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AGENCY DECISION-MAKING IN MERGER CASES

-- Background Note by the Secretariat--

28-29 November

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

*Background Note by the Secretariat**

Abstract

When analysing mergers which risk generating anti-competitive effects, competition agencies must establish whether a transaction generates sufficient anti-competitive harm to either prohibit it or impose conditions to its clearance. The point beyond which sufficient harm is established, and a prohibition decision or the acceptance of remedies are justified, is not always clear or easily predictable.

This note provides the backdrop for the WP3 roundtable on merger prohibitions and conditional clearances and lays out the issues for discussion, including the standard of proof for agency decisions, changes in the level of certainty that agencies are requiring today with regard to merger remedies, different thresholds of certainty at different stages of the merger review process, and issues regarding the effectiveness of merger decisions.

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1. In recent years, the OECD Competition Committee has held several roundtables on merger-related issues, including on the substantive criteria used for the assessment of mergers (2002), the standard of merger review (2009), remedies in merger cases (2011), and remedies in cross-border merger cases (2013), but it has not yet specifically addressed the standards for prohibition decisions or conditional clearances with remedies. In November 2016, the Committee's Working Party No. 3 will be holding a discussion on factors related to prohibition decisions and conditional clearances in merger cases.

2. Merger and acquisition activity worldwide is high in terms of deal value[1]. In 2015 there was an increase of 42% in the value of global deals (totalling USD 4.7 trillion) compared to 2014. Of these transactions, more than 70 mergers were worth more than USD 70 million, and most of them were strategic cross-border transactions between significant players in the healthcare, food and beverage, oil and gas, and chemicals industries, among others. [2]

3. The increased value, geographic scope and concomitant complexity of notified mergers mean that more time and resources must be devoted to merger review by competition agencies. While the vast majority of notified transactions do not raise competition concerns, some transactions are likely to result in competitive harm and therefore cannot be unconditionally cleared, or are found to merit scrutiny in non-mandatory pre-merger notification systems.

4. Merger review revolves around two basic questions: is the merger likely to be harmful for competition? If so, how can this harm be countered? When a competition authority has answered the first question in the affirmative and the transaction could be prohibited on this basis, the merging parties may, and often will, offer remedies to remove the concerns identified by the agency and allow for the approval of mergers that would otherwise have been prohibited.[3] The authorities will then have two options: approve the merger subject to remedies that are considered able to address the prospective competitive harm, or prohibit the merger if no remedy is submitted that can prevent the harm or restore competition.

5. Merger prohibitions, and the imposition of remedies, seem to be on the rise in many jurisdictions, simultaneously with the increase in the overall value of notified mergers. In 2015, the US Federal Trade Commission (FTC) brought 22 merger enforcement challenges. Out of these 22, in 3 cases the FTC started litigation to block the merger; another 17 cases resulted in consent orders and 2 deals were abandoned or restructured. The US Department of Justice Antitrust Division (DoJ) challenged 20 merger transactions, filing a complaint in 10; in another 2 cases the parties abandoned the proposed transaction post-complaint, and in the remaining 8 the DoJ filed settlement papers simultaneously with the complaint. In the last eight years the DoJ successfully challenged or secured the abandonment of 39 mergers, compared to 16 successful challenges or abandonments during the previous eight years. In the EU, in 2015 the European Commission did not block any transaction, but of a total of 337 notified cases, 8 cases were withdrawn, 13 were cleared with remedies at the end of Phase 1, and Phase 2 investigations were opened for 11 notified mergers, of which 7 were cleared with remedies.

6. The trend is for remedies to become bigger in scope, deeper in detail and more demanding in implementation, taking more time and resources to analyse and implement. More upfront remedies or fix-

it-first solutions are used[4], suggesting that agencies may be becoming more risk averse. However, a wide set of remedies is no guarantee that a merger raising competition concerns will be cleared[5] and indeed the harm that risks being caused by certain transactions is so high that it cannot be remedied.

