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Out-of-Market Efficiencies in Competition Enforcement – Summaries of contributions

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This document reproduces summaries of contributions submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement.htm

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03534265

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Argentina

In Argentina, debating the existence and entity of potential out-of-market (OOM) efficiencies necessarily implies thinking on the concept of General Economic Interest (GEI) – the interest protected by Act 27.442 on the Defence of Competition (LDC, for its acronym in Spanish) - and on the objectives of competition policy.

The task of the CNDC – as the enforcement authority of the LDC in Argentina – is to protect and promote competition under the premise that a higher economic welfare can be achieved through more and better competition in the markets. Safeguarding the GEI is the main goal of competition policy, and it is also the welfare standard that guides the LDC.

OOM efficiencies comprise those benefits that may derive from an anti-competitive conduct, or from a merger capable of hindering competition in a market. These benefits are not captured in a more "traditional" impact assessment of an act with anti-competitive effects, but could, in theory, offset such effects in the affected market, or benefit a market other than the one in which the harm occurs. Here the delineation of the GEI plays a preponderant role as it allows, firstly, to establish whether OOM efficiencies occur and, secondly, to assess whether they succeed in neutralising or counteracting a hypothetical harm to the competitive environment.

In order to analyse to what extent the assessment of OOM efficiencies is admissible within the Argentine regulatory framework, and the recent precedents of conduct and mergers analysis that incorporated their evaluation, this note is structured as follows. The first part analyses certain provisions of the LDC, particularly the sections referring to agreements among competitors and their effects on competition, and the exemptions that could be issued by the competition authority, even in the face of evidence of anticompetitive effects. The second part examines the new "*Regulation for Mergers Notification*", issued in 2023, and the reinterpretation of the old section on "efficiency gains" in transactions with potential anti-competitive effects. That section is now called "Benefits of the transaction on the general economic interest" and it incorporates the analysis of certain OOM efficiencies. The third section describes the "Avon/Natura" merger, objected by the authority in 2022, in the context of whose analysis, the companies raised the existence of efficiency gains and benefits to the GEI that would mitigate the potential adverse effects of the transaction. As a conclusion, the fourth section reflects on the rapprochement between competition policy and the rest of the regulatory body that makes up the economic policies of a jurisdiction, which is implicit in the OOM efficiencies' assessment within the antitrust analysis.

Australia

Pursuant to the *Competition and Consumer Act 2010* (Cth) (the **CCA**), the ACCC is able to grant authorisation for conduct, specified in the authorisation, to which one or more provisions of the CCA apply. The ACCC may authorise mergers and anti-competitive conduct. There are differences in the process for each, but both include a consideration of whether the conduct/merger would be likely to result in a net benefit to the public.

This paper explains Australia's authorisation tests for mergers and non-merger conduct, which allows for the weighing of public benefits and detriments as part of a public benefit test.

Consideration of the net public benefit entails identification and analysis of likely public benefits and public detriments, and the weighing of the two. The ACCC must not grant authorisation unless it is satisfied that the proposed merger or non-merger conduct wouldn't be likely to substantially lessen competition or would be likely to result in a net public benefit. The ACCC must be satisfied that there is a nexus between the proposed conduct or merger and the claimed public benefit.

This submission also provides case examples where the net public benefit test has included regard to environmental claims as an example of consideration of possible out of market efficiencies.

In principle, the ACCC treats environmental claims, in the same way as out of market efficiencies, in the sense that both may be capable of recognition in the authorisation process provided that the ACCC can be satisfied they are real and verifiable. The ACCC will also give more weight to benefits which are enduring.

