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INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Note by the Secretariat --

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More documents related to this discussion can be found at:
http://www.oecd.org/daf/competition/investigations-consummated-non-notifiable-mergers.htm

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INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

*Note by the Secretariat**

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1. Introduction

1. This paper discusses the circumstances in which competition authorities can review potentially anti-competitive mergers and acquisitions that have been consummated, i.e. the merging parties have integrated the businesses and started operation as a single entity vis-à-vis customers, suppliers and competitors. The paper will focus in particular on situations where a transaction was not notified, either because it was not subject to notification requirement or because it was subject to a voluntary notification (and the parties decided not to file it).

2. Today more than hundred jurisdictions have merger control regimes as part of their competition laws. Most jurisdictions require that a proposed merger that meets the notification thresholds is subject to antitrust scrutiny before it can be implemented. These jurisdictions see merger control as an *ex ante* scrutiny tool aiming at preventing that a prospected transaction which has an anti-competitive effect on competition is consummated. These jurisdictions assume that preventing a competition problem from arising can be more effective than fixing it afterwards. For this reason, transactions which meet certain size and/or turnover requirements and are considered to have a nexus with the jurisdiction (i.e. those transactions who are potentially capable of having an effect in the jurisdiction) are subject to a pre-merger mandatory notification to the competition authority. In most jurisdictions with a pre-merger mandatory notification system the notification has a suspensory effect, i.e. the parties cannot close the deal and integrate their businesses before they have obtained the required regulatory approval by the competition authority.

3. In jurisdictions where mergers are subject to an *ex ante* mandatory filing, there are five main situations where questions arise as to the treatment of consummated mergers:

- Can the competition authority investigate a merger with anti-competitive effects, which falls below the mandatory notification thresholds?
- Can the competition authority investigate a merger which has been notified, approved (or conditionally approved) and consummated, if it results that it has had anti-competitive effects after its approval?
- What can a competition authority do if a merger which should have been subject to a mandatory filing was not filed and consummated?
- Can the competition authority investigate a merger which was filed by the merging parties, but it was consummated before the competition authority approved it (so called “gun-jumping”)?
- Can the competition authority investigate a series of related transactions which are not individually subject to mandatory filing but cumulatively meet the mandatory filing notification thresholds (so called “creeping acquisitions”)?

4. In a limited number of jurisdictions, the notification of a transaction to the competition authority is voluntary. In these systems, the merging parties can decide to file the transaction and seek legal certainty by requiring approval by the competition authority. This avoids that an *ex post* investigation of the competition authority finding that the merger has anti-competitive effects might put them in the situation where they have to take actions to restore the situation existing before the merger was consummated. Because *unscrambling* a merger is not easy (and sometimes even not possible) and may result in significant costs for the parties, competition authorities usually provide guidance as to when a voluntary notification is recommended, although the decision as to whether to file or not remains

ultimately with the parties. In voluntary notification systems, the review of a consummated merger is an integral part of the merger control systems.

5. The first part of this paper will review the advantages and disadvantages of voluntary notifications systems, as opposed to mandatory notification systems. The second part will review the current treatment of consummated mergers in jurisdictions with a pre-merger mandatory notification systems in the five circumstances listed above. The last part of the paper will discuss the selection and evaluation criteria used by agencies to prioritise investigations of consummated mergers, the implications for business of the competition authorities' powers to investigate consummated mergers, and questions arising in relation to designing effective remedies for consummated mergers with an anti-competitive effect.

2. Merger notification systems - General remarks

6. If one reviews the overall history of competition law, even in jurisdictions where competition has been well established for a long time, notification systems for mergers are a relatively young institution. In the United States, for example, the first provisions on anti-competitive mergers dates back to 1914, when Section 7 of the Clayton act prohibited mergers and acquisitions whose effect is to substantially lessen competition. However, the pre-merger notification program was only introduced in 1976 with the Hart-Scott-Rodino Act. The Act provides that the parties to certain proposed transactions must submit to the U.S. Federal Trade Commission (U.S. FTC) and to the U.S. Department of Justice (U.S. DOJ) information about the transaction before the transaction occurs by means of a pre-merger notification form. Similarly, in the European Union merger control and the pre-merger notification regime was introduced for the first time with the EC Merger Regulation (ECMR) in 1989, [1] i.e. thirty years after the general competition provisions of the EU Treaty came into force.

7. While merger regimes, and associated notification systems, have developed differently in different jurisdictions, it is possible to categorise them in two broad groups.

- The majority of jurisdictions with a merger control system have opted for a pre-merger mandatory notification system. In these systems, a transaction that meets certain criteria (i.e. the notification thresholds) has to be reported to the competition authority before it is consummated. The execution of the transaction is subject to the prior approval of the competition authority based on the assessment of effects it is likely to have on the market. In few cases, mandatory filing can be made *ex post*, i.e. after the merger is consummated, either combined with an *ex ante* system or on a stand-alone basis.[2] Pre-merger mandatory notifications systems are very similar in how they are structured, the main differences referring mostly to the thresholds for notification and to the time for assessing the proposed merger.[3]

[1] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L395, of 30 December 1989, p. 1-12.

[2] See, for example, Albania, Bosnia, Chile (regarding media mergers), Croatia, Greece, Jordan, Korea, Lithuania, Pakistan and Romania. Bosnia, Lithuania, Korea, Greece, Jordan also have a mandatory pre-merger notification system. Albania, Pakistan and Romania only have an *ex post* mandatory notification system.

[3] See Choe and Shekhar (2009).

- A second group of jurisdictions has opted for a voluntary notification system, whereby the merging parties are under no obligation to report a transaction to the competition authority. However, the competition authority may take jurisdiction over a transaction and investigate if it has anti-competitive effects or not. Notification is however possible if the parties wish to obtain legal certainty before consummating the transaction. To avoid that any transaction is potentially reportable to the competition authority, voluntary merger control system may establish a set of jurisdictional thresholds so that transactions falling below the thresholds are excluded from the jurisdiction of the competition authority.[4]

8. There are also a number of jurisdictions which have adopted *hybrid notification systems* which allow for both mandatory notification (pre-merger or post-merger) for transactions that exceed the notification thresholds and for a voluntary notification for mergers that fall below the notification thresholds.[5] In these jurisdictions, the voluntary notification is an option allowing mergers which are below the notification thresholds to be notified in case the parties wish to seek legal certainty on non-notifiable transactions which might raise anti-competitive effects.[6]

9. According to information from the International Competition Network (ICN) Merger Notification and Procedures Template,[7] of the 58 jurisdictions that provided information on their merger system to the ICN,[8] forty-two have pre-merger mandatory notification systems,[9] including some large OECD jurisdictions like the European Union, the United States, Canada and Japan. Only four OECD jurisdictions have a pure voluntary notification system: Australia, the United Kingdom, New Zealand and Chile.[10]

3. Treatment of consummated mergers in voluntary notification systems

10. In a voluntary notification system, the question of whether the competition authority has the power to review a consummated merger is to some extent misplaced. These systems rest on a broad mandate to the competition authority to review any merger regardless of whether it was (voluntarily) notified or not, and irrespective of whether the parties have consummated it or not.

11. A voluntary notification system assumes that any competition concern can be adequately addressed *ex post* for consummated mergers and has advantages particularly for developing economies with relatively new antitrust regimes.[11] The primary benefit of a voluntary system is that it allows the

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4 This is for example the case in the United Kingdom.