7. The increase in enforcement actions involving merger prohibitions or the imposition of conditions to clearance has brought to the fore the important issue of the standard of proof, i.e. the decisional threshold to justify a prohibition decision (or its equivalent), as well as the standard to consider that some remedies are sufficient to allow for a clearance decision. This note provides the backdrop for the WP3 discussion on merger prohibitions and conditional clearances, by describing standards of proof for prohibition decisions as well as criteria for assessing acceptable remedies, providing some examples. The aim is to provide insights into factors that tip agencies' decisions to either prohibit anticompetitive mergers, or accept (or reject) remedies based on their assessment of likely competitive harm, and remedies' likelihood of success or risk of failure.

1. A balancing act: agencies' standard in prohibiting mergers

8. Agencies need to establish that a merger will generate significant anti-competitive effects that are not countered by sufficient pro-competitive effects, before prohibiting it. Since establishing the balance of anti-competitive and pro-competitive effects involves a prediction of the impact of a merger on future market conditions, agencies need to rely on a decisional threshold, i.e., a tipping point beyond which sufficient harm to competition is reasonably expected, and which distinguishes mergers that should be prohibited (absent remedies) from those that should be allowed. This is the standard of proof for agency decisions, which needs to be met "*before an adjudicator decides that a point is proven in law*"[6]. In merger review, it is the point at which the substantive merger control test is satisfied, harm is presumed, and, thus, a prohibition decision is justified and can be expected to withstand judicial scrutiny. This point can move across a theoretical range of possibility and probability levels, starting at mere possibility, and following through plausibility (i.e., in line with experience and common sense), to more than mere plausibility (i.e., having good chances of occurring), to being established on the balance of probabilities (i.e., more likely than not), up to the point of legal certainty (i.e., beyond reasonable doubt). The specific standard followed in each jurisdiction is usually explicitly set forth in legislation or guidelines, to ensure that the level of scrutiny that transactions are likely to be subject to is understood and can be relied on by enforcers and businesses.

9. As merger analysis is a forward looking exercise, it not only requires assessing a set of current facts, but also requires "[…] an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not … certainty about anticompetitive effect is seldom possible and not required for a merger to be illegal […]" (US DoJ and FTC 2010 Horizontal Merger Guidelines). Competition agencies combine the best information available at the time of the transaction with methodologies that have been developed to predict how mergers will affect competition.[7] Their conclusion is based on balancing facts, arguments and evidence that is usually complex, often imperfect, possibly conflicting and unlikely to conclusively resolve all uncertainties.

10. This forward looking exercise may explain why in several OECD jurisdictions, including the EU and many of its member states, Australia, and the US, merger prohibitions are justified when it is expected that the merger is "more likely than not" harmful – though the exact wordings and case law on the plausibility of harm differ.

Box 1. Standard of proof in selected jurisdictions

In Australia, merger analysis under section 50 of the Competition and Consumer Act 2010 prohibits mergers that would have the effect, or be likely to have the effect, of substantially lessening competition in a market. Current case law in Australia seems to indicate that it is sufficient that there is a "real chance" of significantly lessening competition, a standard higher than a mere possibility but arguably lower than the balance of probabilities (Australian Gas Light Company v ACCC (No. 3) (2003) FCA 1525). There have been arguments that the significant lessening of competition must be shown to be more likely than not on the "balance of probabilities", rather than on "real chance": in ACCC v Metcash Trading Limited case (2011) FCAFC 151, there were divergent opinions among the full federal court judges in relation to the required standard of proof (i.e. whether "likely" means "a real chance" or "the balance of probabilities"), but the court did not rule on this issue.

The US Department of Justice and Federal Trade Commission 2010 Horizontal Merger Guidelines set out that the US agencies will find against mergers which are "likely to" create or enhance market power. The agencies rely on a rule of reason approach, balancing anticompetitive effects against procompetitive benefits to distinguish lawful from unlawful business conduct. Case law (United States v. Phila. Nat'l Bank (374 U.S. 321, 362 (1963)) has further established a presumption that where a merger results in a large market share in a concentrated market, the merger is unlawful: "*a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects*".