Austria

Traditionally, in most cases, out of market efficiencies are not fully taken into consideration in competition law. Recently, however, there have been signs that out of market efficiencies are becoming more important in the assessment. An overview of Austrian experience, concerning the Austrian sustainability exemptions and the Austrian merger control regime, is provided in this paper. The Austrian legislator pioneered with the amendment of the criteria for cartel exemptions under the Austrian Cartel Act, whereby even out of market efficiencies may suffice to fulfil the criteria for the national sustainability exemption. Further complementary soft law instruments, such as Sustainability Guidelines, issued by the Austrian Federal Competition Authority (AFCA), highlight options that allow undertakings to promote sustainability through suitable cooperations without infringing cartel law. A modification of the criterion of consumer participation (“fair share”) has also come into the debate, regarding the difficulties lie in recognizing sustainability effects as relevant efficiencies within the meaning of competition law. An adapted test scheme for the evaluation of sustainability agreements, applied by the AFCA, is presented.

Austrian law provides a basis for parties’ arguments towards considering broader potential benefits of mergers that might occur out of market, which can include effects outside of the relevant product or geographic markets, as well as potentially on labor markets. The so-called three possible “justifications”, examined under the Austrian Cartel Act, are proposed: “improvements in competitive conditions criterion”; “international competitiveness criterion” and “economic justification criterion”; “economic advantages criterion”. Third newly introduced justification poses several questions for competition law practitioners. It may exist potential doubts, whether and to what extent the Austrian Cartel Court will take a broader stance towards including societal goals (such as fair income distribution or environmental standards) when assessing potential economic advantages of anti-competitive mergers. The criteria for taking out of market efficiencies into account in merger proceedings remain somewhat vague.

BIAC

Business at OECD (BIAC) appreciates the opportunity to comment on the Competition Committee roundtable on out of market efficiencies in competition enforcement. As BIAC has emphasized on a number of previous occasions, the treatment of efficiencies is an issue of great importance to the business community at large, not least of all in the evaluation of proposed mergers. Mergers, as well as less far-reaching collaborative arrangements, often offer firms the ability to gain synergies that they otherwise would not be able to achieve or would be able to achieve only at significantly higher costs or over longer periods of time.

Typically, out of market efficiencies affect consumers in different markets from those where possible competitive effects may allegedly be felt as a result of a merger, an agreement, or unilateral conduct. For example, out of market efficiencies could benefit consumers in other product or geographic markets, or future consumers benefitting from efficiencies that will only materialize in the future. As the Call for Contribution for this roundtable observes, one main question is whether competition authorities should balance the impact on consumers that are directly harmed, on the one hand, with beneficial effects that occur outside the market under consideration, on the other hand.

The debate about efficiency claims has certainly intensified over the past few years, partly as a result of concerns voiced by some that competition law enforcement should be more aligned with societal interest and partly because of concerns that a failure to give proper attention to the role of efficiencies that materialize outside the boundaries of the relevant market would discourage firms from entering into business strategies with sustainable development goals that would benefit societal welfare overall. For instance, conflicts may arise between environmental or sustainability goals and antitrust law where companies cooperate to implement CO2 reduction initiatives, which would benefit society at large, but where their collaboration might give rise to higher consumer prices in some markets.¹

As set out in this submission, BIAC is in favor of taking out of market efficiencies on board, preferably on the basis of a well-defined standard and methodology. This position is fully in line with the position it took at the Roundtable on Sustainability and Competition in December 2020, where it stated that “sustainability benefits are economic and cognizable efficiencies” that could and should be credited against harm resulting from an agreement or other business conduct.² BIAC would acknowledge that such out of market efficiencies should be recognized only when cognizable and demonstrable but notes that this assessment should be objective and not based on the highly imbalanced and dismissive view of efficiencies that currently pervades most competition authorities.

While it would welcome a robust acknowledgement that out of market environmental efficiencies can and should be taken on board, BIAC also is of the view that there is a strong need for a reflection on the treatment of out of market efficiencies more generally. This is because environmental out of market efficiency claims do not present unique features – except perhaps the fact that they will almost always involve benefits outside the potentially

¹ Similarly, fishery conservation efforts by fishermen in the form of catch limitations (potentially leading to price increases, thereby affecting consumers in the relevant market) may help to combat resource depletion (benefitting consumers at large), but antitrust law may be an obstacle to those efforts.

