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This document reproduces summaries of contributions submitted for Item 1 of the 133rd 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>

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on conglomerate effects of mergers (133rd Meeting of the Competition Committee on 10-16 June 2020). 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 *.

Belgium

Some decisions distinguish in the assessment of effects between vertical, horizontal and conglomerate effects, and one decision between non-co-ordinated/conglomerate effects, non-co-ordinated/vertical effects and non-co-ordinated/horizontal effects. Market foreclosure has been identified as the major conglomerate effect. But the risk of market foreclosure has been assessed in a number of decisions as a unilateral effect without qualifying the effect explicitly as conglomerate.

We do not think that there should be changes to the assessment framework of conglomerate effects of mergers.

The *Auditorat* (Investigation and Prosecution Service) and the Competition College have in seven non-simplified procedures looked at possible conglomerate effects without concluding that they raised specific competition concerns for the following reasons:

- in two cases it was decided that a sector regulator offered sufficient guarantees against the risk that access to data of the target might create conglomerate effects;
- in one case conglomerate effects were deemed unlikely, and hypothetical concerns unlikely to be different from concerns caused by other unilateral or co-ordinated effects of the transaction (which required remedies);
- in two cases the market share of the target was deemed unlikely to create an incentive for what might result in conglomerate concerns;
- in one case in which there already existed structural links between the undertakings concerned, potential conglomerate concerns were deemed not to result from the notified transaction;
- in one case the draft proposed by the *Auditorat* identified market foreclosure as a unilateral vertical and conglomerate concern requiring remedies; the Competition College retained the horizontal concerns in the motivation of its decision and imposed remedies, but without reference to the qualification of the effects as conglomerate.

We have not identified any conglomerate theories of harm particular to digital sectors (e.g. gatekeeper firms, product ecosystems).

We think that the current notification thresholds are sufficient because a transaction between smaller undertakings is unlikely to have a significant effect on the behavior of market participants, and even less likely to have a significant impact on the market in general.

We would consider the same range of efficiencies as we do in respect of unilateral and co-ordinated effects and will be more inclined to retain a positive presumption.

Brazil

The purpose of this paper is to evaluate the application of conglomerate effects in CADE's merger analyses as of the enactment of Law 12529/2011, which instituted the Brazilian Competition Defence System.

Based on the definition of conglomerate effect, we selected relevant cases of conglomerate mergers that were analysed by CADE, related to both product and market expansion. These acquisitions involved the financial, agricultural, and higher education industries.

The paper also reviews the theories of harm applied in the analysis of conglomerate effects. The study shows that CADE generally associates conglomerate power to the theory of 'reciprocal dealings', which has guided the imposition of antitrust remedies to discourage practices of tying and bundling. However, it has also been adopting arguments related to other theories of harm such as 'substantial lessening of competition' and the 'entrenchment doctrine'.

Furthermore, it is possible to conclude that the assessment of conglomerate effects remains a challenge that tends to get more difficult, especially in sectors that are already strongly verticalised and which are linked to the digital economy. However, CADE has made progress in the analysis of these effects: i) the analyses have expanded beyond the so-called portfolio effect, now integrating other theories of harm; and ii) they have been increasingly supported by quantitative economic studies, which address issues related to efficiency, market rivalry, bargaining power, among others.

BIAC

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.

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.

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.

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.

Chile

In Chile, the current mandatory merger control regime was established in 2017, and since then the National Competition Authority (*Fiscalía Nacional Económica* or “FNE”) has had a few cases that have been analyzed as conglomerate mergers. In these cases, the FNE has evaluated different practices that can restrict competition, mainly involving tying and bundling strategies, by assessing whether the merging parties have the ability and incentives to engage in these types of practices. Notably, a recent case involving two digital platforms represented an important challenge for the FNE, in terms of the assessment of conglomerate effects in digital markets.

In particular, the FNE recently assessed the acquisition of Cornershop Technologies LLC (“**Cornershop**”), a company that operates in the grocery delivery market, by Uber Technologies Inc. (“**Uber**”), who operates as Uber Rides in the ride-sharing market and as Uber Eats in the food delivery market. Since these parties operate in different affected markets, in which both of them are relevant players, the FNE had to assess the potential conglomerate effects that could arise in this case.

