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Disentangling Consummated Mergers – Experiences and Challenges – Note by BIAC

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More documents related to this discussion can be found at https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm

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1. Introduction

1. This paper builds on previous contributions of BIAC on related subjects, including the analysis in the 2014 Roundtable on Investigations of Consummated and Non-notifiable Mergers.[1] It reiterates that while BIAC fully supports vigilant enforcement designed to prevent anticompetitive mergers, these actions must be balanced against the need for businesses to have legal certainty.

2. Certainty and predictability with respect to merger control are of fundamental importance to fully functioning economies. Belated enforcement not only limits the ability of agencies to prevent competitive harm, but it can also impose substantial costs on businesses and result in considerably less efficient markets.[2]

3. The prospect of disentangling consummated mergers arises in two ways before antitrust agencies across the globe:

- **Notifiable Consummated Mergers:** The review of consummated mergers, which were originally approved by an agency (or reviewed with no action from the agency) but were later revisited post-implementation.
- **Non-Notifiable Consummated Mergers:** The review of consummated mergers which did not trigger pre-merger notification thresholds (i.e., non-notifiable transactions).

4. In both these instances, these types of post-merger reviews may create less efficient markets as uncertainty could lead firms to err on the side of avoiding even highly procompetitive mergers, because, on the margin, they would not wish to close a transaction amid unresolved questions about whether they will be forced to divest the acquired assets years later, likely incurring additional costs to do so and potentially selling at fire-sale prices.[3] The coupling of these direct and indirect consequences makes ex post merger review particularly unattractive for business.

5. BIAC therefore recommends that:

- The review of notifiable consummated mergers be limited to cases where a transaction was never properly notified or where the notification was significantly misleading or erroneous.
- The review of non-notifiable consummated mergers should only occur under a limited time window, and antitrust agencies should make clear the criteria they will

[1] OECD, Investigations of Consummated and Non-Notifiable Mergers–Note by the Secretariat, DAF/COMP/WP3(2014)1, (Jan. 20, 2015), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)1&doclanguage=en [hereinafter OECD 2014 Background Note].

[2] These concerns are aligned with those in the Secretariat's Background Note for this session. *See* OECD, Disentangling Consummated Mergers: Experiences and Challenges, Background Note by the Secretariat (2022), https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges-2022.pdf [hereinafter OECD 2022 Background Note].

[3] Timothy J. Muris & Jonathan E Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29, 31 (2021).

use to evaluate when these mergers will be reviewed. These criteria should identify the types of anti-competitive harms that an agency may seek to address through a review, what remedial tools it may employ and provide a limited time for such review.

- The ex post review of consummated mergers be subject to a higher standard of review before competition agencies intervene in the transaction when compared to the ex ante counterpart.

2. Jurisdictional Analysis

6. Pre-merger notification programs were created to provide certainty, predictability, and a coherent framework for the business community. Many businesses today rely on the pre-merger process to properly screen mergers for legality.

7. As of 2019, 135 antitrust jurisdictions worldwide include regulations or laws related to merger control in their competition regimes, which allow antitrust agencies to investigate certain types of transactions.[4] These regimes are aimed at protecting consumers from transactions that substantially reduce competition. Although the specific systems and implementation strategies differ across jurisdictions, merger control regimes can be broadly categorized into two groups: (a) suspensive regimes and (b) voluntary regimes.

2.1. Suspensive Regimes

8. Suspensive regimes, which are prevalent, require that any proposed merger that meets certain pre-defined threshold(s) notify the antitrust agency prior to the transaction being completed. In these jurisdictions, the pre-merger mandatory notification system is viewed as an ex ante merger control tool. Once the parties notify the antitrust agency of a potential transaction, the transaction is "suspended," meaning that parties cannot close prior to obtaining regulatory approval or allowing a statutory waiting period to expire.[5] Canada, the United States (U.S.), and the European Union (EU) are all examples of jurisdictions with suspensive regimes.

2.2. Voluntary Regimes

9. The United Kingdom (UK), Australia, New Zealand, and Singapore all have voluntary notification regimes. The term "voluntary" in this instance tends to be a misnomer, however, as it suggests that parties may choose not to notify a proposed transaction, which is not always the case.[6] The lack of a mandated pre-merger notification process means that the review of consummated mergers is an integral part of ensuring that a voluntary notification regime is effective, which in-turn creates uncertainty for companies contemplating transactions in these jurisdictions.

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[4] OECD, *OECD Competition Trends 2021*, *Volume II*, *Global Merger Control* 9 (2021), https://www.oecd.org/daf/competition/oecd-competition-trends-2021-vol2.pdf.

[5] OECD, Investigations of Consummated and Non-Notifiable Mergers–Note by BIAC, ¶ 3 (Feb. 20, 2014), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/WD(2014)26&docLanguage=En.

[6] In certain situations, agencies from these regimes may compel notification of a proposed merger.