² OECD, Sustainability and Competition – Note by BIAC, DAF/COMP/WD(2020)71, at 12 (Nov. 13, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)71/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)71/en/pdf).

harmed market – that merit a *lex specialis* under antitrust law to specifically deal with those types of efficiencies.

In fact, the intellectual case in favor of including out of market environmental efficiencies into the competitive assessment is strong and those same considerations apply to efficiencies that provide out of market consumers with other, non-environmental benefits in the form of lower prices, quality enhancements or more innovation.³ At base, the rationale for including out of market efficiencies is straightforward: as every consumer's welfare counts, regardless of whether a consumer happens to be part of the relevant market impacted by horizontal overlap or vertical relationships, there is no reason to exclude the welfare of those consumers from the antitrust assessment.

As BIAC already observed in 2012, the treatment of efficiency claims continues to be given short shrift by antitrust enforcement agencies and is in some cases inadequate.⁴ In its 2012 submission, BIAC set out that this stemmed from numerous factors, including “asymmetrical treatment of efficiency analysis [] compared to competitive effects analysis” and “systematic procedural biases” and suggested a number of potential improvements, including an adequate mechanism to recognize dynamic efficiencies, the need to apply the merger specificity requirement in a practical manner, and the development of better tools.⁵ Another reason for the allergic reaction of competition authorities to efficiency claims stems from the procedural environment in which they are considered in merger cases. Where there is no anticompetitive harm from a merger, then efficiencies are not necessary to justify approval. But where the agency concludes that anticompetitive harm exists and wants to block a merger or accept an undertaking, admitting the existence of efficiencies (albeit at a level the agency deems insufficient to counterbalance the harm) creates a greater risk that its challenge will be rejected or overturned. Indeed, it is easier and safer to reject the efficiencies in the first place. Unfortunately, since 2012, the state of affairs with regard to the evaluation of efficiencies has not significantly improved.

As the OECD Background Paper notes, out of market efficiencies are subject to “at least the same procedural barriers as in-market claims, which are rarely accepted by competition authorities. However, most jurisdictions go further in restricting or entirely ruling out such claims.”⁶

Against this background BIAC respectfully suggests that it would make eminent sense, in addition to addressing the debate of the treatment of out of market efficiencies, or, even more narrow, to the treatment of out of market environmental efficiencies, to also revisit the treatment of efficiencies more generally. Indeed, rules and practices regarding (environmental) out of market efficiencies only make sense if the basic analytical framework for the evaluation of all types of efficiencies is clear, fair, and methodologically adequate.

³ Note that in some instances the case for including out of market efficiencies may even be stronger in non-environmental settings, namely where the efficiencies are likely to be immediate and cognizable, as opposed to more benefits that may only occur in the distant future.

⁴ OECD, The Role of Efficiency Claims in Antitrust Proceedings – Note by BIAC, DAF/COMP(2012)23, at 197-206 (May 2, 2013) <https://www.oecd.org/daf/competition/EfficiencyClaims2012.pdf>.

⁵ Id.

⁶ OECD, Out-of-Market Efficiencies in Competition Enforcement – Background Note 3 (2023), <https://www.oecd.org/daf/competition/out-of-market-efficiencies-in-competition-enforcement-2023.pdf>.

European Union

The assessment of out of market efficiencies determines whether benefits for economic agents situated outside the relevant market can help to offset harm to economic agents in the relevant market from an anticompetitive agreement or a concentration.