The EU 2004 Guidelines on the assessment of horizontal mergers state that the merger will be prohibited if it "is likely to" impede effective competition; conversely, mergers will be cleared if it is more likely than not that the merger will *not* lead to a significant impediment of effective competition (Bertelsmann and Sony Corporation of America v Impala C-413/06 P). Case law has attempted to clarify the "more likely than not" standard, and has also imposed stricter requirements for vertical and conglomerate mergers.

In the General Electric/Honeywell merger judgment (case T-210/01 General Electric vs Commission, 14 December 2005, on appeal against the Commission's decision to block the merger) the then Court of First Instance of the European Union (CFI –now called the General Court) held that the Commission was required to establish that there was a "*high probability that the anti-competitive effects will occur and not merely that they might occur*" and to "*quantify those effects and show that they will result from the merger rather than from pre-existing market conditions*". In the event, according to the CFI, the Commission had failed to demonstrate with sufficient probability the vertical and conglomerate effects of the merger. The CFI judgment upheld the Commission's decision on the ground that the horizontal effects of the merger were sufficient to prohibit it in any event.

In Tetra Laval, the CFI overturned the Commission's decision to prohibit a proposed merger between the Swedish packing company Tetra Laval and a French company, Sidel. The Commission claimed that the notified merger would have anti-competitive conglomerate effects, but the CFI found that the Commission had failed to prove that the merged entity would not only have the ability to harm competition, but that it would in fact act anti-competitively. On appeal by the Commission, the Court (Case C-12/03 P, Commission vs Tetra Laval BV, 15 February 2005) stated that "*not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate* effect"; "*evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible*". This case law was widely thought to raise the plausibility standard above the balance of probabilities threshold, but keep it still below full certainty (Vesterdorf 2005, Wood 2008).

The UK 2010 Merger Assessment Guidelines state that the competition agency *"has to make an overall judgement on whether or not an SLC [significant lessening of competition] has occurred or is likely to occur*". This test requires establishing likelihood of an SLC "on the balance of probabilities" on the basis of an extensive Phase 2 investigation.

11. The "more likely than not" assessment is flexible enough to accommodate analyses of future market developments that can reasonably be predicted. A too stringent standard of proof would make it very difficult to establish anti-competitive effects and justify a prohibition decision, or to show pro-competitive effects in support of a clearance decision. However, precisely because of the flexibility of the "likelihood" threshold, it is not easy to predict how this threshold will be interpreted in each case. The question of whether a merger will more likely than not harm competition is neither an easy one nor does it lend itself to a clear-cut answer.

12. While agencies must carry out a balancing exercise in order to reach a decision, these efforts are informed by a number of different factors: legal standards (including the substantive merger control test and acceptable counter arguments and defences, the standards of proof for decisions, but also legal presumptions, burden of proof, evidentiary rules, etc.); evidence cogency; the strength of arguments by the merging parties; the dynamics of the merger review process, in particular time; the risks of a prohibition being challenged in court, and the strictness of judicial scrutiny, as well as the agencies' own experience, successes and errors. Lyons, Menzies and Zizzo (2009) conducted an experiment identifying the influences of different factors in decision making in merger review.

Box 2. Empirical test of decision making in merger review

Lyons, Menzies and Zizzo (2009) conducted an experiment in decision making in merger review, identifying the separate influences of different standards of proof, volumes of evidence, cost of error and professional mix, training and experience. They analysed "*whether alternative standards of proof make any practical difference to decision making; whether the interpretation of standards of proof is professionally determined; whether there is a connection between experience and toughness; whether people take the volume of evidence and cost of errors into account; and whether there are systematic cognitive biases in their decision making*".

Their findings show that, while standards of proof influence decision making[1], contrary to their expectations, there seemed to be no difference in decision making between practitioners in different legal systems, meaning that the impact of different standard is likely not very significant. They also found evidence that professionalization counts: professionals seem to be more able to identify different standards of proof and more likely to take into account the volume of evidence; older practitioners tend to have a more sophisticated approach to evidence and a higher ability to distinguish between different standards of proof. They also found indications of reluctance to find harm in a proposed merger and that weight is given to the risks of Type 1 errors (i.e. cost of an adverse finding when it is ultimately the case that the merger causes no competitive harm). The results leave open explanations based on agency culture and training.

