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Disentangling Consummated Mergers – Experiences and Challenges – Summaries of contributions

This document reproduces summaries of contributions submitted for Item 6 of the 138th OECD Competition Committee meeting on 22-24 June 2022.

More documentation 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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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Disentangling Consummated Mergers – Experiences and Challenges (138th Meeting of the Competition Committee on 22-24 June 2022). 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 *.

Argentina

The Argentinian contribution discusses different aspects of an ex-post-merger control system, considering the fact that Argentina's Competition Defence Act (LDC, for its acronym in Spanish) has recently been amended to establish, among other modifications, an exclusively ex-ante notification system—which has not yet been implemented—and an instance of preliminary assessment before the final decision with the incorporation of Objection Reports.

To contextualize the current situation regarding the mergers control system, the first section carries out a comparative analysis between the previous and the existing LDC and also touches on some of the characteristics of the transitional situation that the Argentinean competition authority (CNDC, for its acronym in Spanish) is going through in connection with the notification system

The second part examines the BRINK'S ARGENTINA/MACO case, a transaction among the last mergers notified under the previous LDC, in which its approval was subject to the compliance of a commitment that considered both structural and behavioural remedies. Given that the communication of competition concerns and the negotiation of possible remedies were done at the last stage of the investigation under the former LDC, the divestiture and relocation of assets agreed upon with the parties had to meet two requirements: to be feasible and mitigate the harmful effects of the operation.

The third section considers how Objection Reports have proven to be a remarkably useful instrument even in the current transitional phase, when the ex-ante regime has not yet been put in place. They have contributed to by reducing the time between the notification of operations and the communication of the identified concerns to the involved parties and channelling through a formal procedure the negotiations on remedies. Likewise, the implementation of this procedure has proved to be an important transitional step on the National Commission's path towards the ex-ante notification system and, at the same time, it has made it possible to bring the CNDC´s investigation and decision times closer to those of other competition agencies, particularly relevant when dealing with transactions of international scope.

The fourth and last section summarises the challenges that await the CNDC concerning the merger control system and agreeing remedies with the involved parties aimed at alleviating the competition risks arising from some transactions.

Australia

The vast majority of mergers that have the potential to raise competition concerns are considered pre-consummation by the Australian Competition and Consumer Commission (ACCC). The ACCC considers that reviewing mergers pre-consummation is much more effective than considering consummated or completed mergers. However, the ACCC is able to investigate completed mergers and institute legal proceedings if it considers that there is evidence that the acquisition would have or be likely to have the effect of substantially lessening competition and seek a range of remedies, including penalties and divestiture.

Australia is one of a small number of countries that operate under an informal, voluntary merger notification regime. Where merger parties threaten to complete without notification or before a review has concluded, the options available to the ACCC include: seeking an urgent court injunction to stop completion; requesting the merger parties to voluntarily provide hold separate undertakings; or allowing the transaction to complete and, if necessary, taking enforcement action to obtain remedies at a later date.

Once a merger has completed, the ACCC's experience is that it is more difficult to effectively investigate the impact of the merger on competition. Primarily, this is because there are fewer commercial incentives post-completion for the merger parties and third parties to cooperate with the ACCC's investigation and provide detailed and timely information. If the ACCC determines that there is evidence that a transaction is anti-competitive and requires a remedy, changes to the market dynamics, asset mixing ("egg-scrambling") or other changes to the business acquired since the merger has completed can create difficulties or make it impossible to restore competition to a pre-transaction level. It can also be more difficult to formulate effective remedies for consummated transactions.

BIAC

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.

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]

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).

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.

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 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

[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).

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.

Brazil

This article analyses the Brazilian experience with recent cases involving the reversal of mergers and acquisitions. It dives into a relevant decision in the country's case law involving the matter - Nestlé's acquisition of Garoto, and the issues arising from the transaction. There is indication that the changes made to the antitrust legislation in 2011 allowed for mitigating the issues observed in this transaction.