In EU antitrust proceedings, Article 101(3) TFEU allows companies that conclude an anticompetitive agreement to defend themselves against a prohibition by demonstrating that their agreement leads to efficiency gains, on the condition – *inter alia* – that consumers receive a fair share of such benefits. As explained by the Commission in its Article 101(3) Guidelines, to meet this “fair share” requirement, companies must prove that the efficiencies (at least) compensate consumers for the anticompetitive harm caused by the restrictive agreement. Out of market efficiencies cannot normally fulfil the “fair share” requirement, as they benefit consumers in a different geographic or product market. An exception to this rule applies when the consumers enjoying such out of market efficiencies are situated on a *related* market and are substantially the same as the consumers suffering the anticompetitive harm *within* the relevant market. In this particular scenario, out of market efficiencies also benefit the consumers that suffer the negative effects of the agreement.

The Commission recently clarified in its new Horizontal Guidelines how it will apply these principles in the assessment of sustainability agreements. In particular, the Commission has shown openness to take into consideration different types of benefits generated by sustainability agreements. This includes accepting not only traditional qualitative or cost efficiencies for consumers of the products (namely in the form of individual use and non-use value benefits) but also, under certain conditions, allowing collective benefits going beyond those consumers. However, regardless of which type of benefits a sustainability agreement brings for consumers, the “fair share” requirement will have to be met to ensure that its effects on consumers of the products in the relevant market are at least neutral.

In its antitrust enforcement practice, the Commission has assessed out of market efficiencies in line with the principles highlighted above. The Union Courts have not yet had to take a position on the specific issue of out of market efficiencies, but its jurisprudence contains some useful indications as to what is required to meet the requirements under Article 101(3) TFEU.

In relation to mergers, the Commission’s Horizontal Merger Guidelines specify that, to take an efficiency claim into account, the efficiencies have to benefit consumers, be merger-specific and be verifiable. As regards the benefit to consumers specifically, the Horizontal Merger Guidelines specify that consumers must not be worse off as a result of the merger and that, for that purpose, efficiencies should in principle benefit consumers in those relevant markets where it is otherwise likely that competition concerns would occur. This three-prong test also applies to non-horizontal mergers.

In conclusion, while the respective antitrust and merger frameworks for assessment are different, the Commission will consider out of market efficiencies where they benefit substantially the same consumers as those suffering the competitive harm in the relevant market. This is because the EU’s legal framework focuses on protecting consumers against harm caused by agreements and concentrations affecting them.

Israel

Israel's first competition law, enacted in 1959, did not address the subject of corporate mergers. In 1975 a committee was appointed to study the subject and recommended adopting some form of merger regulation. When the 1959 law was replaced in 1988, the new law included a chapter on merger review, which contained no explicit mention of efficiencies.

In the 35 years that have passed since enactment of the merger provisions, Israeli courts have addressed the relation between competition considerations and efficiency considerations in the merger context, but they generally have done so in dictum. With one possible exception, no case has actually had to weigh an efficiencies defense in a merger case. Thus, the case-law has not produced a clear statement of whether an efficiencies defense can be recognized, nor has it produced a detailed statement of how – if at all – a claimed efficiencies defense should be evaluated. In no adjudicated case has an efficiencies defense actually been accepted.

The Israel Competition Authority (ICA) has indicated its willingness to consider an efficiencies defense in appropriate merger cases, but it has made clear its position that out-of-market efficiencies will not be considered in this context.

Japan

The Antimonopoly Act has some provisions related to out of market efficiencies, and there are a number of actual cases which may be relevant to the subject.

The Antimonopoly Act has the phrase "contrary to the public interest" (Article 2, Paragraphs 5 and 6) as a part of the definition of private monopolization and unreasonable restraint of trade. It is conceivable, at least theoretically, that out of market efficiencies could also be considered as a type of the "public interest."

However, the "public interest" has traditionally been interpreted in a very limited manner. In Oil Price Cartel Criminal Case, the Supreme Court stated that there may be a case in which an agreement that substantially restrains competition does not violate the Antimonopoly Act on the ground that it is not contrary to the "public interest," with respect to unreasonable restraint of trade. However, as described above, this is only an exceptional case, and it is interpreted that, in principle, the "contrary to the public interest" requirement is also satisfied if the other requirements are met.