Drawing on this study, it seems that while formal standards provide the framework for agencies' finding for or against a merger, decision-making in practice is an exercise with behavioural aspects.

[1] For example, they found that the standard of proof imposed by the European Court of Justice on the Commission to provide "accurate, reliable, consistent and sufficient evidence" is almost as high a standard as full certainty (i.e. the 'beyond reasonable doubt' standard used in criminal courts).

Source: Lyons, B., Menzies G., Zizzo, D., 2009, "Professional interpretation of the standard of proof: an experimental test on merger regulation", Centre for Competition Policy Working Paper 10

13. If competitive harm is found to be likely to occur, thus justifying prohibiting the merger, parties will typically put forward options to address the authority's concerns: they will usually propose to remedy the anticompetitive aspects of the merger.

2. Re-balancing? What is the standard for conditional clearances?

14. In most jurisdictions there are significantly more conditional clearances than outright prohibitions. Indicatively, the European Commission, out of 6,264 mergers notified between 21 September 1990 and 31 July 2016, prohibited only 25 deals and ordered restorative measures in another 4 cases (also, 170 cases were withdrawn: 130 at Phase 1 and 40 at Phase 2). The Commission imposed remedies in 263 cases in Phase 1 and started 242 Phase 2 investigations, out of which 118 (thus approximately 50% of the total) were cleared with remedies.

15. Duso, Gugler, and Yurtoglu (2011) point out that "throughout the last decade there has been a clear shift in merger control to consider remedies as a superior policy instrument if compared to outright prohibitions. Remedies are supposed to function as a surgery treatment in that they effectively tackle the market power concerns potentially raised by mergers without destroying efficiency enhancing synergies".

16. For agencies to accept remedies, should these remedies solve every competition concern the merger risks bringing about? Or should they instead tip the balance in favour of conditional clearance, i.e. eliminate or alleviate enough concerns so that on balance (i.e. according to a standard of proof) the pro-competitive effects outweigh the anti-competitive effects?

17. Merger review rules, and agency guidelines, state that remedies should address all competition concerns, and that the harm that would otherwise justify a prohibition decision should be eliminated, not reduced, preferably through structural remedies. The threshold for accepting remedies is full elimination of risk that competition will be harmed, as this harm is established following each jurisdiction's substantive test and standard of proof rules. Authorities have a margin of appreciation in deciding what action can reasonably be expected to preserve competition.

Box 3. Examples of wording on acceptable level of remedies

In Australia, the ACCC Merger Guidelines 2008 state that "the remedy needs to adequately address the potential harm identified. There will be instances when only an outright rejection of the merger can address the ACCC's competition concerns. … The core obligations in the proposed undertaking (for example, a divesture) [should] <u>specifically, comprehensively and effectively</u> address the ACCC's competition concerns. Importantly, the ACCC will be unlikely to accept an undertaking when, in its view, there are risks that the undertaking will not be <u>effective in preventing</u> a substantial lessening of competition as a result of the merger, and/or the undertaking cannot be implemented in practice and (where necessary) properly monitored and/or enforced" (emphasis added).

In Canada, the Competition Bureau's Information Bulletin on Merger Remedies in Canada (2006) clarifies that "the standard for achieving an acceptable remedy in either a contested or consent proceeding is set out by the Supreme Court in Canada (Director of Investigation and Research) v. Southam Inc. In this case, the Court concluded that "the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger" […] The Supreme Court, in Southam, emphasized the importance of ensuring that the <u>remedy fully eliminates</u> the substantial lessening (or prevention) of competition" (emphasis added).

The EU Merger Regulation and the 2008 Commission notice on remedies specify that commitments have to eliminate the competition concerns <u>entirely</u> and be comprehensive and effective from all points of view (emphasis added).

In the US, the DoJ Antitrust Division Policy Guide to Merger Remedies sets out the "touchstone principle for the Division in analysing remedies [which] is that a successful merger remedy must effectively preserve competition in the relevant market. That is the appropriate goal of merger enforcement. …. Once the Division has determined that a merger is anticompetitive, the Division <u>only considers remedies that resolve the competitive problem</u> and effectively preserve competition…. Before the Division will conclude that a proposed remedy is acceptable, the relief must effectively address <u>each</u> of the Division's competitive concerns" (emphasis added).