5 Albania, Barbados, Bosnia, Canada, Colombia, Croatia, Czech Republic, Greece, Jordan, Ireland, Korea, Lithuania, Macedonia, Mexico, Norway, Pakistan, Russia, South Africa, Spain, Sweden, Turkey, Zambia.

6 See Gonzalez and Benitez (2009).

7 http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx

8 It must be noted that some of the templates date back to 2002, meaning that the merger control system in the relevant jurisdiction may have been modified. An example of this situation is Brazil who made amendments in Competition Law in 2012 adopting a pre-merger control regime but the template of the country is from 2002 reflecting the system as of then.

9 Argentina, Barbados, Belgium, Bosnia, Brazil, Bulgaria, Canada, Colombia, Croatia, Czech Republic, Denmark, Estonia, EU, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Jersey, Jordan, Korea, Latvia, Lithuania, Macedonia, Malta, Mexico, Nederland, Norway, Poland, Portugal, Russia, Slovak Republic, South Africa, Spain, Sweden, Switzerland, , Turkey, Ukraine, the United States, Zambia.

10 In Chile there are no specific regulations regarding mergers, therefore article 3 of the Competition Act-restrictive agreements, is used as a legal basis.

11 See Sokol and Blumenthal (2012).

competition authority to decide which mergers to investigate. This may result in a significant decrease in the workload that would otherwise result from the review of notified transactions.[12] This savings in resources is generally only in part compensated by the need to devote resource to monitoring activities necessary to gather market intelligence about executed deals and to detect possible anti-competitive mergers which have not been subject to a voluntary filing. Moreover the parties can always resort to a notification even under the voluntary system. This signals private information regarding the merger as the parties may choose to notify because they are less confident that their mergers would pass scrutiny if faced by an investigation.[13] Similarly, the fact that the parties opt not to notify may be interpreted as confidence in their merger's compatibility with the competition law.

12. Voluntary systems, however, lend themselves more to the risk that structural remedies which are viewed as the most effective means to address anti-competitive effects of a transaction may have become impossible to enforce for a completed merger, once the merged entities or assets have been fully integrated. Separating the merged entities (or "*unscrambling the omelette*") may result problematic if mergers are controlled *ex post*, i.e. after they have been consummated. Going back to the situation before the merger may result difficult, costly or even impossible if the parties have proceeded to a quick integration. Given that this is a risk that is taken by the merging parties, a large number of deals are in practice subject to pre-merger notification to give the parties legal certainty. In order to avoid situations where the merger has been consummated and was not subjected to notification, competition authorities operating in a voluntary filing system, strongly encourage parties to approach the competition authority to discuss whether a notification is advisable. Moreover, interim arrangements whereby the purchaser agrees to "hold-separate" the target business are increasingly more common, as they minimise the risk that the effective scrutiny is jeopardised while the competition authority decides whether to review a consummated merger and what remedies eventually to impose.

13. Revisiting a merger that has been investigated and approved in a voluntary notification system is possible, but is subject to strict conditions. Voluntary merger control systems typically link the possibility to review a cleared merger to (i) the fact that the information previously provided by the parties resulted false, misleading or inaccurate, or (ii) a violation of a condition imposed on the merging parties in the clearance decision. As a consequence investigation of consummated mergers in voluntary notification systems is not a frequent event. Different situations may apply depending on the jurisdiction at stake:

- In the United Kingdom, a cleared merger can only be reviewed if a decision of Office of Fair Trade, the Competition Commission or the Secretary of State has been successfully appealed.

- The Australian Competition and Consumer Commission (ACCC) reserves the right to reconsider mergers that have been informally cleared if it becomes aware that any information upon which it has based its view, is in any way incorrect or incomplete. If formal clearance is granted based on information by the applicant that is subsequently found to be false or misleading, the ACCC may revoke the clearance or take legal action to seek injunction or divestiture.[14] If formal clearance has been granted subject to conditions, lack of compliance with those conditions means that the merger is not in accordance with the clearance and may expose the applicant to legal action. The

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12 According to the statistics more than 95% of the notified mergers in Europe and the US are approved in the first phase. See Choe and Shekhar (2009), fn 3.

13 See Choe and Shekhar (2009).

14 No applications have been made to the ACCC for formal clearance which has been available since 2007.

merging parties will have to show that the acquisition does not substantially lessen competition if they choose to apply to the Federal Court for a declaration of non-breaching.[15]

- In Chile, the only case in which a merger approved by the Tribunal de Defensa de la Libre Competencia (the Competition Court- TDLC) can be considered contrary to the Competition Law is when a new decision of the TDLC, based on new information, finds the same acts or contracts as anti-competitive and only since this new ruling is notified or published.[16]

- In New Zealand, the Commerce Commission cannot re-open an investigation of a transaction that it previously cleared.

4. Treatment of consummated mergers in mandatory notification systems

14. In mandatory notification systems, several scenarios may arise in relation to consummated mergers and the powers of the competition authority to review their anti-competitive effects. These scenarios will be briefly discussed below.

4.1 Mergers falling below the mandatory notification thresholds

15. Mandatory notification systems involve large administrative costs for both the notifying parties and for the competition authority. This is because in a mandatory notification system many transactions that have no anti-competitive effect on competition are subject nevertheless to a filing and are reviewed by the authorities. This regulatory approval process requires that the merging parties collect and provide information to the competition authority, and that the authority reviews this information to assess the impact of the transaction on competition. The existence of these administrative costs is compensated by the fact that the system offers a high degree of legal certainty to the merging parties, and it reduces the risk that transaction which might be anti-competitive escape antitrust scrutiny.

16. Pre-merger mandatory notification systems imply that if a transaction does not meet the notification thresholds set in the law, it is falls outside the competition authority's jurisdiction under the merger rules and it is not subject to scrutiny, leaving the parties free to consummate it without being exposed to regulatory risks.[17] There are, however, a few and rare exceptions to this general principle. In some jurisdictions, for example, the competition authority has jurisdiction to review a transaction that falls below the notification thresholds.[18] The power to review transactions below the notification thresholds, however, is generally limited in time: usually action must be initiated within one year from the moment the merger has been executed:

15 Since the ACCC is not an administrative decision making body it has to start legal proceedings in the Federal Court when it decides to challenge a merger. In this case, the ACCC has to prove that the merger substantially lessens competition.

16 According to Article 32 of the law "*Acts or contracts executed or entered into in accordance with the decisions of the Competition Tribunal, shall not bear liability, except in the event that they were later deemed as contrary to free competition by the same Tribunal, based on new information, and only after the resolution stating this fact is notified or published as the case may be. In any case, the Judges that concurred in the decision shall not be considered as being disqualified for the new proceedings.*" This provision is considered the legal basis for the possibility of reviewing a decision before the TDLC on the grounds of new evidence or change of circumstances.

17 For this reason the "catching net" created by the notification thresholds in mandatory notification systems tends to be rather wide. This is to avoid that a transaction which might potentially have an impact on competition in the jurisdiction might escape notification and therefore scrutiny.