On the other hand, the interests of general consumers, such as safety, may be considered in determining whether the "substantial restraint of competition" requirement is satisfied. Japan Toy Gun Cooperative Association case can be interpreted as an example where such considerations were given in the context of safety.

As for unfair trade practices, the Antimonopoly Act and other relevant rules contain the phrase "without justifiable grounds," "unjustly," or "unjust" as a part of the definitions. It is possible, at least theoretically, to interpret that conducts necessary to ensure sustainability, safety, or other proper benefits have "justifiable grounds" or are not "unjust." Toshiba Elevator Service case and the Japan Toy Gun Cooperative case can be interpreted as examples where such considerations were given in the context of safety.

Kazakhstan

Despite Kazakhstan's competition laws not explicitly recognizing out-of-market efficiency, practical applications in antimonopoly regulation often consider it. Examples include imposing requirements on mergers to enhance technology infrastructure, improve services, and direct dividends toward long-term sectoral growth. While these practices mitigate adverse effects on competition, the text suggests it's premature to legislatively incorporate out-of-market efficiency into antimonopoly regulation due to a limited number of cases establishing legal conditions and principles.

Mexico

In this contribution, the IFT recalls the efficiency gains established in Mexico's Federal Economic Competition Law and relevant elements to consider in the telecommunications and broadcasting sectors.

It identifies conditions in the market that may have efficiencies in related markets. An example of this is the bundling and discounts of fixed telecommunications services in the Mexican scenario, which was studied by the IFT's Investigative Authority. Bundled offering of services that encompasses various markets such as pay TV, telephone and internet access brings benefits to each of these markets. Users benefit from improved services and a broader selection at a lower overall cost.

Another example analyzed in the contribution focus on Must carry – Must offer rules, which level the playing field in terms of programming and broadcasting; and the elimination of national long-distance charging and the asymmetry in interconnection rates, which have reduced prices, and contributed to an increase in the penetration and adoption of various telecommunications services.

Singapore

Singapore’s legal framework allows for the recognition of out of market efficiencies when assessing agreements between undertakings, as well as mergers:

- Agreements between undertakings may be excluded from the section 34 prohibition under the Competition Act if they are assessed to have a net economic benefit (“**NEB**”). In order for this exclusion to apply, one of the requirements is that the agreement must be shown by the undertakings to improve production or distribution, or promote technical or economic progress. It is possible to have valid efficiencies arising within or outside the market affected by the agreement, although in the latter scenario they would usually arise in “closely related markets”. Claimed efficiencies must be objective, have a direct causal link with the agreement, and be of significant value to outweigh the anti-competitive effects of the agreement.
- Mergers that substantially lessen competition may be excluded from the section 54 prohibition under the Competition Act if it can be shown that the economic efficiencies arising or that may arise from the merger outweigh the adverse effects due to the substantial lessening of competition in the relevant market in Singapore. It is possible to accept efficiencies within or outside the market affected by the merger. The claimed efficiencies must be demonstrable, merger specific, timely, and sufficient in extent.

When assessing airline cooperation agreements, the Competition and Consumer Commission of Singapore (“**CCCS**”) adopts a total welfare approach which considers whether the overall economic benefits to Singapore outweigh the overall harm. Where there are origin-destination (“**OD**”) city pair routes under the alliance with no identified competition concerns, these may be considered as “closely related markets” in determining if the NEB exclusion is made out. Such OD city pair routes include feeder routes (vis-à-vis trunk routes), and OD routes within the alliance that are substitutes for each other. In CCCS’s experience, whether out of market efficiency claims are accepted for airline cooperation agreements largely depends on whether they were sufficiently substantiated. Additionally, submissions on the enhancement of Singapore’s aviation hub status should be demonstrable and separate from the benefits that arise from efficiencies in air traffic.