All four jurisdictions point out the limited circumstances in which behavioural remedies might be effective.

18. If remedies should address all concerns that competition authorities find, then, should remedies fail to do that, the transaction would be expected to be blocked. Competition agencies are scrutinising remedies closely and require a high level of certainty to assuage their concerns.[8] A number of recent cases were not completed after significant remedies offered by the parties were rejected, suggesting that agencies may be becoming more rigorous and cautious regarding the remedies that they are willing to accept. A number of reasons can be found for this – from remedies' failure to remove sufficient anti-competitive harm, to issues of implementation of such remedies, namely regarding the implementation of carve-outs, mixing and matching assets, and hold-separate obligations.

19. For instance, in the EU, and although the European Commission statistics show a willingness to accept remedies, in May 2016, after an in-depth Phase 2 investigation, the Commission blocked Hutchison's plan to take over O2 in the UK. This is the first prohibition decision taken by the Commission since 2013. The Commission's investigation revealed that the deal would likely have led to higher prices and less choice for UK consumers, while harming innovation. Hutchison's offers of remedies were not found sufficient to address the Commission's concerns, as they were deemed to be "*not capable of replacing the weakened competition*" and to raise "*significant uncertainty as regards their effective implementation and monitoring*".[9] This decision may be informed by previous Commission decisions in the context of 4 to 3 mergers in the telecoms sector where remedies previously accepted may not have been easy to implement, or likely to succeed.[10]

20. In the US, there is a recent surge in court challenges to mergers, due to a strict review of remedies offered, and rejection of those found to be unsatisfactory.[11] In April 2016, the DoJ opposed the merger between oilfield services provider Halliburton Co and rival Baker Hughes Inc., despite increasing remedial offers. Together, the two companies (number two and three players in energy services) would have been one of the largest forces in fracking, oil wells and oil services technology, raising concerns that the deal would result in higher prices in the sector. The DoJ argued that the remedies left unaddressed harm in some markets.[12] In July 2016, the DoJ sued to block Aetna's acquisitions of rival health insurers Humana and Cigna Corp, arguing that the remedies offered would not completely resolve the competitive problems created by the mergers and would impose a heavy oversight burden as well. The complaint against the acquisition of Humana argues that assets proposed for divestment would "*have lower sales volume and lower market shares, be less efficient, be of lower quality, provide fewer opportunities for innovation, and otherwise fail to replicate the competition between Aetna and Humana*".[13]

21. Prohibition decisions, which find competitive harm and reject offered remedies, stress that remedies were unacceptable because, precisely, they did not address all concerns. This implies that, in conditional clearances (a generally much higher percentage than prohibitions), remedies are in principle able to prevent all harm (thus satisfying the agency's test to clear the deal) and, at the same time, keep most, or some, merger-specific efficiencies (which are usually the parties' reason for the transaction, and absent which the parties might be expected to abandon the deal[14]). The assessment of how remedies can, or do, solve the problem is each time based on the facts of the case. Authorities have a margin of discretion in their decision-making, which raises the question of whether a remaining insignificant lessening of competition would be identified and explicitly accepted.

22. It may also be that in some cases competition authorities agree to remedies that they anticipated would only partially cure the competitive problem. *"The authority might rationally have done so if it believed there was a significant risk of losing the case if it went to trial. If so, the competitive harm might have been even greater in the absence of the remedy, but still better than if no relief had been obtained at all"*.[15] In this case, the agency decision would accept that some harm would be left unaddressed (and, thus, the anti-competitive effects would not be solved in their entirety) and would balance the likely remaining harm (which may be small) against the risk of losing the case (which may be high). It may also be that in such cases the parties propose weaker remedies, knowing that the agency is less likely to reject them and

thus take on the risk of losing at trial. Also, when prohibition is not feasible, for example due to multijurisdictional constraints and difficulties of extraterritorial enforcement, second-best remedies may be agreed when they seem to be the best policy option on the facts of a particular case.[16]

23. Commentators (Heyer 2012) have also argued that decision making should take into account the pro-competitive effects of mergers, even when these do not fully eliminate individual competitive harms and no perfect remedy can be found for them; thus, accepting remedies in cases where a prohibition would normally be justified. Namely, if there are competitive concerns that involve a relatively small piece of the merger but significant merger-specific efficiencies otherwise (in markets other than those where the competitive concerns arise), then stopping the deal in its entirety may be bad policy. If there is no perfect remedy, imposing an imperfect one that goes a significant way towards resolving the competitive concerns while permitting efficiencies to be achieved would serve consumers and is arguably the optimal enforcement choice.