The adoption of different configurations of economic groups in market economies is a natural process. Asset acquisition, diversification of areas of activity, portfolio updating, outsourcing and other phenomena are used to maximise the return in ever-changing economic contexts. Some of these changes are more lasting, such as the alteration of property rights of certain assets, or the modification of the corporate structure of businesses. As they have the potential to change incentives that improve market operations in a definitive manner, these more lasting changes are subject to merger control in Brazil.

Merger control in Brazil in past decades has seen two phases: one in which reviews were conducted after the facts (1994 to 2011), and another in which it is necessary to request an authorisation from the competition authority before completing the mergers (from 2012 onwards).

The system adopted from 1994 through 2011 imposed high costs for the competition authority to undo transactions but that is not necessarily a bad thing. Statistically, transactions are only blocked or conditionally cleared in a handful of cases submitted to merger control around the world. In most cases, they do not impact competition and represent an attempt to speed the pace of business development by entrepreneurs, besides presenting potential gains in synergy.

As the antitrust authority had not had much experience with the matter, the legislative choice seems to have been to avoid adopting an excessively interventionist approach. The problem with this choice was the seemingly practical difficulty to undo transactions or impose restrictions once they have been completed. The difficulty involved issues such as how to reorganise factories, brands and teams for everything to go back to its original form. It seemed necessary certain precautions prior to the completion of transactions.

The first move in this direction happened via preventive measures or an Agreement to Preserve the Conditions for Merger Reversal (APRO, in its acronym in Portuguese). At this point, these tools allowed for certain transactions to be forbidden, either by a unilateral decision of the Brazilian antitrust authority (using preventive measures) or as a result of a negotiation (APRO[4]). Nonetheless, this system was also flawed. Irreversible transactions were not covered and there was no clear limitation concerning actions taken prior to the reporting of the transaction. Few cases are as emblematic about these limits as the acquisition of Garoto (Chocolates Garoto) by Nestlé (Nestlé S.A.).

[4] Former Statutes of CADE. Consolidated on 2 August 2011. No longer in force.

'Article 99. Once one of the copies of the request filed by the applicants has been received from the Secretariat for Economic Law, the case is to be distributed in the following distribution session.

(1) Once a case is assigned, should the Rapporteur deem it necessary, they will summon the legal representatives of the applicants to discuss the signing of an APRO, or may impose a preventive measure.'

The transaction happened in February 2002 and was reported to the Administrative Council for Economic Defence (CADE), the Brazilian competition authority, the following month. In 27 March 2022, the applicant and CADE signed an APRO to preserve the business distinction between Nestlé and Garoto, their operations and the separation of their workers, factories and brands. The idea was ensuring the useful outcome of the process in case of a decision that did not clear the transaction unconditionally. The acquisition affected three markets: sugar confectionery, chocolate coatings (mixes of cocoa, sugar and milk products, sometimes with additives, used for the production of bonbons or other chocolates), and chocolate confectionery (bars and bonbons industrially prepared and packaged for final consumption). There was no concern involving the sugar confectionery market.

When reviewing the transaction, the antitrust authority observed that, together, the applicants held more than 80% of the shares in the chocolate coating market. Garoto also had almost all of the market's idle capacity, which corresponded to three times the total volume sold in the entire market in the year prior to the review of the transaction. The authority concluded that an entry that could limit the market power of the applicants was unlikely in a two-year term, given the expected defensive strategy to be adopted by the firms after the transaction.

In the case of the chocolate confectionery market, the resulting concentration would be superior to 60% of the market shares. These high concentration levels would be reinforced by the difficulty of creating a competitive portfolio in this market, where incumbents and fringe producers found it extremely hard to develop new brands and recipes that appeal to consumers. In accordance with CADE's case law, artisanal chocolates were not included in the same relevant market.

Thus, in 2004, CADE's Tribunal blocked the transaction by the majority of votes because it resulted in high market concentration, causing adverse effects in the markets of chocolate coating and chocolate confectionery. The Tribunal also rejected conditional clearance and partial divestment as it observed such measures would threaten the existence of the acquired firm Garoto. A partial divestment would also make Garoto's manufacturing operations unfeasible in the medium and long terms, jeopardising market competition.

Nestlé challenged CADE's decision in court and the effects of the transaction's blockage were suspended. Hence, blockage was suspended, but the APRO remained in force.

