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The Relationship between FDI Screening and Merger Control Reviews – Note by Consumers International

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This document reproduces a written contribution from Consumers International submitted for Item 13 of the 139th OECD Competition Committee meeting on 29-30 November 2022.

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

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1. It is important that the relationship between FDI screening and merger control reviews is critically evaluated.

2. When there is foreign direct investment in the form of mergers or takeovers, or the acquisition of substantial minority interests, the standard competition merger review processes usually apply. In the majority of cases foreign direct investment is not harmful to competition and is often strongly pro-competitive although it needs to be reviewed on a case-by-case basis as a part of merger control.

3. The current competition merger processes have been developed over many years and are generally adequate. It is also fair to say that decisions by most competition authorities are not tainted by a wish to protect domestic firms from foreign acquisition although over the years there have been some seeming exceptions.

4. The review of direct foreign investment by non-competition authorities is a legitimate activity particularly from a national security perspective. There has been a substantial increase in FDI screening by non-competition bodies in recent years. From a competition perspective the screening process of non-competition authorities can give rise to potential harms. Domestic entities, especially domestic competitors, may take steps to try to have unwelcome takeovers blocked in the interests of reducing competition or of clearing the way for their own acquisition of the takeover target. Foreign investment review entities need to be aware of these dangers. They need to be well informed of the assessment by the competition body. Moreover, they should seek the views of the competition bodies on the likely economic effects of their proposed rejection of any foreign acquisitions bearing in mind that negative decisions may in some cases amount to a form of protectionism of inefficient and uncompetitive local businesses and that harm to competition, innovation and efficiency may result. There are cases where a close study of the threat to security (especially if minor) versus the economic harm of rejection is required.

5. However, the processes of review by non-competition authorities very often fall a long way short of regulatory best practice standards.

6. Such reviews often lack:

- Political independence. Ministers for example may make final decisions.
- Transparency. The basis for decisions is often not made public. Nor is the fact that some applications have been made in secret and rejected.
- There is often little accountability for decisions. In some cases, there are limited appeal rights to courts, often on narrow grounds. Answerability to legislators and more generally to the public is very limited or non-existent.
- In some cases where conditions are imposed there may not be adequate follow through on compliance.

7. Even though there may be good reasons for non-competition review and for limitations on transparency the broad policy approach should be to foster maximum possible independence, transparency, and accountability, as well as satisfactory compliance monitoring, if competition harms are to be minimized.