10. For example, in the UK if an acquiring party completes and implements a transaction without notifying the UK Competition & Markets Authority (CMA) for merger clearance, the CMA has four months from the date that the deal was made public (or if not publicized, from the date that it was brought to the CMA's attention) in which to decide whether to refer the deal to the UK Competition Commission for an in-depth review.

11. This uncertainty creates certain risks, including frustrating or delaying completion of transactions requiring clearance in more than one jurisdiction, as well as inadvertently signaling to other regulators that the transaction may give rise to potential competition risks, thereby inviting heightened scrutiny.[7] As such, voluntary notification regimes have the potential to disrupt or hinder the clearance process and the global strategy to completion. It is because of this uncertainty that BIAC favors the use of suspensive regimes, when notification requirements and suspensive periods are reasonably implemented.

2.3. Recent Cases & Jurisdictions Contemplating Changes

12. Relatively few jurisdictions, beyond those with a voluntary notification system,[8] are permitted to investigate and review consummated mergers and to impose remedies in cases where such mergers result in a substantial lessening of competition.

13. In mandatory notification regimes, consummated mergers are generally reviewed only in very specific circumstances. These situations include when parties did not properly notify a particular antitrust agency when required, if the transaction was cleared but subject to conditions that were not fulfilled within the established time period, or in other exceptional circumstances (i.e., when clearance was granted on the basis of false or misleading information).[9]

14. The U.S. is a notable exception to this general rule. In the U.S., there is no statutory time limit governing post-merger challenges, meaning that a consummated merger may be challenged at any time, even years later.[10] Some countries, like Canada, allow its antitrust agency to challenge non-notifiable consummated transactions, but within a limited time frame (i.e., one year post-consummation).[11] Even still, historically, most jurisdictions do not opt to re-challenge the legality of a transaction once it is approved.

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[7] Belinda Harvey & Dietrich Marquardt, *The Achilles' heel that can frustrate a global transaction: Voluntary merger notification regimes* (Oct. 2021), https://www.nortonrosefulbright.com/en/knowledge/publications/d7f0da38/the-achilles-heel-that-can-frustrate-a-global-transaction-voluntary-merger-notification-regimes.

[8] In jurisdictions that include a voluntary notification system, reviews of consummated mergers are a key characteristic of the regime itself.

[9] OECD 2014 Background Note, *supra* note 1, at 10.

[10] *Id.*

[11] Competition Act (R.S.C., 1985, c. C-34) at s. 97. This time period is shorter than some other jurisdictions. For example, Australia's competition law provides a three-year limitation period. In February 2022, the Canadian antitrust agency (the Competition Bureau) published a proposal to amend the Competition Act to increase the Bureau's time-limit to challenge a transaction from one year to three years. However, the Bureau does not have responsibility for setting Canada's competition policy or legislation. *See* Competition Bureau Canada, Examining the Canadian *Competition Act* in the Digital Era § 2.6 (Feb. 8, 2022), https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html.

15. However, recent discourse has led to an increased interest in post-consummation merger challenges and the prospect of unwinding long-consummated mergers, particularly in the technology sector.[12] This renewed interest has arisen primarily due to, among other things, perceived market consolidation, so-called killer acquisitions, and calls by officials for strict regulatory scrutiny of "big-tech" companies.[13]

16. In the U.S., the current leadership of the Federal Trade Commission (FTC) and the U.S. Department of Justice (DOJ) issued a joint initiative aimed at conducting a comprehensive analysis of the current U.S. merger guidelines, noting their view that "[r]ecent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses."[14] Similarly, the UK CMA has ordered that Meta (previously known as Facebook) unwind its acquisition of Giphy.[15] While not aimed at the review of consummated mergers specifically, in a joint statement by the CMA, the Australian Competition and Consumer Commission and the German Bundeskartellamt, the three regulators highlighted the importance of rigorous and effective merger control, noting that "[t]echnology markets can also be examples of highly concentrated markets . . . such that market power is easily created or entrenched, and is likely long-lived."[16]

17. With this path open towards scrutinizing mergers post-consummation, regulators around the globe are re-visiting mergers in highly concentrated markets. This can be seen from recent developments in the U.S., Canada, South Africa, and Ireland.

2.3.1. United States

18. In the U.S., in the face of rising public pressure regarding the "big tech" companies, both the FTC and DOJ Antitrust Division formed special investigation units in 2019, with the FTC showing an increasing interest in conducting retrospective reviews.[17] Since 2001, the FTC and DOJ have challenged 47 closed transactions out a total of 666 merger

[12] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2016). This renewed interest aligns with the OECD 2022 Background Note, *supra* note 2, at 10.

[13] OECD, Ex Ante Regulation of Digital Markets (OECD Competition Committee Discussion Paper) (2021), https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf.