In 2016, 12 years after CADE's decision, the antitrust authority and Nestlé reached a settlement with a new proposal for partial divestment aimed at deconcentrating the chocolate confectionery market. Concurrently, the authority launched a new investigation to understand the merger's effects on the market, which revealed many players entered the chocolate coating industry since then, reducing the concentration ratio. Conversely, there has been little change in the market of chocolate confectionery over the 14 years. The antitrust authority was favourable to the settlement proposal as, in its understanding, asset disposal would be beneficial at that time, potentially mitigating concerns in the market of chocolate confectionery. However, failing to be completed in time, the divestiture was unsuccessful.

The litigation has not ended to this day, and the challenge of undoing a deal that was consummated before the premerger notification regime remains a major challenge.

In 2012, the Brazilian parliament passed a new competition law, seeking a more efficient merger control by requiring premerger notification from parties with high sales turnover by Brazilian standards.[5] The idea was to prevent cases such as the Garoto/Nestlé merger.

[5] Equal or greater than BRL 750 million for one party and BRL 75 million for the other.

The rule applies to cases in which the merging parties exceed the sales turnover threshold. Businesses under development – with low or no sales turnover, such as start-ups – are not obliged to notify. Besides, premerger notification applies only to deals that lead to changes in corporate structure or in property rights over assets.

Post-merger control remains for cases in which one or both players do not reach the annual sales turnover established by law and for partnership agreements with a duration of less than two years or undetermined duration. In case of term extension, the parties must notify the authority about it before the agreement is in effect for two years.[6] Partnership agreements are those in which companies are not part of a same corporation but share the risks and results of the economic activity and compete in the relevant market described in the agreement.

[6] CADE Resolution 17/2016: "Article 3. Parties are to notify CADE of agreements inferior to a two-year term or with an undetermined period if they reach or exceed two years as of their signature.

Paragraph 1. The parties must notify the agreements before their renewal; their continuity for a period equal or superior to 2 years is contingent on CADE's approval.

Hungary

The Hungarian merger control regime is ex-ante, however, the Hungarian Competition Authority (GVH) has the power to intervene on certain implemented mergers as well. Its effective legal basis is the Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Competition Act). Notices were delivered to help clarifying the Competition Act and summarising the practice of the GVH.

The legal judgement of an implemented merger depends on whether the transaction fulfils the criteria of mandatory or voluntary notification. Implementation of a concentration constitutes gun-jumping only in case of mandatory notification. There is also different time limit for initiating investigation of implemented concentration in case of mandatory and voluntary notification. The GVH is not authorised to investigate mergers which do not fulfil the criteria of mandatory or voluntary notification.

Most experience in connection with implemented concentrations stems from gun-jumping cases. The parties themselves usually notified the already implemented merger, but occasionally the GVH ex officio also noticed that a concentration was not notified prior implementation. There were also some occasions, when the original decision had to be withdrawn because of misleading information, and in the new investigation, an implemented merger had to be examined.

When the GVH intends to prescribe remedies in an implemented merger, the GVH considers primarily the potential effects and the market situation at the end of the procedure, regardless of whether intervention would have been needed at the time of implementation. The aim is to examine what kind of potential effects the implemented structural changes can have on the future market courses.

One of the most important rule in connection with analysing the effects of implemented mergers is to take into consideration all the relevant data available at the time of the decision. This rule enables the investigation of both pre- and post-merger data, but makes it clear, that the data on the actual effects of the transaction are of foremost importance. The data from the time period of implementation should be carefully checked for accuracy. If it is found that the data has been manipulated to avoid investigation, it should be excluded from the assessment.

Lithuania

In Lithuanian jurisdiction examination of consummated mergers by the competition authority is available as a tool of ensuring competition following the mergers which do not exceed notification thresholds. As an outcome of such investigations, the merger can be cleared, prohibited as well as cleared subject to conditions.

From the standpoint of material assessment of completed mergers, for the most part, the assessment criteria are the same as in the case of ordinary merger review. However, as is illustrated by one of Lithuanian cases, the *ex-post* nature of the procedure enables additional criteria, such as actual price effects (or any other effects) on competition following the merger.