The investigation relied on the collection of several firms’ internal documents, the implementation of a representative consumer survey, and further information collected during the investigation. The FNE also analyzed the dynamic components of the possible conglomerate effects, in particular linked to indirect network effects and multi-homing. The main theory of harm was a potential market foreclosure effect linked to the mixed bundling of services, considering two different possibilities: (i) the leverage of Cornershop’s position in the grocery delivery market to benefit Uber and restrict competition in the food delivery and ride-sharing markets and (ii) the leverage of Uber’s position in the ride-sharing and food delivery markets to benefit Cornershop and restrict competition in the grocery delivery market.

Regarding the leverage of Cornershop position, the FNE concluded that there were no anticompetitive effects linked to this practice since (i) Cornershop user base was significantly smaller than Uber’s user base in both services, and (ii) only a small fraction of users of Uber Eats used Cornershop services. Therefore, the parties could not affect competitors’ scales of operation in a significant way.

With respect to the leverage of Uber’s position in the ride-sharing and food delivery markets, the FNE arrived to the conclusion that it was unlikely for Cornershop’s competitors to be foreclosed, as they should be able to react by offering similar bundling strategies if necessary. In addition, Cornershop’s competitors have relevant expansion projects already in place, in order to improve their services in the short term.

Other theories of harm were considered by the FNE as well, in particular: (i) the possibility of market foreclosure as a result of further data collection, (ii) deterioration of consumers’ privacy policies, and (iii) deterioration of the conditions of service for delivery partners, shoppers and drivers. Those theories of harm were also discarded. As a result, the merger was cleared unconditionally.

Finally, it is important to note that the FNE foresees an increase in the number of mergers involving conglomerate effects, especially if one considers the central role played nowadays by digital markets, which certainly imposes new challenges for the authority.

For this reason, the FNE is constantly looking for new economic tools, in order to strengthen and to ensure a high quality and accuracy of its assessments.

EU

This contribution discusses the approach of the European Commission (the “Commission”) towards conglomerate effects of mergers.

The Non-horizontal merger guidelines² reflect the Commission’s approach that non-horizontal mergers are “*generally less likely to significantly impede effective competition than horizontal mergers*”³ and establish market shares and concentration levels below which the Commission is unlikely to find concerns.

Conglomerate mergers may give rise to a significant impediment to effective competition in two main ways: non-co-ordinated and co-ordinated effects. When assessing the non-co-ordinated effects of conglomerate mergers, the Commission mostly considers a foreclosure theory of harm, and applies the “ability-incentive-effects” framework. Furthermore, anti-competitive effects may arise when the merged entity gains access to commercially sensitive information regarding rivals’ activities. In its assessment, the Commission takes into account efficiency claims as a factor offsetting competitive harm.

In recent years, the Commission has assessed a number of conglomerate mergers. The Commission intervened in some of them, most notably *Microsoft/LinkedIn* and *Broadcom/Brocade* – conditionally cleared in Phase I – *Qualcomm/NXP Semiconductors* and *Telia/Bonnier Broadcasting* – conditionally cleared in Phase II; while it gave unconditional clearance after an in-depth investigation in *Essilor/Luxottica* and *Apple/Shazam*.

Even though the Commission has a clear preference for structural remedies, it considered that behavioural remedies were able to address the competition concerns in some conglomerate mergers. For example, in *Microsoft/LinkedIn*, *Broadcom/Brocade*, the Commission accepted interoperability remedies to address conglomerate competition concerns.

Following the publication of the report of the special advisors to the Commission “Competition policy for the digital era”⁴, new debates have emerged in the context of conglomerate mergers in the digital industry.

2 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, “Non-horizontal merger guidelines”.

3 Non-horizontal merger guidelines, paragraph 11.

4 Report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, available under <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

Hungary

The Hungarian Competition Authority (GVH) considers the conglomerate effects of mergers if the proposed merger involves products that are either complements or neighbouring goods. Please note that mergers defined by this document as “conglomerate mergers” are referred to as mergers with portfolio effects by the Hungarian Competition Authority.