18 This is the case of Canada, Brazil, Japan, Korea, and Mexico, Norway, and Lithuania.

- In Canada, for example, despite the existence of a threshold for notification, mergers are subject to review by the Competition Bureau but no application against a merger can be made in respect of a merger more than one year after the merger has been substantially completed.[19]

- Similarly, the Mexico's Comisión Federal de Competencia Económica can review any merger which fell below the notification thresholds within one year from the consummation of the merger.

- The Brazilian competition authority (CADE) also has the authority to review mergers that do not meet the notification thresholds. Brazil adopted a pre-merger control system in 2012 and because of the large size of the country it was felt that the competition authority should be in a position to review transactions falling below the notification thresholds since a number of local/regional mergers that fall below the general thresholds might still raise anti-competitive concerns. In this cases, CADE has one year from the merger date to request the parties to notify the merger.

17. The United States is the only jurisdiction where the competition authorities can investigate a consummated merger that is not subject to the Hart Scott Rodino (HSR) filing without limits in time.

Box 1. The EU referral mechanism to the European Commission

The referral mechanism set out in Article 22 the ECMR[20] allows one or more Member States to request the European Commission to examine a concentration that does not have a Community dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

Article 22 was originally designed to allow European jurisdictions which did not have a national merger control system to refer to the European Commission a merger which fell below the EC notification thresholds and that might potentially affect competition in the common market. The provision filled a gap that could have resulted in mergers go unscrutinised because of falling below the EC notification thresholds and outside the reach of domestic merger regimes. Today, all EC member states[21] have a merger control regime, and the application of this referral mechanism is generally limited to joint referrals by several EC member states that consider that an European Commission's review of a transaction potentially subject to multiple national filings would be preferable and more effective.

However, it cannot be excluded that Article 22 could be applied in situations where a transaction falls below the EC thresholds *and* below national thresholds, therefore escaping jurisdictional review entirely. The application of this referral mechanism, however, is subject to jurisdictional limits: (i) the merger must affect trade between Member States; and (ii) it must threaten to significantly affect competition within the territory of the Member State or States making the request.

19 The Competition Bureau used this power to dissolve the acquisition of Complete Environmental Inc. by CCS Corporation in 2011. The transaction was non-reportable and when the Bureau learned about it, it applied for and obtained a hold separate order pending completion of its investigation. Following a thorough review, the Bureau determined that the transaction would substantially reduce potential competition for the disposal of hazardous waste in northeaster British Columbia. (see http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf). In the same year, the Commissioner of the Competition Bureau filed another application in respect of a non-notifiable proposed transaction, the joint venture between two airline companies. The case was not litigated as a Consent Agreement prohibiting the parties from implementing their agreement on 14 high-demand trans-border routes was reached.

20 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, in OJ L24 of 29 January 2004, p. 1–22.

21 With the only exception of Luxembourg.

18. The fact that some mergers may escape scrutiny under the merger control system of a jurisdiction because they are below the notification thresholds does not mean that the possible anti-competitive effects of these transactions escape all antitrust scrutiny. These transactions remain subject to the enforcement of the general antitrust prohibitions of anti-competitive agreements between competitors and of abuses of a dominant position. While these provisions are not necessarily meant to apply as means to control mergers, they can be used for that purpose as a last resort, should the transaction escape the merger control jurisdiction. The application of general antitrust rules to review a merger is however subject to limits. Provisions against abuse of a dominant position, for example, can only be triggered if there is a pre-existing dominant position that can be strengthened through the elimination of a competitor by way of the merger. Any other transaction would not meet the required legal standard. On the other hand, the provisions that prohibit anti-competitive agreements would not allow scrutiny of conglomerate mergers, where the parties to the transaction would not have any horizontal or vertically relationship.

19. While the application of antitrust rules as a means to control mergers is rare, this possibility has been tested in courts in jurisdictions at a time when they did not have a merger control regime. This is the case, for example, of the European Union before the adoption in 1989 of the ECMR. Before the ECMR came into force, the European Commission successfully applied the then Articles 85[22] and 86[23] of the EU Treaty to prohibit concentrations between competitors.[24] Two cases are significant in this respect:

- In *Continental Can*,[25] the European Court of Justice (ECJ) upheld the Commission's decision according to which the acquisition by Continental of a competitor was an abuse of dominance under Article 86 of the EC Treaty, and ordered the company to end the infringement.[26] Following the appeal by Continental Can of the Commission's decision, the European Court of Justice annulled the decision and allowed the acquisition to stand. However, the Court rejected the Commission's decision on the facts of the case, but agreed with the Commission that the extension of a dominant position was sufficient legal grounds for the application of Article 86. Thus, the Court confirmed that it is in the Commission's powers to scrutinize mergers that threatened to create firms with a dominant position, even though the resulting firm may not evince any actual abuse.[27] Following Continental Can, the Commission used this precedent to exert a certain degree of control over concentrations but the number of formal decisions applying the Continental Can doctrine is very limited.[28]

- In the *Phillip Morris/Rothmans* case,[29] the European Commission adopted a decision granting an exemption to the Philip Morris' proposed acquisition of a minority stake in Rothmans Tobacco concluding that the transaction would not result in a distortion of competition in violation of Article 85(1) of the EC Treaty. This decision was appealed before the ECJ by RJ Reynolds and

22 Now Article 101 of the Treaty on the Functioning of the European Union.

23 Now Article 102 of the Treaty on the Functioning of the European Union.

24 This application of antitrust rules to control merger transactions raised concerns in the business community and led to discussions which arguably helped forming the consensus for adopting a merger control system by EU legislation.

25 Europemballage and Continental Can v. Commission; Case 6/72; (1973) ECR 215; (1973) CMLR 219.

26 Continental Can Co. Inc., Re [1972] OJL7/25, [1972] CMLR D11.

27 See Rusu (2010), at 85.

28 See Rusu (2010), at 86.

29 British American Tobacco Company Ltd. and R.J. Reynolds Industries Inc. v. Commission; Cases 142/84 and 156/84.

BAT, two competitors of Phillip Morris. They claimed that the acquisition would allow Philip Morris powerful leverage over Rothmans' business decisions and that it might use its privileged position to seek control of Rothmans in the future, thereby accomplishing by stealth what it could not secure overtly. The Court ruled in favour of the Commission. However, it argued that while acquisitions of equity interest did not constitute *prima facie* evidence of anti-competitive behaviour, such acquisitions might nonetheless serve as an instrument to that end. In doing so, the Court expanded the possible application of Article 85 of the European Treaty to mergers.[30]

4.2 Mergers above the notification thresholds, notified and cleared (or conditionally cleared), but with anti-competitive effects subsequently found

20. For the same reasons of legal certainty referred above, in a mandatory notification system once a merger has received clearance from the competition authority it cannot be investigated again, except in exceptional circumstances, i.e. when such clearance was granted on the basis of false or misleading information, or when the clearance of transaction was subject to conditions and these conditions were not fulfilled within the time period established in the decision.