[14] Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

[15] Press Release, Competition & Mkts. Auth., CMA Directs Facebook to Sell Giphy (Nov. 30, 2021), https://www.gov.uk/government/news/cma-directs-facebook-to-sell-giphy. *See also* OECD 2022 Background Note, *supra* note 2, at Box 13.

[16] Competition & Mkts. Auth., Australian Competition & Cons. Comm'n & Bundeskartellamt, Joint Statement on Merger Control Enforcement ¶ 10 (Apr. 20, 2021), https://www.accc.gov.au/system/files/Joint%20statement%20-%20merger%20control%20enforcement.pdf.

[17] Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology-markets; Press Release, U.S. Dep't of Justice, Justice Department Reviewing the Practices of Market-Leading Online Platforms (July 23, 2019), https://www.justice.gov/opa/pr/justice-department-reviewing-practices-market-leading-online-platforms.

enforcement actions.[18] A database of enforcement actions found 47 cases that dealt with consummated mergers since 2006.[19]

19. Historically, since the inception of the Clayton Act in 1914, the U.S. review process focused on challenging mergers *before* any anticompetitive effects were able to materialize.[20] The implementation of the Hart-Scott-Rodino (HSR) pre-merger notification program in 1976 drastically reduced the number of post-consummated merger challenges. However, under the Clayton Act, U.S. agencies are permitted to challenge consummated mergers even if the merger was notified, investigated, and not challenged as part of the pre-merger process. This is due to the fact that the U.S. substantive merger law is isolated from, and not conditional upon, the pre-merger notification process.[21]

20. Although the U.S. does not provide a time frame by which its competition agencies may bring a post-consummation challenge, when the agencies seek to unwind consummated mergers, they generally do so promptly post-consummation, usually because either:

- Non-notifiable consummated mergers brought to the agencies' attention after consummation now present anti-competitive effects; or
- Notifiable consummated mergers where competitive concerns were previously overlooked, now show that the parties unlawfully withheld material evidence during the investigation process.[22]

21. An executive order issued in 2021 by President Joe Biden[23] specifically noted that the FTC and DOJ must vigorously enforce antitrust laws to challenge "prior bad mergers" that have led to significant market consolidation that past Administrations did not challenge.[24] The FTC and DOJ also recently noted that "the current guidelines deserve a hard look to determine whether they are overly permissive."[25] Not surprisingly, the FTC's recent challenges appear to demonstrate their stronger stance in challenging consummated mergers. For example, the FTC is involved in ongoing challenges in the *Altria/JUUL* and

[18] Melody Wang, *Unscrambling the Eggs: How to Unwind Harmful Mergers after They Have Closed*, 21 U.C. DAVIS BUS. L.J. 35, 54 (2020).

[19] John Kwoka & Tommaso Valletti, *Unscrambling the Eggs: Breaking Up Consummated Mergers and Dominant Firms*, 30 INDUS. & CORP. CHANGE 1286, 1293 (2021).

[20] ABA Antitrust Law Section, Competition/Consumer Protection Policy and North American Comments Task Force, Analyzing the Scope of Enforcement Actions Against Consummated Mergers in a Time of Heightened Security 1 (Apr. 2020), https://ourcuriousamalgam.com/wp-content/uploads/Consummated-Mergers-Policy-Task-Force-Apr-2020-FINAL.pdf.

[21] *Id.* at 2.

[22] Muris & Nuechterlein, *supra* note 3, at 33-34.

[23] Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

[24] The White House, FACT SHEET: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

[25] Press Release, Fed. Trade Comm'n, Statement of FTC Chair Lina M. Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Competition Executive Order's Call to Consider Revisions to Merger Guidelines (July 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers.

Axon/Safariland mergers, both of which closed over a year ago.[26] In addition, older mergers are on the FTC's radar as well, with their challenge to Meta's acquisitions of Instagram and Whatsapp, which were completed over eight years ago.[27] Irrespective of the underlying competitive issues, a delay of eight years in bringing a merger challenge creates an unacceptable level of uncertainty for businesses pursuing mergers.

2.3.2. Canada

22. Canada's Competition Act includes mandatory pre-merger notification for transactions that meet certain thresholds. The Competition Bureau (Bureau), Canada's competition agency, has the ability to challenge any merger that the Commissioner of Competition (Commissioner) believes may substantially lessen competition, up to one year post-consummation.[28] This ensures that the Bureau has a one year window to challenge both notifiable and non-notifiable consummated mergers.

23. In recent years, the Bureau has shown interest in engaging in a more aggressive enforcement strategy, and has specifically indicated an increased interest in non-notifiable mergers. Indeed, while post-closing merger challenges have been rare, over the last few years there has been an increasing willingness of merging parties in complex and contested transactions to close "at risk," after the completion of statutory waiting periods, but before receiving affirmative clearance from the Bureau. As in the U.S., a merger may be completed upon the expiry of the first waiting period unless the Commissioner issues a Supplementary Information Request (SIR) to the parties.