However the GVH has not dealt many case has not dealt with a significant number of cases involving conglomerate concerns, based on the GVH’s experience, the majority of conglomerate mergers do not raise relevant competition concerns and when compared to horizontal mergers are generally less likely to substantially lessen competition. The most recent intervention decision based on conglomerate theory of harm was issued in 2012.

Nevertheless, in certain circumstances they may lead to anticompetitive effects and it is therefore necessary to assess such mergers on a case-by-case basis, taking into account the ability and incentive of firms to foreclose competition.

When reviewing conglomerate mergers, in its assessment the GVH follows the European Commission’s Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (“Non-Horizontal Merger Guidelines”). In its assessment the GVH examines first, whether the merged firm would have the ability to foreclose its actual or potential competitors, second, whether it would have the economic incentive to do so and, third, whether a foreclosure strategy would have a significant detrimental effect on competition, thus causing harm to consumers

The GVH does not have sufficient experience regarding conglomerate mergers in the digital sector, since there have been no cases so far where this aspect would have been of significant importance.

Japan

Recent rapid advancement of digital economy has made us realise competitive impacts of conglomerate mergers of which description in our merger guidelines was not as clear as horizontal and vertical ones.

So, based on our accumulated experiences and insights mainly derived from our recent market surveys and studies regarding big data, e-commerce, and digital platforms, and also some of recent cases reviewed in detail, the JFTC amended “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” in December 2019. The new Guidelines make clear what kind of aspects and factors, especially some unique features of digital economy, we should bear in mind to review conglomerate mergers. Along with it, we will further accumulate related cases and also insights into quickly changing market environments.

Lithuania

Conglomerate mergers are notified to the Competition Council of the Republic of Lithuania (Competition Council) on a regular basis. The Competition Council has seen no increase in merger notifications with potential conglomerate effects. Typically, in experience of the Competition Council, conglomerate mergers have not raised competition concerns. At least in three cases a more detailed analysis was required.

In the case of *glass merger*, the Competition Council was notified about the merger of two corporate groups. One group was included in the production of coloured glass containers, another was engaged in the manufacture of clear glass containers. Overlapping TOP 10 buyers were asked about their possibilities to switch suppliers of the glass containers and about the instances of actual switching. The available information did not suggest any anticompetitive conglomerate effects of the merger: the buyers indicated credible supply alternatives and the competitors did not raise concerns.

In other two *mergers of producers of beverages*, the Competition Council made the following assessment:

The Competition Council concluded that it could not establish that after the implementation of the merger due to the possessed product portfolio the merged entity could restrict the opportunities of competitors to operate in the relevant markets or could significantly worsen the position of buyers in them. It was established that other competitors had product portfolios similar to that of the merged entity. Furthermore, the portfolio of the merged entity was substitutable with the brands of other suppliers.

The Competition Council decided that practice of tying, bundling or other foreclosure of products was unlikely due to the strong power of retail chains in Lithuania.

The Competition Council established that there were other strong market players in Lithuania: world-class producers of beverages managing popular brands and sellers with similar portfolio of beverages to that possessed by the merged entity.

The Competition Council made a conclusion that it was unlikely that the mergers would restrict the ability of competing undertakings to operate in the relevant markets. Furthermore, the Competition Council made the conclusion that it was unlikely that mergers would significantly worsen the situation of buyers of beverages.

The Competition Council therefore cleared these three mergers.

The need to take into account various available conglomerate theories of harm was limited in the three described cases. Only plausibility of tying and bundling was articulated as a theory of harm against which the mergers were checked.

Currently, there are no indications that established notifications thresholds in Lithuania are not sufficient to capture transactions that may have substantial conglomerate effects. Furthermore, the Law on Competition of the Republic of Lithuania foresees that the Competition Council may oblige undertakings to notify a merger even when the thresholds are not reached.

Mexico

- **COFECE**

In a limited number of cases the Commission has analysed conglomerate mergers with possible portfolio effects. The assessment has been conducted using recent economic theory tools and in accordance with the best international practices.

