7822_494_3.pdf.

[14] In *Microsoft/LinkedIn*, the Commission identified two sets of exclusionary practices that Microsoft could engage post-merger: 1)Microsoft could require OEMs to preinstall a LinkedIn application on Windows; and 2) Microsoft could integrate certain LinkedIn features into Microsoft Office and prevent competitors of LinkedIn from integrating their features into Office. This could harm competition because of the impact of network effects: the more professionals are hosted on a given network the more valuable the network is to its members. Microsoft offered two sets of commitments: 1) preventing Microsoft from making the LinkedIn application automatically present on all Windows PCs; and 2) interoperability obligations that will enable competitors to offer functionalities similar to those that Microsoft envisages in relation to the integration of LinkedIn with Office. Case M.8124—Microsoft v. LinkedIn, Comm'n Decision (Dec. 6, 2016), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

- Tying and bundling.[15]

22. In relation to remedies, *Business at OECD* would like to make the following comments:

- *Behavioural remedies*. If behavioural remedies are imposed, they should be focused on remedying actual competitive harm and should not be used to stave off the putative competition law violations. Remedies that threaten to stifle business conduct that is potentially pro-competitive, for example bundling, should be imposed cautiously and only after the authority's careful consideration of the relevant market dynamics. Incorrect remedies risk destroying the efficiencies created by the merger, preventing the parties from achieving economies of scales, and reducing the value of the assets acquired, without benefiting the marketplace or the parties' customers.

- *Conflicting remedies*. In cases where the potential harm is highly speculative (such as in the case of conglomerate mergers), if remedies are applied, coordination between authorities is essential. With cross-border transactions being increasingly subject to review in multiple jurisdictions, the costs to business stemming from merger review have increased exponentially. Businesses contemplating cross-border transactions face a real threat of losing efficiencies due to exceedingly broad, inconsistent and/or contradictory remedies. Competition authorities should not impose remedies without considering potential extraterritorial implications and approaches of other authorities to the question of remedy. Conflicts can arise at all stages of the remedy process, from the decision on which remedy to impose to its monitoring for compliance. Conflict can also arise if remedies are changed or reviewed after the transaction has been approved by all reviewing jurisdictions. In this case, the potential modification of remedies in one jurisdiction can result in inconsistencies with remedies applied in another jurisdiction.

6. Due Process and Information Requests

23. The analysis of conglomerate mergers raises several specific procedural issues, in relation to information requests and access to the file. The complexity of the analysis requires that parties are given a proper opportunity to review and comment on the agency's case file. In many cases, the lack of proper access to the file or the opportunity for the company to make its views heard would risk that the agency might take the wrong decision. And an effective review by an independent Court in a timely manner would also be necessary to ensure due-process.

24. The searching nature of analysis required in conglomerate mergers can result in competition authorities sending information requests that are broader than necessary and demand unnecessary information. If conglomerate theories are considered, it is important that the scope of the request is proportionate and limited to markets and products that are clearly complementary and which might have an impact on the assessment of the transaction.

[15] In *Bayer/Monsanto* and *Essilor/Luxottica*, there were concerns about possible tying/bundling practices, but in the end, both were cleared without remedies relating to conglomerate concerns. Case M.8084—Bayer/Monsanto, *available at* https://ec.europa.eu/commission/presscorner/detail/en/IP_18_2282; Case M.8394—Essilor v. Luxottica (Mar. 1, 2018) (summary at 2018 O.J. (C 335) 10), *available at* https://ec.europa.eu/competition/mergers/cases/decisions/m8394_4217_3.pdf.

25. Competition authorities' requests for internal documents are becoming increasingly burdensome and can result in the submission of a very large volume of documents. Many times, competition authorities underestimated the difficulties companies might face when responding to wide requests for information as the data might not be available or might not be available in the format requested by the authority. But such wide-ranging requests raise serious issues in relation to due process. Companies find themselves in difficulty when authorities seek wide-ranging disclosure of internal documents that may capture a significant number of documents, some of which are likely to be covered by legal professional privilege. The burden, the difficulties, and the costs to comply with such requests should be well understood, given the need to review each page of each request for information in order to assess whether the information requested is relevant to the investigation and whether it is subject to privilege. Parties must also be afforded sufficient time to review the documents prior to production. These issues have an impact on the fundamental rights of the parties, especially as the information often needs to be provided within a short deadline. Thus, information requests should be tailored to be no broader than necessary.

26. More fundamentally, due process rights in merger control proceedings are as essential as they are in any other competition law proceedings. This applies in particular to merger proceedings involving conglomerate mergers, which are likely to give rise to significant efficiencies, and where theories of harm may be less robust, sometimes novel and exceptionally even speculative. In these cases, the risk of false positive findings of potential anti-competitive conduct is particularly high. Strict conformity with due process right encourages rigor within the agency's proceedings and contributes to the credibility of merger control proceedings.