21. The United States is the one notable exception to this rule, because the U.S. antitrust agencies have a very broad authority with respect to investigations of consummated merger even if they have already been subject to review under the HSR Act. Under section 7 of the Clayton Act, the U.S. FTC and the U.S. DOJ have the authority to bring suit against previously closed mergers and acquisitions if they can demonstrate that the transaction may have substantially lessened competition.[31] This means that the U.S. agencies have the authority to re-visit any merger with no limitation in time, and regardless of whether one of the two agencies has already reviewed it and/or decided not to challenge it.[32]

22. The adoption of the HSR Act and the introduction of the pre-merger notification requirements have significantly minimized the need for the U.S. agencies to challenge consummated transactions.[33] However, the HSR filing requirement do not capture all transactions that may potentially raise competitive concerns as the HSR Act mandates pre-close review only of transactions that exceed a certain size.[34] The U.S. competition authorities have been looking more closely at consummated and non-notifiable mergers in recent time, especially after the HSR filing thresholds were increased in 2001 from USD 15 million to USD 50 million.[35] The three time increase of the threshold meant that more mergers that were previously subject to notification did not require a pre-merger filing to the agencies anymore. Since 2001, the two

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30 See Cope Huie (1991).

31 The Hart Scott Rodino Act states that "*Any action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under this section shall not bar any proceeding or any action with respect to such acquisition at any time under any other section of this Act or any other provision of law.*" [15 U.S.C. 18a(i)(1)].

32 Sherman and Clayton Acts lack a statute of limitations. In *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957)* (challenging DuPont's acquisition of an interest in General Motors approximately 30 years post-acquisition) the Supreme Court held that the government can bring suit under Section 7 any time it believes a transaction may cause a substantial lessening of competition.

33 In fact, that was the main reason behind the Act.. Sher (2004) cites H.R. Rep. No.94-4373; "*without advance notice of an impending merger, data relevant to its legality, and at least several weeks to prepare case, the government often [had] no meaningful chance to carry its burden of proof, and win a preliminary injunction against a merger that appears to violate section 7.*"

34 See Sher (2004).

35 The threshold which adjusts annually was USD 70.2 million in 2013.

U.S. agencies have challenged more than 30 consummated transactions, and about half of these cases have occurred since 2009.[36] Commentators have justified this peak in enforcement with various reasons, including a more aggressive merger enforcement policy of the Obama administration[37] and the shift of resources from investigations of HSR filings (which have decreased significantly due to the economic downturn) to the investigation of consummated and non-notified mergers.[38]

23. Beside the case of the United States, most competition authorities have no jurisdiction to review a notified, approved and consummated merger but for in exceptional circumstances. This is for example the case where the merger was approved based on information provided by the merging parties which subsequently proved to be false, inaccurate or incomplete. In this case, the competition authority can re-open the investigation and assess the impact of the transaction on the market based on the correct market information. Usually, the parties which have submitted the false, inaccurate or incomplete information can also be subject to civil or administrative fines.

24. A summary review of national merger control legislation has also revealed that some competition authorities have wider powers with respect to notified, approved and consummated mergers:

- In Israel, for example, in very rare cases, a merger clearance may be conditioned upon re-examination of the market within a specified time period.

- In the Slovak Republic, in addition to the case of failure to fulfil the conditions imposed in the merger decision, a conditional approval can be re-visited if the relevant market has substantially changed and its conditions no longer justify the imposition of remedies on the merging parties.

- In Brazil, in addition to the false information and non-compliance provisions, the competition law states that a merger may also be revisited if the intended benefits of a cleared transaction were not achieved.

4.3 Failure to notify a merger which falls within the mandatory notification thresholds

25. The case where a transaction is reportable under the merger regime, and the parties fail to comply with the mandatory filing requirement is generally regulated in the merger law. Usually, the parties are subject to administrative or civil fines, and the competition authority can open an investigation to assess if the transaction has an anti-competitive effect:

- In the U.S. for example a person that fails to comply with the HSR notification requirement can be subject to a civil penalty of up to USD 16,000 for each day the violation continues.

- In the European Union, the European Commission can impose a fine of up to 10% of the aggregate turnover of the undertakings concerned for the violation of the standstill obligation.[39]

- In Japan, the fine for failure to notify a reportable merger amounts to a maximum of 2 million yen.

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36 See Akin Gump Strauss Hauer & Feld (2012).

37 See Hittinger and Esposito (2010).

38 See Greene (2010).

39 In 1998, Samsung was fined EUR 33,000 for notifying the acquisition 14 months after its acquisition of AMT (Case IV/M.920 - Samsung/AST) , and in 1999 A.P. Møller was fined EUR 219, 000 for failing to notify a series of three transactions in 1997 (Case IV/M.969 - A. P. Møller).

- In Brazil, the merger can be declared null and the parties can be sanctioned with a fine ranging from 60 thousand Reais (R$ 60,000.00) to 60 million Reais (R$ 60,000,000.00).

26. Most authorities can also adopt interim measures to ensure that competition is preserved in the interim period until the impact of the transaction on competition is subject to the authority's assessment. For example, the authority can order that the purchaser does not exercise its voting rights in the target company until a decision on the merger is taken by the authority.

4.4 Mergers notified whose completion takes place prior to receiving approval (also referred to as 'gun-jumping')

27. The expression "gun-jumping" has a wide connotation and includes pre-merger coordination between the merging parties. Gun-jumping can occur when the merging parties fail to observe mandatory pre-merger notification requirements (i.e. the situation discussed in the previous section) and/or fail to observe the waiting period requirements under applicable merger control laws, so that they execute the transaction after having filed it but before they have obtained the merger clearance. Gun-jumping has also substantive connotations, as it can entail an antitrust offence under the general competition provisions against anti-competitive agreements between competitors if the parties coordinate their competitive conduct prior to the actual consummation of the transaction.[40]

28. Defining what constitutes an anti-competitive gun-jumping activity is a delicate exercise, since many forms of pre-merger coordination between the merging parties represent a reasonable and necessary collaboration during the merger negotiations. The due diligence process, for example, includes the exchange of a certain amount of information, and competition agencies recognise that due diligence is an essential part of any transaction.[41] However, the parties to the merger should not act as a single business unit with the idea that the transaction will proceed even after the deal-closing documents are signed. The tendency of merging parties to align the incentives as soon as possible increases the risk of gun-jumping.

29. Examples of gun-jumping may include any of these activities taking place prior to the approval of the merger: (i) coordination between merging parties on prices or terms to be offered to customers, (ii) allocating customers for sales, (iii) coordination of negotiations with customers for sales to be made after the merger is approved (e.g., negotiations of long-term contracts); (iv) plans made regarding products, distributors or employees (e.g. the appointment of new directors), and in some cases, also (v) the exchange of detailed information concerning customers, prices, and product plans, despite the fact that this is often part of pre-closing due diligence.

30. Most jurisdictions sanction gun-jumping in the merger law by subjecting the acquiring firm to potential fines. In recent years competition authorities have been particularly active in pursuing gun-jumping cases, and showed a strong commitment to pursue what is increasingly more viewed as a serious

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[40] This type of conduct is generally prohibited in the United States under Section 1 of the Sherman Act and in the European Union under Article 101 of the TFEU. For example, in 2007, the European Commission had "reasons to believe that the companies concerned may have violated Article 7(1) [ECMR]" and dawn-raided the UK offices of Hydro Polymers and Ineos to collect information concerning the planned acquisition by INEOS of Norsk Hydro's polymers business (Kerling ASA, Case COMP/M.4734 – INEOS/Kerling). An important facet of this investigation concerned the fact that the companies might have exchanged commercially sensitive information, and whether that could amount to an infringement of Article 101 TFEU. In January 2008, the investigation was closed without taking any action, but indicated that the Commission was prepared to attack information exchanges occurring in the premerger context under Article 101 TFEU.