Examples of cases assessed by COFECE with possible conglomerate effects are *Alpura/GEPP* and *Essilor/Luxottica*. During the analysis for conglomerate and/or portfolio effects in these mergers no elements were found to determine that the transactions would generate adverse effects on competition. Therefore, both were approved by the Board of Commissioners.

The main concern in this type of cases lies in the parties' potential capacity to implement practices such as foreclosures – through tying, bundling or similar conducts.

So far, the Commission has been able to find enough evidence to analyse possible portfolio effects. Some sources of information useful for COFECE have been internal documents from the notifying parties about, for example, their market shares, brand identity or the importance of a products deemed as “must have”. Another useful source for determining possible conglomerate effects has been third-party information requirements, mainly from the parties' customers.

It is worth noting that in Mexico, efficiencies must be presented by the notifying parties. The burden of proof falls upon them. Thus, to this day, the Commission has not performed an efficiencies analysis for this type of transactions.

- **IFT**

This contribution describes the Mexican legal framework for assessing conglomerate mergers and experiences in the telecommunication and broadcasting sectors, in which the Federal Telecommunications Institute (IFT) acts as the exclusive national competition authority. In the merger cases of *Televisa-Acir*, *AT&T-Time Warner* and *Disney-Fox*, even though a conglomerate analysis was not performed, the IFT identified certain elements and characteristics of the production and the provision of OTT services, including digital platforms, which made it possible to foresee that a significant number of future cases will require a conglomerate analysis. It also describes elements of digital markets that facilitate the existence of conglomerate effects on mergers, and identifies those that can cause harm to competition, like foreclosure, products within the same ecosystem, reduction in innovation incentives and killer acquisitions. Nevertheless, it recognises the need to consider that conglomerate effects could also result in market efficiencies; therefore, the assessment should be conducted on a case-by-case basis, observing the rule of reason. Furthermore, in order to consider such efficiencies, the parties involved should demonstrate to the authority that the transaction would have the potential to make a net contribution to consumer welfare, outweighing any anticompetitive effects.

Russian Federation

Conglomerate mergers are traditionally considered to be associations of such economic entities that are not participants in the same market, but operate in related or otherwise interconnected markets.

The most typical related markets are upstream and downstream relative to each other markets. In this regard, the analysis of conglomerate effects is often similar to the analysis of vertical effects.

In practice conglomerate mergers are quite rare. At the same time, as a rule, possible negative effects arising from the implementation of such transactions are associated with the presence of a market power of the acquired company in the relevant commodity market.

Since conglomerate effects cause significantly less competition concerns than horizontal effects and are often associated with increased efficiency in the relevant markets, in practice they are generally not obstacle to approving deals, but are accompanied by behavioral remedies to minimise possible negative effects.

*South Africa**

In its contribution, South Africa outlines the historical and current role that conglomerate firms have played in the South African economy. The position of these conglomerate firms, which benefited from privileges afforded by the Apartheid government, has given rise to concentration in a range of sectors, including beverages, financial services, paper and pulp and sugar.

With respect to merger control, the contribution observes that conglomerate mergers constituted 7.1% of all mergers notified to the Competition Commission between 2016 and 2019. While the majority of these transactions (52%) were Phase 1 (non-complex) transactions, meaning they posed no potential competition concerns, 34% were Phase 2 (complex) and 14% were Phase 3 (very complex). In terms of complexity, the Commission has found that cases in ICT are most likely to be classified as complex and very complex transactions. Among Phase 2 transactions, 23% were in the ICT sector (the majority involving broadcasting or telecommunications), and 22% in manufacturing. For Phase 3 transactions, the share was 36% for manufacturing and 21% for ICT.

The contribution then sets out the established framework for assessing conglomerate mergers, namely the assessment of the ability and incentive to engage in foreclosure following a merger. A common pool of consumers, barriers to entry and transaction costs were all factors identified as important components for conglomerate theories of harm.

Next, the contribution notes that conglomerate theories of harm in digital markets differ from traditional conglomerate theories in that the likelihood of foreclosure strategies is enhanced due to network effects and the leveraging of big data across multiple markets. In digital markets, where big data is a consideration, the products and services need not be close complements for this effect to be likely, because the markets may be intimately related due to complementarities in the types of data collected or the data processing and analysis capabilities used in the ordinary course of business in these markets.