24. The Bureau has recently challenged two consummated mergers, GFL Environmental's acquisition of Terrapure Environment and Secure Energy Services' acquisition of Tervita Corporation.[29] Neither matter has yet proceeded to a decision before the Tribunal. In the meantime, in a recent set of proposals, the Commissioner is advocating for a longer period for the review of consummated mergers of up to 3 years.

2.3.3. South Africa

25. The South African Competition Commission (SACC) recently released the Draft Guidelines of Small Merger Notifications (Merger Guidelines).[30] Although still in draft form, the Competition Commission published the Merger Guidelines to counter the perceived harm of "killer acquisitions" in South Africa by requiring that parties to small mergers (i.e., mergers that do not meet the defined statutory thresholds for notification) in

[26] *See* In the Matter of Altria Group/JUUL Labs, FTC No. 191 0075, https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0075-altria-groupjuul-labs-matter; In the Matter of Axon Enterprise and Safariland, FTC No. 1810162, https://www.ftc.gov/legal-library/browse/cases-proceedings/1810162-axon-enterprise-safariland-matter.

[27] *See* Fed. Trade Comm'n vs. Facebook, Inc., FTC No. 191 0134, https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v.

[28] Competition Act (R.S.C., 1985, c. C-34) at s. 97.

[29] *Commissioner of Competition v. GFL Environmental Inc.* CT 2021-006, Notice of Application (Nov 30, 2021), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/516939/index.do; *Commissioner of Competition vs. Secure Energy Services Inc. and Tervita Corporation* CT-2021-002, Notice of Application under s. 104 (June 29 2021), https://decisions.ct-tc.gc.ca/ct-tc/cdo/en/item/499665/index.do.

[30] Competition Comm'n of S. Afr., Draft Guidelines of Small Merger Notification (May 7, 2021), https://www.gov.za/sites/default/files/gcis_document/202105/44545gon404.pdf [hereinafter S. Afr. Draft Merger Guidelines].

digital markets specifically inform the Competition Commission of the transaction.[31] The Merger Guidelines require the notification of small mergers where parties to a transaction "operate in one or more digital market(s)" and certain thresholds are met.[32]

26. Measures to address small mergers are not unique, particularly in the context of the acquisition of nascent competitors. In fact, the International Competition Network's (ICN) Recommended Practices for Merger Notification and Review Procedures recognize the role and importance of "residual jurisdiction" subject to the requisite safeguards, such as a period of limitation.[33] Whether the introduction of sector specific thresholds is necessary or appropriate is perhaps more contentious, however.

27. The effective prohibition of "killer acquisitions" requires a consideration of "potential competition," which, in turn, must be illustrated by the Competition Commission to be likely through actual and qualitative evidence. The concept of potential competition is not new to South African competition law. In this regard, the seminal case for "potential competition," which the Competition Commission cites in its Policy Paper, is that of MIH eCommerce Holdings (Pty) Ltd, at the time trading as OLX South Africa and WeBuyCars (Pty) Ltd (WBC Transaction).[34]

28. The WBC Transaction and other cases show that legislative changes are not required to address the issue of potential competition. It also demonstrates that where evidence of potential competition exists, the existing legal framework is sufficient to address the potential harm. The difficulty with this precedent and the regulation of potential competition is that it requires that the Competition Commission identify, with reasonable certainty, whether an acquired start-up will become a significant competitor to the incumbent absent the merger. The Competition Commission must also determine with sufficient certainty that there exists market features to prevent other start-ups from entering the market segment, and thus restoring any lost competitive pressure on the incumbent. However, although the Merger Guidelines enable the Competition Commission to review certain transactions ex post, an ex post review will not necessarily make it easier to determine whether a start-up would eventually be a competitor to the incumbent. As a result, the ex post review would fail to address the fundamental issues associated with the review of "killer acquisitions." Should public interest be utilized to circumvent this analysis, this would result in severely prejudicial consequences, harm to competition, and harm to the Competition Commission's broader public interest objective of increasing entry and expansion of small firms in digital markets.[35]

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[31] *Id*. at 3.

[32] *Id*. Thresholds include having the purchase consideration: exceeds ZAR190 million; at least one of the parties to the transaction has a market share of 35% or more in at least one digital market; or the merger results in the merged entity being "dominant" in the market (as defined in the Competition Act). *Id*.

[33] INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES 3 (2018), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf [hereinafter ICN MERGER NOTIFICATION RPS].

[34] Competition Tribunal of S. Afr., Competition Commission and MIH Ecommerce Holdings (Pty) Ltd; We Buy Cars (Pty) Ltd, https://www.comptrib.co.za/case-detail/8860.

[35] Absent assessments based on market features, unintended prejudicial consequences arise through focusing on short term gains through, for example, employment conditions, which distort the potential growth for long term employment and expansion through thorough market assessments.