27. Specifically in Europe, the General Court has confirmed that rights of defence must be guaranteed in all EU proceedings, including merger proceedings before the Commission.[16] This means that a business subject to proceedings must be "afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim,"[17] i.e., its right to a fair hearing must be respected. As the General Court confirmed, these principles apply even where the deadlines in such procedures are tight.

28. The right to make one's views known on the agency's evidence implies that agencies should offer the notifying party the opportunity to examine the evidence. In turn, this implies allowing the notifying party to gain full and timely access to the case file.

29. The procedures employed by the European Commission provide an important and relevant example. A party under investigation in a Commission proceeding, including merger proceedings where a notified transaction raises "serious doubts," has the right to access all information gathered by the Commission staff in connection with the case, irrespective of whether the information has been cited in the "Statement of Objections," the formal document detailing the Commission's anticompetitive concerns. This important safeguard is based on the "equality of arms" principle, enshrined in the case-law of the EU

[16] Case No. T-194/13, United Parcel Service, Inc. v Comm'n, (Mar. 7, 2017), *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62013TJ0194. The General Court annulled the Commission's decision in relation to the proposed acquisition by UPS of TNT on the basis that it had failed to communicate a final version of its econometric analysis to UPS – which contained substantive changes to the models discussed during the administrative procedure – and therefore had failed to give UPS an opportunity to express its views before adopting its decision.

[17] *Id.*, ¶ 200.

courts, which states that regarding exculpatory documents "it cannot be for the Commission alone to decide which documents are of use for the defence" of undertakings in proceedings involving infringement of the competition rules.[18]

30. Access to the file must also be provided with sufficient time for the respondent to assess the information in preparation of its defense. For this reason, jurisdictions routinely provide access to materials even before the issuance of formal charges.[19] The ICN makes clear that "[a]n Agency's communication of competitive concerns should be made in time for the parties to have an opportunity to respond to the concerns."[20] Similarly, the ABA recommends that "[p]rior to the time when any contention of infringement is asserted, each target should be provided with all evidence (regardless of whether subject to any assertion or finding of confidentiality) then known to officials. . . ."[21] It follows that the disclosure of evidence must take place sufficiently in advance of any deadline for response to permit the party to fully evaluate that evidence and prepare a responsive submission.

7. Conclusion

31. Authorities should tread with caution when examining possible conglomerate theories of harm. As the OECD said in its 2002 paper on portfolio effects in conglomerate mergers, there is a danger of invoking the portfolio effects theory "to justify blocking or conditioning a merger [resulting in] a number of potential exclusionary effects, none of which can be convincingly enough established to be the sole justification for opposing [the] merger."[22] Many of the anticompetitive effects allegedly arising from certain conglomerate mergers involving portfolio effects are more hypothetical than the effects commonly cited as grounds for blocking or conditioning horizontal and vertical mergers.

32. Typically, the risk of tying or bundling by the merged entity should be addressed more efficiently through ex-post enforcement rather than by prohibiting the deal or imposing conditions ex-ante. Ex-post enforcement has the advantage of dealing with the

[18] Case T-30/91, Solvay v Comm'n, 1995 E.C.R. II-1775, ¶ 81.

[19] OECD, Competition Committee, Procedural Fairness: Transparency Issues In Civil And Administrative Proceedings 10 (2011), *available at* www.oecd.org/daf/competition/48825133.pdf ("The points at which subjects can access these files vary. Some jurisdictions allow access throughout the investigation stage, i.e. after the formal opening of an antitrust procedure. In other jurisdictions access rights are triggered only after a certain stage in proceedings. This is commonly after the main investigation has taken place and the written document setting out the allegations has been issued.").

[20] INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS § 6.4 (2015), *available at* www.internationalcompetitionnetwork.org/uploads/library/doc1028.pdf.

[21] AMERICAN BAR ASS'N, SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE–REPORT OF THE ABA SECTION OF ANTITRUST LAW INTERNATIONAL TASK FORCE 7 (MAY 22, 2015), *available at* www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.authcheckdam.pdf; *see also* INT'L CHAMBER OF COMMERCE, RECOMMENDED FRAMEWORK FOR INTERNATIONAL BEST PRACTICES IN COMPETITION LAW ENFORCEMENT PROCEEDINGS, ¶ 2.1.2 (2010), *available at* www.icc-portugal.com/images/documentos/comissao_concorrencia/2010_Recommended-framework-for-international-best-practices-in-competition-law-enforcement-proceedings.pdf ("A firm cannot defend itself appropriately unless the competition authority informs the firm of the allegations, the claims, and the evidence supporting the claims. To ensure procedural fairness and effective decision-making, the exchange of such information between the competition authority and the firm or firms under investigation ('the Respondent(s)') must take place on a continuing basis through all stages of an investigation and proceeding, consistent with the principles of engagement. . . .").

[22] *U.S. Portfolio Effects Note*, *supra* note 3, at 41.

conduct actually implemented by the parties rather than theorizing about potential violations of the law. Only be in very exceptional cases, where it can be proven that there would not be an effective remedy ex-post, should competition authorities intervene.