24. The degree to which remedies address competition concerns is not the only factor on which reviewing authorities can base their decision to accept or reject a remedy. These decisions are also motivated by internal decision-making factors, like reaching agreement in split panels of decision makers (as such decisions both allow the deal but, at the same time, impose conditions), or managing potential political pressure to allow transactions.

3. Are there different standards for conditional clearances in different stages of the merger review process?

25. Merger control in many jurisdictions involves two stages, or phases. In Phase 1, the competition authority examines the available evidence in a relatively short time and decides whether the evidence is sufficient to allow the merger through, or, conversely, refer it for in-depth assessment in Phase 2. Phase 1 can end with a clearance, a conditional clearance with remedies, or the opening of Phase 2 (or second request for additional information, in the US). Phase 2 involves a deeper analysis of issues and the gathering of more information and evidence. Phase 2 can end with a clearance, a conditional clearance with remedies, or a prohibition. The standards for conditional merger clearances in Phases 1 and 2 of merger review can however be different.

26. Because of the nature of Phase 1 (shorter and less detailed), decisions which accept remedies need to eliminate initial, not thoroughly investigated, concerns of likelihood of competitive harm.[17] This suggests that remedies are acceptable only when the competition problem is both clearly identifiable on the basis of available evidence and able to be easily addressed. Phase 1 remedies need to show in a clear manner that they can eliminate concerns that the merger may cause competitive harm; if the offered remedies do not dissipate such doubts, the authority would normally proceed to open Phase 2, rather than accepting the remedies. These then become more targeted in Phase 2, and need to resolve a more clearly identified competitive problem. The Commission's Merger Remedies Study (Commission 2005, p. 136) found that Phase 1 remedies were overall more far-reaching and effective.

27. Commentators (Duso 2006) point out that, since firms may be reluctant to go through the lengthy and costly Phase 2 investigations - which can be more costly than the imposed remedies, in particular if speedy clearance is critical for the deal -, they may be willing to make more generous offers in Phase 1.

4. Effectiveness of merger decisions

28. Agencies' merger decisions are not fool-proof. Commentators question whether merger review and remedies are always effective (Kwoka 2015, Kwoka 2013, Duso, Gugler and Yurtoglu 2011, Seldeslachts, Clougherty and Pita Barros 2007). They point out that mergers which have been cleared

unconditionally seem to have raised prices, suggesting that there may be Type II errors in waiving through anticompetitive mergers, and therefore under-enforcement. Also, some accepted remedies turn out to be unsuccessful.[18] The 2016 brief by the US President's Council of Economic Advisers points out that "*there is ongoing debate over the effectiveness of merger remedies in preserving the competitive pre-merger conditions. Some observers have praised the increased use of remedies in recent years as aggressive and creative, while others question the government's ability to craft such remedies, monitor compliance with them, and whether they actually promote competition*". So, in some cases, outright prohibitions instead of clearances, conditional or not, might have worked better and would have given a stronger signal to the market that tough enforcement decisions can be made.

29. Some agencies have conducted ex post studies of merger decisions and merger remedies. In particular in the case of merger remedies, ex post studies show why and how some remedies failed to perform as expected and were partly or wholly ineffective in preventing anticompetitive harm.[19] Such ex post studies do not allow for generalisations about agencies' decision-making in accepting remedies as they are based on case-specific facts of design and implementation faults, information asymmetries, or risks inherent in accepting a solution which relies on assumptions and aims to have an impact upon future competitive conditions.