Strong network effects allow the merged entity to engage in self-preferencing strategies post-merger, particularly when the merger involves a digital platform although it may also include preferential access to important data. These also take the form of feedback effects that allow the merged entity to protect the core product from future competitive threats, raising barriers to entry in the core market. The combination of different datasets or data processing capabilities can provide the merged entity with an advantage over competitors to improve on products in a way that cannot be matched.

The contribution then describes the review of an acquisition of WeBuyCars, a car-buying service. The Competition Commission recommended prohibition of the transaction, which was upheld by the Competition Tribunal. Self-preferencing and preferential access to data were a particular focus of the ability and incentive analysis underpinning this assessment.

Finally, the contribution highlights some of the challenges in dealing with conglomerate mergers, including the difficulties posed by rapidly evolving markets.

Spain

In this contribution, the Spanish Competition Authority, (Comision Nacional de los Mercados y de la Competencia, hereinafter, the ‘CNMC’), will describe the main features in the identification and analysis of conglomerate effects in the Spanish merger review.

In line with the European Union (EU) *Guidelines on the assessment of non-horizontal mergers*’ view, the CNMC considers that conglomerate effects could be harmful to competition in different ways, that are set out in this paper. Aspects such as potencial harm to innovation represent a great challenge, in particular for the diverse implications it may have in different markets (e.g. digital markets). The theory of harm should include in its analysis the role of the market power, as well as the information gathered from key operators, and killer acquisitions are to be assessed on an in depth, case-by-case basis.

This paper also covers the practical challenges in reviewing conglomerate effects, such as the role of remedies, providing some examples of national case law in conglomerate mergers.

The main conclusion to be drawn from this paper is that when the Spanish merger control regime assess transactions with conglomerate effects, the CNMC will apply the theories of harm in a rigorous way, in order to reach solid conclusions on the likely effects, including conglomerate effects that a particular merger could create.

Chinese Taipei

The Fair Trade Commission (FTC) reviews merger cases under an ex-ante framework. It aims to prevent mergers resulting in excessive concentration of economic power or distorting market competition. In practice, there have been relatively few conglomerate cases reviewed by the FTC under the general procedure of merger review, but an upward trend has been observed over recent years. The general considerations for anti-competitive effects of conglomerate mergers in the Merger Guidelines are typically assessed through qualitative analysis. So far, no quantitative methods have been used in conglomerate merger evaluation.

Between 2010 and 2019, the FTC reviewed 43 conglomerate mergers under general procedures, of which all cases were not prohibited, and 6 cases were cleared conditionally with behavioral remedies, mostly in industries relating to Cable TV, payment settlement and bonus point. These industries are characterised by high market concentrations that may contribute to the occurrence of a natural monopoly. Conglomerate mergers in such industries are likely to encourage tying and bundling carried out by merging parties. To minimise potential anti-competitive impacts and monitor relevant markets, the FTC therefore imposed behavioral remedies on merging parties, for example, regular submission of sales guidance and sales data.

TUAC

On 10-12 June 2020, the OECD Competition Committee will hold a session on the conglomerate effects of mergers. Conglomerate mergers bring together firms that operate in different industries. Less frequent than mergers between firms operating on the same product markets, conglomerate mergers are now attracting more attention in the context of digital business models. Online platforms in particular tend to be significant conglomerates, with holdings operating over a wide range of sectors (retail, consumer goods, tourism etc.). These super star firms are also known for their aggressive mergers and acquisitions strategies towards smaller sized businesses.

The purpose of this TUAC contribution is to bring the attention of the Competition Committee to the harmful effects of conglomerate mergers on employment, and to call for new methodologies to address excessive economic power.

Turkey

Mergers and acquisitions creating a dominant position or strengthening an existing dominant position are prohibited as a result of the legal provision (Article 7 of the Act no 4054 on the Protection of Competition) and the dominance test in the Turkish Competition Law. Conglomerate mergers and acquisitions are also evaluated within this framework. Whether undertakings that are active in adjacent markets with respect to relevant product market or that have complementary relationships become dominant or strengthen their dominant positions as a result of the merger is taken as a basis.

The Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, (the Guidelines) explains how conglomerate mergers and acquisitions are handled apart from horizontal mergers and acquisitions follow the systematic of EC Guidelines and adopt the theory of harm. The Guidelines evaluate whether the merged undertaking has the ability or incentives to leverage its strong position in one market to other markets by means of bundling, tying or other exclusionary practices. With respect to co-ordinating effects, there is a reference to findings and observations made in the Guidelines on the Assessment of Horizontal Mergers and Acquisitions.

Although there are many Turkish Competition Board (hereinafter “Board”) decisions regarding conglomerate mergers and acquisitions, Luxottica and Essilor merger⁵ is notable as it has global significance. Luxottica and Essilor made an application to the Competition Authority on 22.05.2017. The Board took the transaction under final examination due to competitive concerns. As a result, the transaction was conditionally approved.

In its decision, The Board stated that the transaction created horizontal concerns, as both undertakings were active in the markets for “wholesale of designer brand sunglasses” and “wholesale of designer brand prescription optical frames”. In addition, in the markets of “wholesale of designer brand prescription optical frames” and “wholesale of ophthalmic lenses” there is a complementary relationship.

The Board highlighted that the merged entity may leverage its market power in sunglasses market to other markets and also the merged entity will meet a huge part of an optician’s needs after gaining significant market power in relevant markets and this may support an important portfolio power that may be used against competitors.

Upon those concerns, the parties offered divestiture commitments to solve horizontal overlaps and to relieve anticompetitive conglomerate concerns stemming from portfolio power. They also offered additional behavior commitments to relieve anticompetitive conglomerate concerns.

In relation with anticompetitive conglomerate effects in digital markets, the Competition Authority has not received a merger or an acquisition application by big IT companies. It is possible to suggest that threshold systems play a role here. In this framework, the working group under the body of the Competition Authority carries out a meticulous work to see whether it is necessary to amend or revise the threshold system used in mergers and acquisitions, especially in IT area and digital markets.

⁵ The Board decision dated 01.10.2018 and numbered 18-36/585-286.

United States

Standard theories of horizontal and vertical harm capture most modern, economically-sound theories of what the OECD Secretariat describes as “conglomerate” effects. Mergers of complements may raise concerns analogous to those raised by mergers of vertically related firms. Some mergers between firms supplying broad product ranges can raise horizontal concerns about a loss of future competition. Conglomerate mergers that raise neither vertical nor horizontal concerns are unlikely to be problematic under U.S. merger law.

During the 1960s and 1970s, the U.S. Agencies pursued mergers based on theories no longer considered valid under U.S. law or economic theory. One such theory was “entrenchment,” which condemned mergers if they strengthened an already dominant firm through greater efficiencies, or gave the acquired firm access to a broader line of products or greater financial resources, thereby making life harder for smaller rivals. Cases brought under these now-discredited theories include *FTC v. Procter & Gamble Co.* and *FTC v. Consolidated Foods Corp.*

Today, the Agencies recognize that efficiency and aggressive competition benefit consumers and we do not prohibit mergers *because* they facilitate efficiency. This shift in thinking was reflected in the DOJ’s 2001 decision to clear with minimal conditions the *GE/Honeywell* merger. This decision diverged from that of DG Competition, which blocked the merger based on conglomerate concerns.

The Agencies have challenged mergers of complements based on vertical theories. For example, DOJ recently required divestitures to address vertical concerns in *UTC/Raytheon*, and the FTC resolved concerns with a proposed merger of complementary products in *Cadence/Cooper & Chyan* (1997).

The Agencies recognize that a product-by-product or area-by-area analysis may understate the horizontal concerns caused by a merger in some cases. For example, broader concerns can arise where the parties’ large size or presence in multiple markets give the merging parties advantages in competing for a particular set of customers or unique incentives and capabilities to invest in innovation.

In such cases, an effective remedy may require consideration of these broader harms. For example, in *Bayer/Monsanto*, an effective remedy required divestiture of a broad set of assets, including R&D capabilities, in addition to overlapping products and pipelines. Likewise, in *Teva/Allergan*, the FTC’s remedy required traditional divestitures along with provisions to prevent input foreclosure.