[41] See Naughton (2006) at 8.

infringement of the merger rules. In the last years, for example, the U.S., the European Union, Norway, Germany and Romania[42] have each imposed fines for failing to observe national pre-merger notification requirements and waiting period.

- In the US, the two competition agencies are very sensitive to any exercise of influence by the acquiring party over the business of the target, and to any integration of infrastructure, personnel, corporate identity, marketing efforts, etc., prior to the expiration or early termination of the waiting period, as well as the obvious instances of pre-closing integration such as the premature transfer of the target's assets or securities.[43]

Box 2. Gun-jumping in the United States

In the United States, gun-jumping is regulated by the HSR Act, Section 7A of the Clayton Act and Section 1 of the Sherman Act. Section 7A prohibits the transfer of "*beneficial ownership or operational coordination*" before the HSR waiting period ends, whereas Section 1 prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. In a gun-jumping case, the statute applied has implications on the conduct prohibited, the timeframe during which the statute applies, and on the penalties that can be imposed:[44]

- The Sherman Act does not prevent a conduct unless it would be a violation absent a merger, HSR Act prohibits an acquirer from exercising control over an acquired firm.[45]

- The HSR Act's prohibition on gun-jumping terminates with the expiration of the waiting period, the Sherman Act continues to prohibit agreements limiting competition until the parties have actually completed the merger.

- The Sherman Act can be enforced civilly and criminally, while the HSR Act is only enforced civilly by the Attorney General, who can obtain civil penalties of USD 16.000 per day of violation.[46]

There is an established enforcement practice in the U.S. against gun-jumping as demonstrated by this selection of cases:

- In 1998, Input/Output, Inc. entered into a merger agreement with Laitram Corp. to purchase DigiCOURSE but in the waiting period the executives of DigiCOURSE managed the combined business of the two companies and began running a division of Input/Output.[47] At the end of the waiting period a civil penalty of USD 225.000 was imposed on each party.

42 In Romania, the competition authority raided in 2009 the Advent Group and Ozone Laboratories to investigate possible premerger gun-jumping. (See http://www.internationallawoffice.com/newsletters/detail.aspx?g=42ced84a-edd5-4fb7-a384-c949ff0047bf)

43 See Hogan & Hartson LLP (2009).

44 See Liebeskind (2003).

45 Certain acts that might violate Section 1 may not violate Section 7A as well, such as information exchange that does not implicate beneficial ownership or operational control.

46 See Liebeskind (2003).

47 See http://www.justice.gov/atr/cases/f203600/203653.htm.

- In 2002, Computer Associates International (CA) and Platinum Technology signed a merger agreement which required CA's written approval for discounts, variations to standard form contracts and offers of consumer consulting services. In that context, CA received commercially sensitive information about Platinum's customers including prices, discounts and contract terms offered. The merger which fell within the HSR thresholds was duly notified and cleared, but two years later the U.S. DOJ considered that parties had effectively closed the merger before clearance and that the exercise over pricing decisions constituted price-fixing in violation of the Sherman Act. The penalty imposed was USD 638.000 with undertakings not to exchange this type of information. [48]

- In 2003, the merger between Gemstar and TV Guide was subject to a seven-month investigation but in the end it was not challenged by the U.S. DOJ. However, the U.S. DOJ contended that the parties had fixed prices, allocated customers, and violated pre-merger waiting period requirements. The two companies were found to have infringed both the Sherman Act and the HSR Act and were required to pay USD 5.67 million in civil penalties, i.e. the maximum amount that was available under the HSR Act.[49]

- A similar transfer of beneficial ownership was the subject matter in 2006 merger between Qualcomm and Flarion Technologies. The merger agreement necessitated Qualcomm's written consent on important decisions of Flarion such as licensing of its intellectual property, entering into any material contract, hiring any employees outside the ordinary course of business. These restrictions were sufficient to arrive at a conclusion of transferred beneficial ownership and consequently violation of Section 7A. Qualcomm settled the case for a USD 1.8 million.[50]

- In 2010, the U.S. DOJ complained that after executing the merger agreement and prior to receiving HSR clearance, Premium Standard sought Smithfield Food's consent necessary for Premium Standard's ongoing business, following a merger in 2006. The U.S. DOJ and Smithfield Foods settled the case for USD 900.000.[51]

- In the European Union, in the 1998 *Bertelsman/ Kirsch/ Premiere*[52] merger case, the Commission threatened to fine the parties for taking steps towards implementing a transaction that was not approved, but ultimately refrained from doing so after the parties undertook steps to stop the gun-jumping activities. In 2009, the Commission found that Electrabel had *de facto* acquired sole control of Compagnie Nationale du Rhône (CNR) through an acquisition that took place in 2003.[53] The Commission decided to impose a fine on Electrabel of EUR 20 million despite that in

48 See http://www.justice.gov/atr/public/press_releases/2002/11029.htm.

49 See http://www.justice.gov/atr/public/press_releases/2003/200740.htm.

50 See http://www.usdoj.gov/atr/public/press_releases/2006/215617.htm .

51 See http://www.justice.gov/atr/public/press_releases/2010/254357.htm .

52 Case No IV/M.993 - Bertelsmann/Kirch/Premiere.

53 Case COMP/M.4994 - Electrabel/CNR. According to the Commission, with the 2003 transaction Electrabel increased its shareholding in CNR from 17.68% of the shares and 16.88% of the voting rights to 49.95% and 47.95% respectively. Since the remaining shares were widely dispersed and past attendance rates were low, the Commission concluded that Electrabel had obtained control over CNR by being in a position to have resolutions passed. There were other factors considered by the Commission, including the fact that Electrabel was the sole industrial shareholder of CNR and that it had taken over the role previously held by EDF in the operational management of the power plants and the marketing of electricity of CNR.

2007 Electrabel had approached the Commission about its interest in CNR and notified the concentration.[54]

- In Germany, the Federal Cartel Office (FCO) issued two decisions for breaching German merger control rules on pre-merger notification and stand-still obligation. In December 2008, the FCO imposed a fine of EUR 4.5 million against Mars, Inc., since Mars and Nutro Products, Inc. closed a notified transaction and transferred the main assets *after* the deal was not opposed in the United States, but *before* approval by the FCO.[55] The amount of fine was reduced taking into consideration Mars' cooperation in eliminating the domestic effects of the transaction. In 2009, the FCO levied a EUR 4.13 million fine against Druck und Verlagshaus Frankfurt (DuV) for notifying only one of two assets acquired in a transaction that had taken place in 2001. The FCO found about the previous acquisition while analysing another proposed deal of DuV.

4.5 'Creeping', 'serial' or 'staggered' acquisitions

31. The question of the treatment a consummated merger arises also in the peculiar scenario of "creeping acquisitions", "serial transactions" or "staggered transactions". This scenario usually refers to situations where a firm acquires either parts of a company or complementary businesses through a number of consecutive and interrelated transactions each of which, taken separately, would not meet the criteria for merger notification, but would do so if they were considered together as one single reportable event. The purpose of these rules is to avoid that by structuring a large transaction in smaller deals companies may circumvent merger review and give effect to anti-competitive transactions.[56]

32. Regardless of the model used to control creeping acquisitions a degree of legal uncertainty is incorporated into the merger control system through these provisions.[57] That is mainly because a transaction that was considered *de minimis* and not subject to a merger filing can be "clawed back" and it may have to be undone if it is found to have had an anti-competitive effect. Rules on creeping acquisitions reflect the need for competition authorities to challenge situations of substantial lessening of competition resulting from a series of related transactions each of which would not meet the notification requirement on a stand-alone basis. This, however, opens the door to subsequent reviews of transactions which have already been consummated.