2.3.4. Ireland

29. In January 2022, the Irish government published the Competition (Amendment) Bill 2022, which, among other things, gives the national competition authorities strengthened powers in relation to merger control.[36] Specifically, the Bill allows the government to unwind completed mergers, regardless of whether or not it met the threshold for pre-merger notification. With this amendment, the Irish competition authority's powers become more in line with the European Commission and the UK's CMA. As of May 2022, the Bill is under debate in the Senate.[37]

3. Notifiable Consummated Mergers (Already Reviewed) Generally Should Not Be Disentangled

30. As shown in the above major jurisdictions, and spearheaded by the discourse emanating from the U.S., many jurisdictions are contemplating legislative and regulatory changes to allow longer time frames and other remedial powers to re-review consummated mergers. However, while this may tempting for regulators who cannot be sure what anti-competitive behaviors may arise from a transaction many years in the future, BIAC recommends against such an exercise for at least the following reasons:

- A longer timeframe for re-review may disrupt predictability and certainty and also deter pro-competitive mergers, while punishing those who are compliant with the merger review process;
- Antitrust agencies will have to engage in costly and lengthy litigation and meet economic and evidentiary burdens to disentangle a consummated merger; and
- This practice is susceptible to being politicized during election campaigning and changes to governing regimes. Businesses should not be used as the pawns in a political game.

3.1. Deterrence and Punishment

31. Today, where businesses may expend significant resources on pre-merger notification, certainty and finality should be a reasonable expectation of pre-merger review. The very reason that pre-merger investigations are bound by time limits are to incentivize agency staff "to investigate and make enforcement recommendations within a relatively short time period."[38] These time limits also enable the agencies and businesses concerned to work together, often faced with overcoming the challenges posed by seriously different procedures and timeframes to reach consistent well-reasoned outcomes.[39]

32. Intervention that takes place well after a transaction has closed is less likely to be efficient at preventing the competitive harms that the agencies seek to fend-off and more likely to be costly, drawn-out proceedings. Business following the rules and providing truthful, accurate and timely information to agencies charged with monitoring mergers

[36] Competition (Amendment) Bill 2022 [No. 12 of 2022], https://www.oireachtas.ie/en/bills/bill/2022/12/?tab=bill-text (Ir.).

[37] *Id.*

[38] David Givensky, *Investigating Consummated Mergers: The Antitrust Agencies' Shift Toward a Retroactive Enforcement Policy*, 32 REV. BANKING & FIN. L. 88, 95 (2012-2013).

[39] OECD 2014 Background Note, *supra* note 1.

should be afforded with a reasonable degree of legal certainty that their transaction will not be upended years later, especially when the overall impact of the merger, given its scope, is immaterial.[40]

33. Challenged businesses may be unfairly disadvantaged because their competitors are able to "move[] on and continue[] to develop next-generation products" while they are burdened with the investigation.[41] Additionally, these challenged businesses may lose customers, vendors, and employees throughout the review process because of the uncertainty that the business may be broken up.[42] These consequences can be even more counterproductive when an investigation concludes that no antitrust violation was found and the deal is able to remain intact.

34. Agency review of consummated mergers is justified in situations in which the parties have wrongfully provided information that is incomplete, misleading or erroneous. This standard should only be met where there has been "material fraud or deception" (e.g., deliberate withholding of strategic business documents that but for being withheld would have led to a new line of inquiry).

35. If the agency is able to fulfill their evidentiary burden, it is possible that they may be able to preserve competition by intervening after the fact, but only at a significant cost. Indeed, review of consummated mergers may have a negative impact on the willingness of parties to engage in merger activity to begin with. With the potential for inefficient effects on investment and integration, there could be less efficiencies that benefit the economy.[43] Any expansive and unprincipled approach of post-consummation review could also generate social harm, by increasing the levels of legal uncertainty in the merger review process.[44] These types of investigations are also shown to be more likely to result in increased litigation than pre-consummation challenges.[45] Lastly, some scholars suggest that not only does the government lack detailed information to devise how a company should be disassembled, but competition agencies cannot ensure that companies will assist in their own unwinding.[46]

3.2. Costly Litigation and Economic and Evidentiary Burdens

36. When faced with post consummation challenges, companies have more at stake and thus are more willing to litigate (to save their transaction) than if the investigation occurred pre-consummation. The governments of certain agencies are also more likely to initiate litigation in these circumstances because there is generally more evidence that can be collected post-consummation.

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[40] *Id.*

[41] Scott Sher, *Undoing Done Deals: The Chicago Bridge Decision*, DEALLAWYERS.COM (Jan. 19, 2005), https://www.deallawyers.com/blog/2005/01/undoing-done-deals-the-chicago-bridge-decision.html.

