Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **07-Nov-2016**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/M(2016)1/ANN3/FINAL
Unclassified

Working Party No. 3 on Co-operation and Enforcement

EXECUTIVE SUMMARY OF THE ROUNDTABLE ON JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

14- 15 June 2016

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item V of the 123rd meeting of Working Party No. 3 held on 14-15 June 2016.

More documentation related to this discussion can be found at www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03404681

Complete document available on OLIS in its original format

English - Or. English

EXECUTIVE SUMMARY OF THE ROUNDTABLE ON JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

By the Secretariat[1]

Considering the discussion at the roundtable held by Working Party No.3 on Co-operation and Enforcement on 15 June 2016, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points are noted:

1. Merger control systems should not be burdensome for either businesses or competition authorities, and should require transactions to be notifiable only when they have an appropriate local nexus.

The 2005 OECD Recommendation on Merger Review and the 2002 ICN Recommended Practices for Merger Notification and Review Procedures still reflect a general consensus among competition agencies on the key principles that should govern merger review systems. Countries should continue to converge towards these international best practices.

The increasing number of merger control regimes around the world raises concerns, including the possibility that agencies may reach divergent decisions, the risk of the strictest merger regime becoming the *de facto* standard for cross-border mergers, and the increase of regulatory costs for companies.

All merger control regimes face a tension between using merger notification criteria that should be objective and transparent, and criteria that target potentially harmful transactions. The latter tend to be flexible standards that allow fact-specific inquiries but, if used to establish jurisdiction, they can undermine the goal of greater transparency and predictability for businesses. Objective notification criteria can provide greater clarity as to which mergers should be reviewed, but do not target transactions likely to prove anticompetitive. International recommendations recommend the adoption of objective notification criteria as jurisdictional thresholds for merger control.

The discussion indicated that notification thresholds must have an appropriate local nexus, be clear and objective, and be easy to use and to comply with. While other elements also may be relevant to assessing the effectiveness of a merger regime, local nexus is vital to a well-functioning merger control system that achieves an appropriate balance of costs and benefits.

1 This executive summary does not necessarily represent the consensus view of the Competition Committee. It encapsulates key points from the discussion at the roundtable, the delegates' written submissions, the panellists' presentations and the Secretariat's background paper.

2. The main factor that is usually taken into account to determine whether a transaction has appropriate local nexus is the local activity of the target or of each of at least two parties to the transaction, usually measured by reference to material sales or assets levels within the territory of the jurisdiction concerned. However, elements related to local nexus are only part of wider jurisdictional tests expressed through notification thresholds. These other elements vary across jurisdictions.

There is wide consensus about the minimum requirements for identifying local nexus. Determination of a transaction's nexus to the jurisdiction should be based on the activity in the territory of at least two parties to the transaction and/or of the acquired business. Most jurisdictions consider that local assets and domestic turnover are clear, objective, and easy to use criteria to measure activities within the territory.

Elements related to local nexus, however, are part of wider jurisdictional tests that determine whether a transaction should be subject to merger control. These jurisdictional tests are expressed via notification criteria. There are various types of notification criteria, of which those based on turnover and/or assets are the most common, along with the value of the transaction and market share thresholds. There are additional tools which are sometimes used together with these more common notification criteria to refine the jurisdictional rules for merger. These include exemptions from notification of certain transactions, residual jurisdiction (which allows for the review of potentially problematic mergers that do not meet the merger control thresholds), or obligations by dominant companies to notify mergers in markets in which they are dominant regardless of whether the transaction meets any kind of threshold.

Different types of notification criteria can be used simultaneously – alternatively and/or cumulatively – to create notification thresholds. Each option creates trade-offs in the fine-tuning of the notification thresholds between legal predictability, flexibility and appropriate targeting of transactions susceptible of having a material impact on local markets. As such, there is no single optimal combination of notification criteria.