33. There are different approaches used by competition authorities to address the issue of creeping acquisitions. The most commonly used methods are the "sectorial method", the "aggregation model" and "the substantial market power model": [58]

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54 The Commission's investigation found competition concerns with the transaction. The General Court dismissed Electrabel's appeal rejecting the argument that Commission's action was time barred and confirmed that the Commission was correct to classify the infringement as serious, even if the breach was negligent rather than intentional, and even though the acquisition had no negative substantive effects on the market. (Case T‑332/09, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009TJ0332:EN:HTML).

55 The parties filed the transaction with the authorities in the US, Germany and Austria in May 2007.

56 Such type of "salami" transactions are not uncommon especially with respect to listed companies, where control is acquired through a series of acquisitions of shares.

57 The uncertainty extends to (a) The merging parties' decision on whether to file; (b) the level of supporting work that will be necessary to prepare a filing and ensure clearance; and (c) the competition authority's assessment process.

58 See BIAC (2011).

- Under the "sectorial method", transactions that would normally not trigger a notification are nevertheless subject to merger control if they take place in an industry sector where staggered transactions are perceived as the means to acquire market power and to increase concentration. In these cases, specific regulation may be the preferred approach, requiring the notification of transactions that would not normally be subject to a filing. For example, in the United Kingdom acquisition by any large grocery retailer of any store with groceries sales are above 1.000 square meters must be notified to the Office of Fair Trading by the acquiring party.

- Under the "aggregation model" a series of transactions that would normally not be subject to notification requirements are subject to merger control when the acquisitions are made by the same parties and in the same or a related market over a specified period of time.[59] One example of this method is the ECMR which provides that "*two or more transactions (within the meaning of first subparagraph) which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction.*"[60] Similar provisions apply also in the U.S.[61] and in the UK.[62] In Turkey, a 2011 communiqué provides that two or more transactions carried out by the same parties within a period of two years shall be considered as a single transaction.[63]

- Under the "substantial market power model" any acquisition by a company which has reached a certain level of market power, irrespective of the size or the market share of the target, is subject

59 There are three circumstances which may be relevant under the aggregation model: (i) when a first transaction not meeting the threshold is followed by a second one requiring notification, then the first one must be notified as well; (ii) when a first notifiable transaction is followed by a second transaction below the threshold, then the latter transaction is notifiable; (iii) and when two or more parts of a company are simultaneously acquired by the same purchaser from the same vendor, the transactions are treated as constituting a single transaction to determine if they meet the notification requirements.

60 See Article 5(2) paragraph 2 of Merger Regulation. According to the EC Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), the purpose of this provision is "*to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation*." The European courts have supported this interpretation and stated that "*a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over activities of one or more other undertakings.*" (Case T-282/02 Cementbouw v Commission).

61 The HSR Act refers to the aggregation of separate acquisitions of voting securities, assets or other 'non-corporate interests' within a period of 180 days. (See Code of Federal Regulations, §801.13 Aggregation of voting securities, assets and non-corporate interests).

62 The Office of Fair Trade has a broader time horizon to treat successive events as having occurred simultaneously. According to subsections 27(5) and 27(6) of the 2002 Enterprise Act, " *(5) The decision-making authority may, for the purposes of a reference, treat successive events to which this subsection applies as having occurred simultaneously on the date on which the latest of them occurred. (6) Subsection (5) applies to successive events; (a) which occur within a period of two years under or in consequence of the same arrangements or transaction, or successive arrangements or transactions between the same parties or interests; and (b) by virtue of each of which, under or in consequence of the arrangements or the transaction or transactions concerned, any enterprises cease as between themselves to be distinct enterprises.*"

63 See Communiqué No. 2010/4.

to a merger control filing. This is for example the case in Sweden, where the Swedish Competition Authority may request a notification of a merger if the total turnover threshold is met and the individual turnover threshold is not, but the acquirer is a strong undertaking obtaining control over small undertakings one by one.

5. Considerations concerning the review of consummated mergers

34. This section will discuss general considerations that can arise when a competition authority has jurisdiction over a consummated merger. These considerations include the criteria that a competition authority can use to prioritise their enforcement in this area and the evidence that they can rely on to show that the consummated merger has had an anti-competitive effect on the market. It will also discuss what impact the power to review consummated mergers has on the merging party and on their strategies and the challenge that these reviews may face when it comes to designing appropriate remedies for the anti-competitive effects that the authority may identify.

5.1 Case selection and evaluation criteria

35. When they have the powers to go after consummated mergers, competition authorities generally do not specify the criteria they use for selecting cases of consummated mergers to pursue. There are many ways in which a competition authority may become aware of a consummated, non-reportable and potentially anti-competitive transaction, but the methods most commonly used are: closely monitoring of the press and of pre- or post-closing press releases from the merging parties, of securities or bankruptcy related filings, of foreign merger or other regulatory filings, communications with foreign authorities or filings of subsequent transactions. Media monitoring in search for intelligence related to transactions in specific industry sectors is often a good source of leads for investigation of non-reportable transactions. Third party complaints are also a way to become aware of potentially anti-competitive, non-reportable transactions, as well as key customers complaining about price increases.

36. Price increases which occur after the merger is executed appear to be the most common reason for competition authorities to open an investigation of a consummated merger.[64] In general, a significant price increase might give rise to consumer complaints and this increases the likelihood of post-consummation challenges.[65] In the *Carilion Clinic* case'[66] the U.S. FTC alleged that the out-of-pocket cost for a brain MRI for many patients increased by almost 900%, from approximately USD 40 to USD 350. In *FTC v. Ovation Pharmaceuticals, Inc.*[67], the price of Indocin increased nearly 1,300 percent, from USD 36 to nearly USD 500 a vial. In *FTC v. Hearst Trust*[68], the price increased in some instances more than twice or three times the total fees previously paid, far exceeding inflation or any cost increases specific to the relevant market.

64 In the United States where even transactions which have been notified and cleared by the competition authority can be subject to *ex post* review, agencies continue to monitor the market behaviour of the merged entity after a clearance has been granted especially if the merger was given the go ahead with doubts. In 2002, the FTC approved the merger of Synopsys, Inc. and Avant! Corporation but three Commissioners separately drafted public statements announcing the clearance was done hesitantly and stated that the Commission would not hesitate to intervene if any anti-competitive conduct is observed.

65 See Marks and Ang (2010).

66 See http://www.ftc.gov/sites/default/files/documents/cases/2009/07/090724carilioncmpt.pdf.

67 See http://www.ftc.gov/news-events/press-releases/2008/12/ftc-sues-ovation-pharmaceuticals-illegally-acquiring-drug-used.