[42] J. Thomas Rosch, Consummated Merger Challenges–The Past is Never Dead, Address Before the ABA Section of Antitrust Law Spring Meeting 20 (Mar. 29, 2012), https://www.ftc.gov/sites/default/files/documents/public_statements/consummated-merger-challenges-past-never-dead/120329springmeetingspeech.pdf.

[43] ABA, *supra* note 20, at 7-8.

[44] Menesh S. Patel, *Merger Breakups,* 5 WIS. L. REV. 975, 980 (2020).

[45] Givensky, *supra* note 38, at 94-95.

[46] Wang, *supra* note 18, at 43.

37. Unfortunately, with litigation comes lengthy investigations, high costs, and a number of other derivative effects that negatively impact the challenged businesses, consumers, and market. These lengthy investigations can "paralyze markets" by creating substantial financial and manpower burdens that create inefficiencies.[47]

38. Importantly, in order for antitrust agencies to consider unwinding consummated mergers, they would also be required to prove certain economic and evidentiary burdens with respect to anti-competitive effects.[48] According to some economists, antitrust agencies would be hard pressed to meet three heavy evidentiary burdens, and would be required to prove.[49]

- **Causal Link**: That but-for the merger, the world today would likely be substantially more competitive than the world post-merger. If the answer is no, there can be no liability. That is, the antitrust agency must demonstrate whether the outcome of the merger was foreseeable based on the world at the time of the merger (and not the result of post-merger developments).[50] Further, antitrust agencies would have to establish that anticompetitive market effects are a direct result of that particular merger and not due to any other natural shift in market dynamics or developments.[51] Establishing a causal link is increasingly difficult in those markets that are characterized by a firm's ability to effect rapid changes to its structure and conduct and which is susceptible to a shift in market dynamics as a result of factors unrelated to a particular transaction.[52]
- **Foreseeability**: That the reason for breaking up the merger was foreseeable at the time of consummation, and the merger could have been challenged at that time. When challenging an underlying merger, it must be judged in reference to the state of the world when it was consummated. A merger cannot be legal at the time of consummation but become unlawful based on changes that occur afterwards. Importantly, it may be possible that a merger that appears procompetitive ex ante may be seen as anti-competitive when viewed ex post. An example of this would occur if a competitor unexpectedly withdrew from the market, increasing market concentration sometime soon after consummation of the merger. Even still, antitrust agencies would not be permitted to enforce the unwinding of this type of merger without creating a no-fault liability competition regime.[53]
- **Balance of Benefits and Harms**: Antitrust agencies would need to demonstrate that the potential benefits of breaking up the consummated transaction would outweigh the potential harms. This would include weighing the costs and inefficiencies. This burden reflects an antitrust agency's obligation to exercise discretion in the public interest. This is particularly applicable in light of the costly and timely litigation associated with ex post merger review which is likely to result in the inefficient allocation of an antitrust agency's scarce resources.

[47] Sher, *supra* note 41.

[48] Muris & Nuechterlein, *supra* note 3, at 30.

[49] *Id.* at 35.

[50] ABA, *supra* note 20, at 32.

[51] Muris & Nuechterlein, *supra* note 3, at 31.

[52] Scott Sher, *Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act*, 45 SANTA CLARA L. REV. 41, 97 (2004).

[53] Muris & Nuechterlein, *supra* note 3, at 31.

3.3. Opens Up Merger Review Processes to Politicization

39. There is a growing concern that expanding the period for the review of consummated mergers could lead to changes in policy that cater to shifts of political regimes. While certain mergers may not garner public favor, they may be pro-competitive and efficient for certain economies. To gain political favor, aspiring political candidates could campaign for an upcoming election on the basis of unwinding a consummated merger, thus causing merger regimes to shift with the whims of individual opinions and not sound antitrust principles.

4. Non-Notifiable Consummated Transactions Need Clear Guidelines For Review

40. BIAC submits that legal certainty and efficiency in terms of both timing and costs remain essential hallmarks of any effective merger control regime.[54] BIAC therefore generally recommends caution in evaluating post consummation review of non-notifiable (or sub-threshold) mergers for the following reasons:

- The practice of imposing structural remedies on non-notifiable consummated mergers would have the effect of imputing a no-fault liability regime, undermining the rationale for applying thresholds in the first instance.
- Non-notifiable transactions are usually smaller in size and post consummation review may have a particularly adverse effect on merger incentives for small firms.
- In instances where transactions do not meet these notification thresholds, parties to the transaction expect certainty regarding the implementation of the transaction without incurring the time and costs required to obtain merger clearance.

41. Across many jurisdictions it is becoming an emerging practice to review non-notifiable consummated mergers.[55] In this regard, the imposition of structural remedies on non-notifiable consummated mergers would have the effect of imputing a no-fault liability regime. Firms would be liable for future market developments that were otherwise uncertain at the time of the transaction's consummation.[56] The implementation of a no-fault liability regime is unfair to any transacting party but particularly so to those of a sub-threshold transaction which was lawful at the date of consummation and supposedly "unlawful" at the time of the ex post review. Incidental to such assessments would also be prolonged transaction costs and timing which may hamper the success of sub-threshold transactions if such costs and timing are too burdensome on the transacting firms.