Furthermore, there are differences regarding the level at which notification thresholds are set in different countries. It is common for countries, when reviewing the level of their notification thresholds, to take into account their GDP, the dimension of local companies, the structure of their economy, the experience of similarly situated jurisdictions, previous merger control experience, and to conduct international comparisons. This is an area which was identified in the discussion as interesting for future work.

3. There is increasing compliance with OECD and ICN recommendations, but some jurisdictions still adopt notification criteria, such as market shares and domestic effects tests, that are not in line with international best practices.

Almost all OECD countries have revised their merger control notification thresholds since 2005, and many have taken this opportunity to align them with international best practices: for example, a number of countries have revised their notification criteria from looking at global assets or turnover to focusing on local assets or turnover. As a result, over the past few years compliance with the 2005 OECD Recommendation on merger review has increased. At present, all OECD Members and Participants in the Competition Committee require some form of local nexus.

On the other hand, the Secretariat’s review found that a number of countries rely on notification criteria – such as market shares and domestic effects tests – that are not fully in line with international recommendations regarding their clarity and objectiveness. Some jurisdictions have revised their merger control thresholds but expressly decided not to fully align themselves with international recommendations and to continue to rely on non-objective criteria such as market shares. According to an ICN’s recent survey on the implementation of the ICN recommended practices on merger review, which had a wider sample than the Secretariat's review and was based on self-reporting, almost 40% of agencies acknowledged that the buyer alone can trigger a notification requirement, and almost 30% stated that the seller's activities, as opposed to the target, count for jurisdictional purposes – both of which are not in line with international best practice.

4. While OECD and ICN best practices have been very influential, they do not provide answers to all questions regarding the relationship between local nexus and "materiality" of the transaction. As a result, countries have discretion regarding what they deem "appropriate" local nexus and how to identify transactions which might have a "material" impact on the jurisdiction, which is one of the reasons behind the wide variety of notification thresholds across the world.

The existence of local nexus is a necessary but not sufficient condition for merger control. Merger notification thresholds are designed to screen out from mandatory notification most transactions without an appreciable nexus to the reviewing jurisdiction. Designed well, they should allow an agency to focus its resources on transactions most likely to have an effect in the jurisdiction. On the other hand, in many cases thresholds limit an agency's jurisdiction, determining the reach of an agency's ability to review transactions. Nonetheless, a competition agency does not want to review all mergers, only those that pass some materiality threshold, even if this exempts transactions with some form of local nexus from merger control review. Thus, the relevant question for setting notification criteria is not only whether there is local nexus but also whether that nexus is sufficiently material.

For example, it is clear that a transaction in which only one of the companies has a link to the jurisdiction can be said to have some sort of local nexus. However, since the objective of notification thresholds is to ensure that only those mergers which are likely to have a material impact on competition in the jurisdiction concerned are reviewed, it is arguable that merger control should be triggered only by the presence in the jurisdiction of at least each of two participating undertakings; if the local turnover of only one participating undertaking was sufficient to trigger merger notification, then a very significant number of merger transactions which have no or very little impact on competition in the country would have to be notified.

Thus, the level of local nexus required is intrinsically linked to the potential that the transaction has to have a sufficiently material impact in the reviewing jurisdiction. International best practices do not address the relationship between materiality and local nexus in detail, which leaves the issue to the local jurisdiction's discretion as long as the minimum requirements set in recommendations regarding local nexus are met.

Some delegations expressed a concern that, while there has been a trend towards increasing the level of notification thresholds to limit the number of notifications – thereby increasing the level of materiality required for a transaction to be notified, and exempting from review a number of transactions that have sufficient local nexus – this may lead to transactions with sufficient material impact escaping review. A number of options were suggested by speakers to deal with this risk. A first one is to keep notification thresholds low and adopt light notification procedures so as to keep costs down. Another approach, which has been adopted or considered by countries which have thought of increasing their notification thresholds, is to adopt high thresholds but allow voluntary notifications or grant residual jurisdiction to the authority to review transactions falling below the notification thresholds. A last option suggested was to have thresholds based on some form of domestic effects test with sufficient guidance to ensure legal certainty and predictability.