Box 4. OECD Reference guide on ex-post evaluation of competition agencies' enforcement decisions

The OECD advocates periodic ex post evaluations of enforcement decisions to determine the impact that the decision has had on the market. Ex post evaluations may cover the whole decision (e.g. was it appropriate to clear a specific merger or should it have been blocked?), or only some elements of the decision, such as the effectiveness of the remedies imposed (e.g. did they work, or could they have been better designed, enforced and monitored?), or the validity of anticipated market developments.

Ex post evaluations can help to check whether an intervention (or non-intervention) has achieved its objectives and, if not, the reasons it failed to do so, using both post-merger data and internal agency data. Such assessments allow analysing the cogency and precision of the predictive techniques used by the agency, any limitations and errors, and help improve decision-making, in terms of both methods and results.

Source: OECD, 2016, Reference guide on ex-post evaluation of competition agencies' enforcement decisions, www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf. Annex C to the Reference Guide includes an extensive list of ex-post studies done by authorities and academics. See also OECD, 2014, Guide for helping competition authorities assess the expected impact of their activities, www.oecd.org/daf/competition/Guide-competition-impact-assessmentEN.pdf

30. Ex post evaluations will not lead (at least immediately) to change the legal standards of proof in merger review. They can however guide agency future decision making as to which mergers are "more likely than not" to cause harm, and which remedies can successfully eliminate anti-competitive effects or are unlikely to succeed. These evaluations thus can lead to changing the practice of an agency towards merger prohibitions and remedies, enabling to better target problematic mergers and enhancing the design and implementation of adequate remedies.

ENDNOTES

1 This note uses the term "merger" for all transactions that fall under the applicable merger review laws.

2 Thomson Reuters, 2016, Mergers & Acquisitions Review, http://share.thomsonreuters.com/general/PR/MA-4Q15-(E).pdf

3 OECD, Best Practice Roundtables on Competition Policy 2011, Remedies in Merger cases, Executive Summary, DAF/COMP(2011)13 and www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf

4 Competition Policy International, *Rising tide of 'Fix-it-first' and 'Up-front Buyer' remedies in EU and UK merger cases*, 2016, www.competitionpolicyinternational.com/rising-tide-of-fix-it-first-and-up-front-buyer-remedies-in-eu-and-uk-merger-cases/

5 Freshfields, *Merger Remedies: Meeting Agencies' Higher Expectations*, www.freshfields.com/en/global/TKT2015/9__Merger_remedies/

6 Vesterdorf, B., 2005. "Standard of proof in merger cases: reflections in the light of recent case law of the Community Courts." European Competition Journal 1:3-33.

7 OECD, 2016, Reference guide on ex-post evaluation of competition agencies' enforcement decisions, www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf

8 Freshfields, *Merger Remedies: Meeting Agencies' Higher Expectations: "... authorities are increasingly demanding more extensive and complex remedy packages. Moreover, when testing whether these remedy packages will deliver the desired outcomes, authorities are being more thorough than ever before, and we expect this intensive scrutiny to continue ... authorities are demonstrating an appetite to dive into the details of the remedies offered with an unprecedented degree of granularity. Parties should expect several rounds of negotiations on the exact wording of the remedy package",* www.freshfields.com/en/global/TKT2015/9__Merger_remedies/

9 "*The proposed remedies did not resolve the structural problems created by the disruption to the current network sharing agreements in the UK. They were also not capable of replacing the weakened competition in the retail and wholesale mobile telecoms markets as a result of the takeover. Furthermore, the largely behavioural measures raised significant uncertainty as regards their effective implementation and monitoring , also because they were difficult to define precisely and some depended on the agreement of others":* European Commission - Press release 11 May 2016, *Statement by Commissioner Vestager on competition decision to prohibit Hutchison's proposed acquisition of Telefónica UK*, http://europa.eu/rapid/press-release_STATEMENT-16-1713_fr.htm

10 Massimo Motta, presentation at ACE Annual Meeting, Università Bocconi November 2015, *Mobile mergers: What have we learned?*, www.competitioneconomics.org/dyn/files/basic_items/566-file/Motta-Mobile%20mergers%20What%20have%20we%20learned%20[Compatibility%20Mode].pdf