42. BIAC submits that the uncertainty and costs occasioned by post-consummation review and potential unbundling will, in particular, have an adverse effect on merger incentives for small firms. Given that the vast majority of mergers, and especially those between small firms, are likely to give rise to neutral or pro-competitive effects, post-consummation review and ex post structural remedies can result in worse outcomes for competition and consumers. The adverse effects on merger incentives for small firms and costs arising from post-consummation review can also result in less entry by innovative

[54] INT'L COMPETITION NETWORK, MERGER WORKING GROUP, NOTIFICATION & PROCEDURES SUBGROUP, SETTING NOTIFICATION THRESHOLDS FOR MERGER REVIEW 4 (2008), https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_SettingMergerNotificationThresholds.pdf.

[55] Givensky, *supra* note 38.

[56] Muris & Nuechterlein, *supra* note 3, at 42.

small firms. This is because entrepreneurs are only incentivized to innovate, and funders only incentivized to invest in nascent firms, where there is a potential path to reward. Generally, the only feasible channel through which to receive such a reward is through acquisition by a rival. The business model of nascent competitors may therefore be built on such an exit. By increasing the uncertainty and costs associated with post-consummation review, innovation and investment may be disincentivized.

43. Notably, the adverse effects arising from the uncertainty and cost brought about by post-consummation merger review and potential ex post remedies are broad. This is because such uncertainty and risk affects all firms considering legitimate sub-threshold mergers, across a range of different markets. In contrast, the potential benefits from post-consummation merger review will typically be narrow, and at best will result in an increase in competition in the specific market(s) in which the merging parties operate. For this reason, BIAC submits that post-consummation merger review should be held to a particularly high burden of proof.

4.1. Guidelines For Reviewing Non-Notifiable (Sub-Threshold) Consummated Mergers

44. BIAC recommends that antitrust agencies be constrained in their discretion to review non-notifiable consummated mergers and that any guidelines or regulation for the review of non-notifiable mergers must be strictly defined so as to avoid nullifying the objectives of merger thresholds.[57] The review of non-notifiable mergers should be limited to a review period of no more than one-year following implementation and on the condition that the transaction has the potential to substantially prevent competition or result in adverse public interest concerns. It is noted that a one-year period is in line with the approaches adopted by the Canadian Competition Bureau[58] and South African Competition Commission.[59]

45. Additionally, competition agencies must apply a streamlined approach in the review of non-notifiable transactions to allow the parties to the transaction to fully implement the transaction and to effectively participate in the market.

[57] ICN MERGER NOTIFICATION RPS, *supra* note 33, § IV.A, Comment 3.

[58] *See Overview of the Merger Review Process*, COMPETITION BUREAU, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_04448.html#sec2. (allows review of non-notifiable transactions up until one year from its consummation).

[59] South Africa's Competition Commission has issued its draft guidelines for the review of sub-threshold transactions in which it is provided with the authority to review such mergers within six months of their implementation on the basis that it suspects that the transaction may result in substantial harm to competition, consumer harm or other public interest factors. *See* S. Afr. Draft Merger Guidelines, *supra* note 30. *See also Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases*, at 5, C(2021) 1959 final (Mar. 26, 2021), https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf (allowing review of non-notifiable mergers within six-months of their implementation).

5. Challenges of Finding Appropriate Remedies

46. The use of divestiture remedies in notifiable and non-notifiable consummated mergers may disregard the merging parties' substantial investments of time, capital, and resources.[60]

47. In instances where a merger has been implemented for a significant period of time, structural remedies often become unfeasible and near impossible to implement due to the degree of integration between the firms.[61] The imposition of such remedies may result in businesses becoming disincentivized to enter into mergers, particularly where there is a risk that business would be forced to divest the assets they acquired long after the acquisition has taken place.[62] Such divestment may also result in direct costs associated with unbundling integrated operations and assets, as well as indirect costs in the form of foregone economies of scale and scope. Equally, efforts to source a suitable purchaser presents significant challenges.[63] Further, even where a purchaser is found, the sale is bound to occur at sub-market value due to the decrease in bargaining power as a result of the divestiture order. Ex post review is also bound to have adverse effects on consumer welfare as firms would be disincentivized to engage in product development which otherwise stands to be lost to ex post remedies, whether they be structural or behavioral. Accordingly, unwinding a consummated merger should not be a first option for competition agencies.[64]

48. While behavioral remedies are generally favored over structural remedies in the case of consummated mergers,[65] BIAC submits that, in addition to the difficulty for authorities to monitor compliance, behavioral remedies are not entirely fit for purpose given the inherent difficulty in correctly identifying the relevant anticompetitive effects.