68 See http://www.ftc.gov/sites/default/files/documents/cases/2001/04/hearstcmp.htm..

37. Investigations of consummated mergers, differently from an *ex ante* merger review, offer the advantage that the competition authority can observe the actual effects that the transaction has had on the market. This makes the definition of the relevant market either easier[69] or in some cases even redundant.[70] The task of the competition authority is also made easier in terms of proving that the consummated merger has anti-competitive effects. For example, the U.S. Horizontal Merger Guidelines[71] state that the antitrust agencies should "*consider the same types of evidence they consider when evaluating unconsummated mergers*" but recognise that "*evidence of observed post-merger price increases or other changes adverse to customers is given substantial weight.*" This represents a major advantage for competition authorities when it comes to proving their claim, because evidence of actual anti-competitive effects can already be available at that point.

38. The availability of actual evidence of anti-competitive effects, however, is not sufficient to challenge the transaction. The competition authority must show a causal link between the consummated merger under investigation and the anti-competitive effect identified in the market. The competitive concerns identified may not necessarily be the result of the investigated transaction but they could be a natural outcome of other market dynamics. For example, such a burden of proof can be challenging in high-tech markets which are prone to rapid developments and changes.[72] This is why it is rare for competition authorities to challenge a transaction which has been consummated for a long time, as in these cases establishing a causal link between the consummated merger and the anti-competitive effects may prove very difficult. According to the U.S. Horizontal Merger Guidelines, if a competition authority can determine that observed price increases or other changes adverse to customers are the result of the consummated merger under investigation, this evidence can be dispositive. However, the Guidelines also recognise that "*a consummated merger may be anticompetitive even if such effects have not yet been observed, perhaps because the merged firm may be aware of the possibility of post-merger antitrust review and moderating its conduct.*" Obviously, in case of a consummated merger whose effects have not yet been observed, the agencies should be cautious in initiating an investigation.

5.2 Implications for the merging parties

39. The scope of the competition authorities' powers to review consummated mergers may have direct implications for businesses. Broad review powers of consummated mergers involve increased transaction costs, a higher degree of legal uncertainty and increased risks of loss in competitiveness and higher litigation costs. All these implications may have a direct impact on the willingness of parties to engage in in merger activity in the first place. If the review powers are very broad and can be exercised outside pre-defined criteria, legitimate and pro-competitive merger activity might be chilled, especially in borderline cases. This may be the case especially in jurisdictions where the competition authority is entitled to challenge a consummated merger which has been previously cleared. But similar chilling effects can arise if mergers falling below the notification thresholds can be subject to *ex post* scrutiny. In this case, businesses would have to self-assess many transactions and decide whether to inform the authority even

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69 See Rosch (2012), at 10.

70 According to the U.S, FTC "*[i]n a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish […] liability without separate proof of market definition.*" See Opinion of the Commission, Polypore Int'l, Inc., Docket No. 9327 (Dec. 13, 2010), available at http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf.

71 See http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

72 See Compton and Sher (2003), at 6: "*In a network industry, one must seriously question whether the tipping of a market to a technology adopted by a firm that recently engaged in a series of acquisitions is a result of those acquisitions, or alternatively (and equally likely in many industries), because of an inherent advantage in the technology that caused customers to choose that platform over its rivals.*"

though there is no obligation to do so. This raises the companies' transaction costs and may contribute to chilling legitimate business activity, leading to inefficient market outcome and ultimately harming customers.

The time period within which the competition authority can initiate an investigation of a consummated merger is an important factor for consideration. Generally, statutory deadlines do not apply to consummated mergers causing uncertainty in the market and difficulties in the imposition of remedies.[73] But even in jurisdictions where a short period of limitation applies, there may be undesired consequences as the merging parties may strategically delay pricing decisions in order to avoid the risk of an investigation. This is also true in voluntary notification systems where the threat of a post-closing merger challenge and the extent of the possible investigation[74] bear not only the risk that the deal might have to be undone but also a risk of losing significant time that could be used for product development or enhancement.

40. When competition authorities decide to challenge a consummated merger, the chances of litigation are significantly higher.[75] The merging parties will be more inclined to litigate simply because the commercial interests at stake will be high as the transaction has already been executed, and unscrambling an integrated business may require great efforts and possibly significant costs. The competition authority will be more inclined to litigate as the evidentiary basis provided by data on the actual effects on the market of the transaction can make a convincing case before a court.[76] Although the evidence on the number of investigations of consummated merger is far from suggesting that *ex post* merger investigations are being preferred over the traditional *ex ante* approach in merger enforcement, some have argued that "*as the antitrust agencies become less confident of their ability to predict anti-competitive effects pre-closing,*

73 The window for opening the investigation of a consummated or non-notifiable merger is limited in some jurisdictions. In Canada and in Brazil, for example, the competition authority has one year after the merger has been substantially completed to initiate proceedings. In Australia, if divestiture is pursued, application to the Court must be made within 3 years and applications for penalties must be made within 6 years from the execution of the transaction.

74 In Australia, for example, completed mergers which are not notified to the ACCC undergo a different process than acquisitions which have been notified for clearance to the authority, and for example no indicative timeline for their review is published.

75 Between 2010 and 2012, the U.S. FTC challenged a total of 48 mergers. Out of these 48, 9 were consummated mergers and four of those challenges resulted in litigation. In contrast only 6 of the 39 challenges to unconsummated mergers resulted in litigation. See Rosch (2012).

76 The authority can make a more convincing case based on market data which can be a more compelling story for a court to understand. See Fales, Davis and Lowe (2012): "*For the agencies, consummated mergers can be low-hanging fruit.*" See also Rosch (2012): "*A case focused on market definition risks getting bogged down in esoteric fights over critical loss analysis or the SSNIP test. In contrast, a court is likely to be persuaded that a merger that resulted in a price increase violates Section 7, even if the court harbors some doubts about the precise relevant market.*" In addition, an anti-competitive claim can be strengthened by post-acquisition data in the companies' internal documents. In the Polypore case, the U.S. FTC argued that "*[d]ocuments created by the merging parties in the ordinary course of business are often highly probative of both industry conditions and the likely effects of a merger*" (Polypore Opinion, *supra,* at 10). In the Bazaarvoice case, theU.S. DOJ argued that the transaction eliminated the company's only significant rival. The Court was not convinced by the Bazaarvoice's defence that the target firm PowerReviews was a weak and unworthy competitor, since there were pre-merger documents showing that Bazaarvoice considered PowerReviews its strongest competitor. See United States v. Bazaarvoice, Inc., Memorandum Op. at 44, No. 13-00133 (N.D. Cal. Jan. 8, 2014), available at http://www.justice.gov/atr/cases/f302900/302948.pdf.

they will increasingly feel compelled to attempt to remedy mergers that result in demonstrable anti-competitive effects post-closing."[77]

5.3. Remedies in consummated mergers

41. Generally, competition authorities who have the power to review consummated mergers do not have a separate and different remedies policy for consummated mergers with an anti-competitive effect. Most competition authorities apply the same considerations to the design of remedies in case of both consummated and non-consummated mergers. In particular, the general preference for structural remedies and divestitures applies also to consummated mergers. Such a preference might include the disposal of all or some of the target shares or the transfer a part of its business and the customers associated to it. However, competition authorities recognise that the remedies package may necessarily be more complex in consummated mergers where the parties have already integrated their businesses or are in the process of doing so.