11 Attorney General Loretta Lynch told the American Bar Association on April 6, 2016 that *"...we will not accept [..] the idea that the mere act of divestiture is enough…The Department of Justice is not interested in settling for the sake of settling; we are willing to settle only when we have a high degree of confidence that an agreement will preserve competition and protect consumers in every market that a merger affects. The more complex the deal – and the more markets it potentially endangers – the greater our scepticism that divestiture will safeguard competition. And if we believe that no good solution exists, then we will prosecute our suits to the very end."* (emphasis added): www.americanbar.org/news/abanews/aba-news-archives/2016/04/halliburton-bakerhu.html

[12] Bill Baer, acting Associate Assistant Attorney General, addressing the American Antitrust Institute on June 16, 2016 referred to the case stating that the proposals "*fell well short of ensuring that the current competitive dynamic would be preserved*… I*n the end, there was no assurance that customers would view some unidentified third party buyer as a serious alternative to Halliburton and Schlumberger*". In general *"a remedy should fully and squarely cure the violation. It needs to preserve the status quo ante in affected markets by* effectively addressing any and all anticompetitive effects arising from the transaction*… Partial remedies do not cut it."* (emphasis added): www.americanbar.org/news/abanews/aba-news-archives/2016/04/halliburton-bakerhu.html. The deal was abandoned one month after the DoJ lawsuit.

[13] Case 1:16-cv-01494 complaint vs Aetna Inc and Humana Inc proposed merger.

[14] Laprévote F-C., *Abandon All Hope, ye Who Enter Here? Efficiencies in European Merger Control: A Few Lessons from Recent Decisional Practice* Concurrences Journal N° 2, May 2014

[15] Heyer, K., 2012, *Optimal Remedies for Anticompetitive Mergers*, Antitrust, Vol. 26, No. 2, American Bar Association, www.americanbar.org/content/dam/aba/publications/antitrust_magazine/spring_2012_heyer.authcheckdam.pdf

[16] ICN Merger Working Group, 2005, Analytical Framework Subgroup, *Merger Remedies Review Project: Report for the Fourth ICN Annual Conference in Bonn*, www.internationalcompetitionnetwork.org/uploads/library/doc323.pdf, Appendix L on the Draeger Medical AG & Co acquisition (Germany) of AirShields (US). The merger of the wholly-owned distributors of the two entities in the UK was found to likely result in a substantial lessening of competition. Also see OECD, Best Practice Roundtables on Competition Policy 2013, *Remedies in cross-border merger cases*, www.oecd.org/daf/competition/competition-remedies-in-cross-border-merger-cases.htm.

[17] The European Commission accepts remedies in Phase 1 if they clearly rule out "serious doubts" that the concentration may significantly impede effective competition (as this is the test for the Commission to open Phase 2): OECD Best Practice Roundtables on Competition Policy 2011, Remedies In Merger Cases, Submission by the European Union, DAF/COMP/WP3/WD(2011)59 and www.oecd.org/daf/competition/competition-remedies-in-cross-border-merger-cases.htm

[18] In two recent FTC cases, the Hertz Global Holdings/Dollar Thrifty Automotive Group Inc. merger and the Albertsons LLC/Safeway Inc. the divestiture buyer approved by the FTC filed for bankruptcy shortly after the FTC cleared the transaction; in Hertz/Dollar Thrifty, the divested Advantage Rent a Car business, filed for bankruptcy within four months after the FTC cleared the business plan, and in Albertsons/Safeway, the divestiture buyer filed within nine months of the FTC approval.

[19] Canada: Competition Bureau, 2011, Merger Remedies Study Summary, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03392.html; European Commission: DG COMP, Merger Remedies Study, 2005, http://ec.europa.eu/competition/mergers/legislation/remedies_study.pdf; United Kingdom: Competition and Markets Authority, 2015, Understanding past merger remedies www.gov.uk/government/uploads/system/uploads/attachment_data/file/448223/Understanding_past_merger_remedies.pdf; United States: Federal Trade Commission, Bureau of Competition, A Study Of The Commission's Divestiture Process (FTC Divestiture Study), 1999, www.ftc.gov/os/1999/08/divestiture.pdf;

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