49. Equally, behavioral remedies are complex, and designing an appropriate behavioral remedy which may, nevertheless, be rendered less effective or more difficult to implement due to changing market circumstances, creates additional business risk.[66] Furthermore,

[60] Givensky, *supra* note 38.

[61] OECD, Executive Summary of the Roundtable on Investigations of Consummated and Non-Notifiable Mergers, DAF/COMP/WP3/M(2014)1/ANN3/FINAL, at 4-5 (Mar. 11, 2015), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3/M(2014)1/ANN3/FINAL&doclanguage=en.

[62] Muris & Nuechterlein, *supra* note 3.

[63] Attempting to identify a purchaser of the divested company, initial acquiring firms are prone to looking after their own interests by drawing out investigations and litigation whilst simultaneously wasting the acquired firm's assets—making it as unattractive for purchase as possible, prejudicing the target firm. *See* Scher, *Closed But Not Forgotten*, *supra* note 52, at 54.

[64] *See* United States v Microsoft Corp. 253 F.3d 34, 105 (D.C. Cir 2001) (noting that a divestiture order would not be appropriate unless the authority is able to prove the causal connection between exclusionary conduct on the part of the merged party and the merged party's position in the market).

[65] Wang, *supra* note 18.

[66] OECD 2014 Background Note, *supra* note 1, at 4; Frank Maier-Rigaud & Benjamin Loertscher, *Structural vs Behavioral Remedies*, CPI ANTITRUST CHRON. (Apr. 2020) https://www.competitionpolicyinternational.com/wp-content/uploads/2020/04/CPI-Maier-Rigaud-Loertscher.pdf, at 5.

behavioral remedies may also result in the distortion of an affected firm's behavior, and dampen the incentive to innovate.[67]

50. Behavioral remedies also tend to result in an additional form of "regulation" on the firms themselves particularly as the remedies are designed with the aim of preventing circumvention, resulting in the remedy often being overly detailed which restricts the firm's ability to compete efficiently and effectively within the market.[68]

51. Accordingly, while behavioral remedies may be preferred over structural remedies, these types of remedies can still be highly complex and burdensome to merger parties and if not applied cautiously, may also undermine the underlying principles of an effective merger regime.

52. Finally, it should be noted that antitrust agencies are equipped with many other remedial tools to address anti-competitive effects in markets. For instance, many regimes provide for civil remedies to address abuses by dominant firms, as well as legislative authority for the agency to investigate "reviewable practices," which can result in remedial orders including behavioral restrictions, fines and significant administrative monetary penalties.[69] Many agencies also have the ability to initiate market studies and investigations. Market studies enable agencies to assess market conditions to enable them to identify means to restore competitive market dynamics.[70]

6. Conclusion

53. Although jurisdictions around the world appear to be trending towards the possibility of disentangling consummated mergers, this remedy risks costly and onerous litigation, reduces the legal certainty and predictability that is integral for business transactions, and risks the possibility of politicizing the merger review process. While post-consummation review and challenge is appropriate in certain limited circumstances, if post-consummation reviews become widespread, this would lead to adverse effects, including harm to consumers and the imposition of no-fault liability regimes. This would run counter to the objectives of merger control. Instead, regulators should ensure that the post-merger review process is efficient and allow parties to effectively participate in the market.

[67] Thomas Hoehn & Alex Lewis, *Interoperability Remedies, FRAND Licensing And Innovation: A Review of Recent Case Law*, 34 EUR. COMPETITION L. REV. 101 (2013).

[68] Frank P. Maier-Rigaud, *Behavioural versus Structural Remedies in EU Competition Law*, *in* EUROPEAN COMPETITION LAW ANNUAL 2013: EFFECTIVE AND LEGITIMATE ENFORCEMENT OF COMPETITION LAW (Philip Lowe, Mel Marquis & Giorgio Monti, eds., 2016), 207, 210.

[69] Antitrust agencies are aware that these tools exist and should be put to use, e.g. in regard to killer acquisitions. In 2021, agencies from the G7 met for an Enforcers Summit to discuss collaboration and enforcement on issues such as large digital platforms, app stores, online marketplaces, digital advertising, mobile ecosystems, cloud computing, and algorithms. The summit included representatives from the European Commission, as well as 2021 G7 invitees Australia, India, South Africa, and South Korea. *See* Press Release, G7, G7 Shared Policy Objectives for Competition in Digital Markets (Dec. 15, 2021), https://www.g7uk.org/g7-shared-policy-objectives-for-competition-in-digital-markets/.

[70] For example, in South Africa, the SACC may institute a "market inquiry" to determine whether *any feature* results in an adverse effect on competition in a market. Further to this, the SACC may take *any action* within its powers and as recommended in its Report subsequent to a market inquiry, which includes the implementation of new or amended policy, legislation or regulations.