From the procedural side as well, there are many resemblances to the ordinary merger review. However, there are also some particularities, such as the need to set a deadline for submitting the merger notification.

In terms of judicial review, in cases on concentrations considered upon initiative of the Lithuanian Competition Council, judicial challenges of non-final decisions adopted during the procedure are very common, in contrast to ordinary merger review where such challenges are relatively rare.

Mexico

Federal Economic Competition Commission (COFECE or the Commission)

Mexico's competition legal framework provides for the analysis of two types of consummated mergers that can be broadly classified as: (i) those that do not raise competition concerns, and (ii) those that can harm competition – referred to in the Federal Economic Competition Law (LFCE) as unlawful mergers. The former are assessed by the Technical Secretariat with the objective of investigating, sanctioning and, if there is evidence of no competition concerns, authorizing consummated mergers that should have been notified, while the latter are investigated by the Investigative Authority aiming to determine among other elements, if the merger has anticompetitive effects or facilitates the commission of unlawful monopolistic practices. For any case, a main challenge is to have access to the necessary information to support the findings of the omission to notify a consummated merger, or an unlawful merger. Also, compliance by the parties of commitments imposed by the Commission in unlawful mergers may be a challenge.

Federal Telecommunications Institute (IFT)

This contribution describes the applicable legal framework for merger analysis in the telecommunications and broadcasting (T&B) sectors in Mexico, mainly limited to operations that were not authorized following the general merger notification procedure established in the competition law (LFCE), either because the parties did not comply with the obligation to notify when they should have done so or because the merger fits in the exception provided for in the Ninth Transitory Article of the sectoral law (LFTR). Also, it shows the type of remedies, actions, or measures that the IFT could take to avoid or correct damages to the competition process in merger cases, which may differ, depending on whether they are result of ex ante evaluations or ex post investigations, and brings into consideration the discussion on the challenges of imposing structural remedies, even in unconsummated mergers.

It presents three case studies related to: 1) unlawful mergers investigations on sound broadcasting radio services, which were closed by the IFT's Board; 2) a substantial market power investigation on Pay TV, which is in the process of evaluation for the imposition of specific measures in the relevant markets determined by the IFT; and 3) the Disney-Fox merger, which was authorized subject to remedies, and their compliance was certified on January 12, 2022.

Singapore

As a matter of first principles in many competition law frameworks, should merger parties consummate anti-competitive mergers without taking due care to assess the anti-competitive effects of the merger or seek the competition authorities' clearance, the merger parties can be required to dissolve the consummated merger. This is true not only for mandatory merger notification regimes, but also for voluntary regimes such as Singapore's.

Practical issues and difficulties can arise, however, making it difficult to unscramble some consummated mergers and remedy the harm to competition. These issues may be especially pronounced as regards mergers between digital platforms, given the intangible assets involved, as well as the role of network effects and tipping in such markets.

Given the practical issues and difficulties that can arise, it is important for competition law frameworks to both effectively detect and deter potentially anti-competitive mergers, as well to effectively remedy any such completed mergers. While some jurisdictions seek to achieve these through mandatory merger notification regimes that may be further reinforced through strict gun-jumping penalties, CCCS's framework seeks to achieve this through a multi-pronged approach of (i) a voluntary notification regime; (ii) prompt and strict enforcement action against errant merger parties; (iii) the power to impose financial penalties as a punishment and deterrent; and (iv) wide powers to impose remedies to restore competitive outcomes, or at least contestability, even if the merger cannot be completely reversed.

A case in point is the investigation by CCCS into the sale of Uber's Southeast Asian business to Grab for a 27.5% stake in Grab in return (the "Grab-Uber merger")[7]. The un-notified Grab-Uber merger was completed on 26 March 2018. CCCS commenced investigations on 28 March 2018 and imposed interim measures directions on 13 April 2018. While it was not possible to direct the reversal of the driver and customer network that had migrated to Grab, or to direct Uber's pre-transaction network to be divested to another competitor once the network had been dismantled by the immediate implementation of the Grab-Uber merger, CCCS designed directions to address the competitive harm and facilitate entry and expansion by other players, in addition to the imposition of financial penalties deter parties from entering into anti-competitive transactions irreversibly. CCCS's investigation and enforcement action, and the multi-pronged approach of the Singapore merger control framework, were affirmed by the Singapore Competition Appeal Board in the determination of an appeal by Uber against CCCS's infringement decision.