CCCS is currently assessing feedback from a public consultation on a draft *Guidance Note on Business Collaborations Pursuing Environmental Sustainability Objectives*. Key features of the draft Guidance Note include – (i) what CCCS considers to be environmental sustainability objectives, (ii) a non-exhaustive list of examples of agreements pursuing environmental sustainability objectives that would likely qualify for the NEB exclusion, and (iii) CCCS’s policy to considering economic benefits beyond just those arising in the relevant market if benefits to society at large can be shown, noting that environmental sustainability initiatives often seek to reduce negative externalities, or give rise to positive externalities, or both, and correct the market failures associated with such externalities.

United States

The U.S. submission focuses solely on out-of-market efficiencies in U.S. merger review, not in other contexts in which questions relating to out-of-market efficiencies might arise.

In the United States, if the effect of a merger may be substantially to lessen competition or tend to create a monopoly in any relevant market, it violates Section 7 of the Clayton Act, the principal federal antitrust law governing mergers. Section 7 makes no reference to efficiencies, and the U.S. Supreme Court has stated that efficiencies provide no defense to illegality under that statute. Nonetheless, defendants regularly attempt to justify their transaction by pointing to professed efficiencies. When parties have raised efficiencies as part of a rebuttal, U.S. courts have assessed whether the efficiencies are verifiable, merger-specific, would be passed through to prevent a reduction in competition in the relevant market, and would be of sufficient magnitude and likelihood such that no substantial lessening of competition or tendency to create a monopoly would be threatened in any relevant market.⁷ In the experience of the Department of Justice Antitrust Division and Federal Trade Commission (collectively, the “Agencies”), merger efficiencies are often claimed but rarely substantiated.

U.S. law does not permit consideration of out-of-market merger efficiencies. The language of Section 7 indicates that potential violations must be evaluated within the confines of a particular relevant market. U.S. courts have rejected consideration of efficiencies outside the market in which the transaction would harm competition. Consistent with the applicable statute and Supreme Court case law, the Agencies as a rule will not consider out-of-market efficiencies when evaluating a proposed merger. Rather, they will seek to prohibit mergers that would harm competition in any relevant market that might be affected by the merger, without engaging in a balancing of harms and purported benefits across different markets. The Agencies follow this practice not only when a merger would affect multiple downstream product or geographic markets, but also, for example, in evaluating the effects of a proposed merger on workers or other upstream suppliers. Stated differently, when the Agencies file a merger challenge under Section 7 of the Clayton Act, defendants cannot be permitted to offset or balance harm in a challenged market by professed benefits in some other market.

⁷ See, e.g., *FTC v. Hackensack Meridian Health, Inc.*, 30 F.4th 160, 176 (3d Cir. 2022); *United States v. Anthem, Inc.*, 855 F.3d 345, 354 (D.C. Cir. 2017) (courts have rejected efficiencies claims where “the merging parties had not clearly shown the merger would enhance rather than hinder competition”); *id.* at 369 (Millet, J., concurring) (The proffered efficiencies, even if they are verifiable and merger specific, “must at least neutralize if not outweigh the harm caused by the loss of competition and innovation.”); *St. Alphonsus Med. Center-Nampa, Inc. v. St. Luke’s Health System Ltd.*, 778 F.3d 775, 791 (9th Cir. 2015) (“It is not enough to show that the merger would allow St. Luke’s to better serve patients. The Clayton Act focuses on competition, and the claimed efficiencies therefore must show that the prediction of anticompetitive effects from the prima facie case is inaccurate.”); see also U.S. Dep’t of Justice and Fed. Trade Comm’n, Draft Merger Guidelines § IV.3 (2023) (Draft Merger Guidelines); U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 10 (2010) (2010 Horizontal Merger Guidelines) (“Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service.”).

These practices and policies avoid a complex balancing of harms and benefits across different markets or choosing whether to favor one group affected by a merger over another.