42. If antitrust intervention occurs at a point in time when integration of the merging firms' businesses is not yet completed, competition authorities can order interim measures. These are steps to prevent that the integration of the businesses might affect the effectiveness of the authority assessment of the transaction and especially of the implementation of the most effective remedy package that the authority will require. If the merger has already been completed, interim measures will normally be addressed to the acquirer and they would aim at prohibiting any further activity towards the integration of the target's business, without the prior consent of the competition authority. If the merger has not yet been completed, interim measures would be addressed to both the acquirer and the target company and, depending on the stage of integration, the competition authority may aim at (i) preventing the exchange of sensitive information between the parties, (ii) preventing any attempt to further integrate the two businesses, (iii) preventing any joint commercial activity of the merging parties, and (iv) preventing any employment decision that might affect the target company. Competition authorities, however, recognise that in certain circumstances, some degree of integration may be required to maintain the viability of the target business. In this cases, a derogation to the interim measures could be granted by the competition authority, subject to a motivated request by the merging parties.

43. When a competition authority reviews a consummated or a non-notifiable transaction, and it considers that it may have anti-competitive effects, it might require that these anti-competitive effects be addressed with an appropriate remedy package to restore competition to *status quo ante* the merger. Under normal circumstances, most competition authorities have a strong preference for structural remedies, in the form of divestitures.[78] This is because structural remedies are generally simple, relatively easy to enforce, and definitive in terms of their impact on the market. Competition authorities normally aim for structural reliefs in consummated mergers as well as in non-consummated mergers, but the fact that the parties have integrated (all or in part) their operations might complicate the suitability of a divestiture as a viable remedial option in some cases.[79] In these cases, other remedies might be better suited, such as behavioural or conduct remedies.

77 See Liebeskind (2004).

78 See OECD (2011) and OECD (2003).

79 For example, the time elapsed between the merger and the investigation may have rendered the pre-merger products of the parties obsolete meaning that divestiture could lead to inefficiency in the market.

Box 3. Conduct remedies for consummated mergers

The U.S. FTC analysis in the *Evanston* case is illustrative of how alternative remedy propositions might a more viable solution in consummated mergers.[80] In 2000, Evanston Northwestern Healthcare Corp., which already owned the Evanston Hospital and the Glenbrook Hospital, merged with Highland Park Hospital. The merger was filed under the HSR Act and it was completed without challenges by any government agency or private party. Four years after the transaction, the U.S. FTC decided to file a complaint based primarily on the allegation that the merger had substantially lessened competition in the area surrounding the hospital, in violation of Section 7 of the Clayton Act. However, the U.S. FTC did not require the divestiture of Highland Park (the original target), but imposed instead a conduct remedy, on the basis of four considerations:[81]

1. A long time elapsed between the closing of the merger and the conclusion of the litigation;
2. Evanston had integrated the operations of Highland Park with the two other local Evanston hospitals;
3. Some of the post-merger improvements at Highland Park would not survive a divestiture; and
4. It would take a long time for Highland Park to recreate on its own the post-merger improvements after a divestiture.

According to the U.S. FTC, the divestiture might have left Highland Park without the volume to support a cardiac surgery program that was developed and implemented after the merger, which in turn might have meant that Highland Park, as a stand-alone business, would not be an as effective competitor and competition might have not been restored. Consequently, the U.S. FTC imposed a conduct remedy that required Evanston to establish separate negotiating teams for Highland Park and the other hospitals to compete for patients' business, to allow separate negotiations of contracts with Highland Park. It also prohibited that any contract or prices negotiation for Highland Pak be contingent on entering into a contract for one or the other Evanston's hospitals, or vice-versa. The U.S. FTC also imposed a firewall between the negotiating teams and ordered that disputes resulting from the separate negotiations be submitted to mediation.

44. Cases like the Evanston case show how far investigations of consummated and non-notifiable mergers can go in some jurisdictions. The case involved a merger that was above the filing thresholds. The transaction was duly notified and it was not challenged by the reviewing agency. Ultimately, when the merger was found to have had anti-competitive in an *ex post* review, a structural remedy was not required[82]. It also shows that divestitures are not necessarily the only available remedy to deal with anti-competitive effects of consummated mergers. Two instances especially might render divestiture ineffective: 1) restoring the acquired firm as an independent competitor is nearly impossible and 2) there is a lack of suitable buyers which can act as independent competitors.

80 See Botti (2008).

81 See Opinion on Remedy of the U.S. FTC, Evanston Northwestern Healthcare Corp., Docket No. 9315, 2007 FTC LEXIS 210 (Aug. 6, 2007), available at http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf. The U.S. FTC Opinion acknowledges the possible criticisms against the decision for not requiring divestiture. However, it stresses strongly that the circumstances of the case are extraordinary and "*divestiture is still almost always the appropriate remedy in such cases*" (at 11-12).

82 A possible reading of this case is that at least in some circumstances an *ex post* merger analysis can reveal anti-competitive effects that an *ex ante* merger analysis could not, but that remedies *ex post* might not be as effective as in an *ex ante* review.

6. Conclusions

45. Investigations of consummated and non-notifiable mergers are not frequent in competition law enforcement. In jurisdictions with a voluntary notification system, which allows parties to close a transaction without prior clearance from the competition authority, reviews of consummated mergers are a key feature of the system itself. In most jurisdictions, competition authorities rely on mandatory pre-merger reviews and they are not allowed to review (i) mergers which have been cleared, unless in exceptional circumstances (e.g. new developments or inaccurate factual submissions which affected the authority's initial assessment) and (ii) mergers which fall below the notification thresholds set by the law, except in a very limited number of jurisdictions whose merger review powers extend to these transactions as well. In any case, consummated mergers which are not subject to merger control anymore remain subject to the general scrutiny under the antitrust provisions on agreements between competitors and abuse of dominance/unilateral conduct in the competition law.

46. The ability to review mergers which have been already consummated allows competition authorities to base their assessment on the actual effects of the transaction in the market. This changes the nature of the review from a predictive and speculative assessment to the review of the actual competitive effects of the transaction. This offers competition authorities the advantage to access data and evidence on post-merger price behaviour of the merged entity, which can make their case more compelling in court in case of litigation. Competition authorities, however, will have to show a causal link between the anti-competitive effects on the market and the consummated merger under investigation. This can prove challenging especially in dynamic and fast-changing markets, where changes in the market structure may have as well caused the price increase or the post-acquisition anti-competitive effect under investigation.

47. From the business perspective, broad powers to investigate consummated mergers can affect legal certainty and chill pro-competitive merger activity. This uncertainty can be managed if jurisdictions with a mandatory notification system allow for voluntary notifications of mergers below threshold, or are generally open to discuss with the parties the possible implications of these transactions on competition. Clear criteria and time limits for opening investigations of consummated mergers which have been subject to a notification and cleared (or conditionally cleared) by the competition authority are also viewed as a means to provide legal certainty by making competition enforcement in this area more predictable for businesses.

48. If a competition authority finds that a consummated merger has had anti-competitive effects it can order remedies to reinstate the competitive situation existing before the merger. There is no separate or different policy on remedies for consummated and non-consummated mergers. Structural measures in the form of a divestiture remain the preferred option for competition authorities. However, consummated mergers imply that the operations of the merging parties have already been fully or partially integrated, and unscrambling a done merger can raise problems that may affect the success and effectiveness of a structural remedy. For this reason, there are cases where competition authorities have accepted behavioural or conduct remedies.

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