[7] Notice of Infringement Decision issued by the Competition and Consumer Commission of Singapore on infringement of the section 54 prohibition in relation to the sale of Uber's Southeast Asian business to Grab in consideration of a 27.5% stake in Grab, CCCS 500/001/18, 24 September 2018.

Slovakia

The Antimonopoly Office of the Slovak Republic (hereinafter as „AMO“) describes in tis contribution firstly the legislative background of the merger control in Slovakia based strictly on ex ante merger assessment with straightforward turnover notification criteria.

The contribution describes several attempts of AMO to change the legislation and to introduce supplementary ex officio based system of the merger assessment in case of mergers with prima facie possible impact on markets involving Slovakia. Also the essence of the objections upon which those proposals were not successful are the subject of the contribution.

Further, the AMO presents the possibility of the ex post assessment of mergers in cases of failure to notify and/or gun jumping cases. The practical aspects connected with time frame of an assessment, certain remedy issues and prioritisation policy are subject of the contribution. The illustration of practical challenges the AMO had to face to is included in the form of the specific example of the ex post evaluation of gun jumping merger case.

Sweden

This contribution reproduces in part certain aspects of the Swedish contribution to the 2014 Competition Committee Roundtable on Consummated and Non-notifiable Mergers that remain relevant today. It also provides updates to take account of more recent legislative and case developments and offers further conclusions that can be drawn from these, particularly with respect to the Swedish rules regarding voluntary or ordered notification of mergers that fall within the Swedish regime's residual turnover threshold.

Since the Swedish Competition Authority has limited direct experience of remedies for consummated mergers, this contribution focuses primarily on the legal framework in Sweden relating to mergers that are not subject to mandatory notification, and discusses its relevance for the assessment of consummated mergers.

United Kingdom

Under the Enterprise Act 2002 (the Act) there is no mandatory notification requirement, or automatic bar to parties completing transactions before or during a review by the Competition and Markets Authority (CMA). The United Kingdom (UK) has therefore a voluntary, non-suspensory merger control regime. Merging parties may choose to complete transactions before seeking or obtaining clearance from the CMA, and the CMA reviews many completed transactions every year.

Where the CMA finds that a transaction gives rise to competition concerns, whether that transaction is anticipated or completed, the CMA is required to take action to remedy any such concerns. To protect the CMA's ability to address any substantial lessening of competition (SLC) that may result from a transaction, the CMA has tools at its disposal to prevent or unwind integration during the course of its review (ie interim measures).

Reviewing completed transactions and remedying any competition concerns resulting from them gives rise to certain challenges. The CMA does not, however, consider that remedies relating to completed transactions should in principle be different from remedies relating to anticipated transactions.

This paper sets out the approach of the CMA when reviewing completed transactions and implementing remedies to address competition concerns resulting from completed transactions. Additionally, this paper discusses the CMA's use of interim measures, which are a fundamental element of the UK's voluntary, non-suspensory merger control regime.

The paper is structured as follows:

- Section 2 provides a general overview of the merger control regime in force in the UK. This is considered under the following headings:
  - Merger review process
  - Voluntary, non-suspensory nature of the UK merger control regime
- Section 3 explains the use and importance of the CMA's interim measures powers against the backdrop of the UK merger control regime. This is considered under the following headings:
  - The concept of pre-emptive action
  - Forms of interim measures
  - Derogations
  - Unwinding powers
  - Monitoring Trustees (MTs) and Hold-Separate Managers (HSMs)
  - Enforcement
- Section 4 explains the CMA's approach to remedies to address competition concerns resulting from completed transactions. This is considered under the following headings:
  - Identifying appropriate remedies in completed transactions
  - The implementation of remedies in completed transactions

- Section 5 discusses the lessons which the CMA has learned from its experience of implementing remedies across merger review cases involving competed transactions.