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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS**
**COMPETITION COMMITTEE**

## Working Party No. 3 on Co-operation and Enforcement

# EXECUTIVE SUMMARY OF THE ROUNDTABLE ON PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

**14 June 2016**

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

*More documentation related to this discussion can be found at: www.oecd.org/daf/competition/public-interestconsiderations-in-merger-control.htm*

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# EXECUTIVE SUMMARY OF THE ROUNDTABLE ON PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

*By the Secretariat* [*]

Considering the discussion at the roundtable held by Working Party No. 3 on Co-operation and Enforcement on 14 June 2016, the delegates' submissions, the panellists' presentations and the Secretariat's background paper, several points emerged:

## *1. Allocative efficiency and consumer welfare are central to competition law and policy in all OECD Member countries. However, the laws of several OECD jurisdictions allow public policy objectives to be taken into account in merger assessment (so-called public interest considerations).*

The rules applicable to merger review in several OECD jurisdictions allow public interest considerations, which extend beyond the core economic goals of competition law, to be used in merger assessment, thus potentially causing a decision on a merger to be made on grounds other than the merger's pro-competitive or anti-competitive effects.

The discussion at the roundtable showed that even when the laws in OECD Member countries allow merger decisions to be based on public interest considerations, this rarely occurs in practice. The main policy and enforcement argument for considering competition-only objectives in merger assessment is that other public interests may be promoted through market efficiency, and thus there is no room, or need, for their specific consideration within the competition system. However, some delegations mentioned that they expect seeing an increase in public interest arguments during times of financial or other crises. Also, public interest considerations carry more weight in emerging economies and consequently non-Members use public interest considerations more.

The business community strongly supports the assessment of mergers exclusively on competition principles, as the introduction of public interest considerations into the merger review analysis increases complexity and unpredictability, can be burdensome and costly for businesses, and may potentially have a chilling effect on pro-competitive mergers.

## *2. There is no universal definition or list of public interest considerations. Public policy goals significantly differ from one jurisdiction to another, depending on the social, cultural and political context and may change over time to reflect social developments.*

Public interest clauses can take various forms. Sometimes they are a general statement of principle in the preamble of the competition law. Sometimes they are included in clauses stating the objectives and purposes of the competition law, therefore applying to all enforcement actions including merger control decisions. In most cases, they are explicitly included in the merger assessment criteria that the competition authority is required to apply.

[*] This Executive Summary does not necessarily represent the consensus view of the Working Party. It does, however, encapsulate key points from the discussion at the roundtable, the delegates' written submissions, and the Secretariat's background paper.

There is no exhaustive list of public interest considerations used by jurisdictions. The concept of public interest can be either general (e.g. '*legitimate public interest'*, '*overriding public interest*', weighting the '*public benefits'*) or specific and narrower, reflecting the social, political and economic needs of the country. Specific considerations can refer to a certain sector or industry, and are particularly common in the sectors of energy (e.g. '*security of supply*', '*stable provision of energy*'), media ('*plurality of the media*'), finance ('*prudential rules*', '*stability of the financial system*') and defence ('*national security*', '*national defence*'). It is possible to draw a distinction between considerations that relate to economic matters (e.g. '*protection of small and medium enterprises*', '*international competitiveness of domestic firms*', '*economic development of non-metropolitan areas*') and considerations which target other goals (e.g. social '*protection of employment*', '*public health*' or the '*protection of environment*').

Some jurisdictions rely on a precise and narrow definition of public interest. Other jurisdictions have a broad definition and leave its interpretation to the relevant authority. Others have a narrow list of public interest grounds, which can be added to, if necessary in a particular case.

***3. The majority of OECD Member country competition authorities are not responsible for applying public interest considerations in reviewing mergers; the task is left to sector regulators or government departments. Different institutional models for assessing public interest considerations lead to different enforcement challenges.***

The institutional channels for enforcing public interest considerations in merger assessment are divided in two main categories:

- In the '*dual responsibilities model'* the competition authorities conduct the standard competition assessment, and public interest considerations can be used by a sector regulator or a political body, like a government department. This is the model followed by the majority of OECD Members, and it ensures better predictability and transparency. The enforcement challenges are aligning the procedures of the separate institutions in time and outcome; thus it is useful to have rules or guidelines clarifying the principles and steps of the separate reviews, in order to avoid overlaps and delays.

- In the '*single authority model'* the competition authority is entrusted to conduct the public interest test in merger review, regardless of the sector or industry concerned. In this model, competition authorities might face difficulties balancing public interest criteria against competition factors.

The discussion showed that OECD Member country competition authorities that are empowered to assess public interest considerations rarely rely on them, and, when they do, they usually interpret and apply them narrowly. Most delegations expressed the view that non-efficiency public interests can be more effectively addressed by specific policies and not through the competition system. The case-related practice in OECD Member countries indeed suggests that, in general, non-competition intervention in mergers is exceptional, and limited to certain sectors and markets only.

***4. Public interest clauses may raise challenges in how competition authorities weigh competition and public interest considerations in merger analysis. Striking the right balance may not be easy: the assessment of the same merger on the basis of competition or public interest criteria could reach different conclusions.***

Competition authorities might face a difficult balancing exercise in weighing public interest criteria (which may include political and socio-economic considerations) against competition-related factors for a number of reasons.

- First, public policy objectives may be defined broadly in the law and change over time, which makes their consistent interpretation and application challenging. For this reason, most agencies prefer that the law includes a clear definition of public interest, or that the concept is clarified through soft law documents, like guidelines.

- Second, public interest clauses can sometimes be relied on in unpredictable and special circumstances, such as a financial crisis, which make it even harder to define, delimit and apply them.

- Third, merger control involves a forward-looking analysis, meaning that agencies must assess the likely impact of the merger on competition in the medium to long-term. Including public interest considerations in such assessment may force agencies to balance what appear to be valid short-term solutions based on current public policy considerations, against what might be more uncertain longer-term consequences for competition and consumer welfare. The balance between short-term gains and the long-term benefits of sustaining competitive markets is not easy.

- Finally, merger control requires a sufficient causal link between the merger and the alleged anticompetitive effects for a competition authority to intervene. Arguably, if public interest considerations are part of the assessment, they should also be merger-specific; that is, in case a merger is cleared or blocked on public interest grounds, these grounds need to be firmly linked to the likely effects of the specific merger. There is a risk that when applying public interest clauses, relevant authorities may address policy objectives going beyond the specific merger.

### *5. Jurisdictions which intend to make more extensive use of public interest considerations in merger control should consider the risks to the certainty and predictability of their merger control system, and the need to ensure consistency of cross-border merger reviews.*

The increased interconnection of the global economy has led to more cross-border mergers. The potential for conflicting decisions on the same merger in different countries is magnified when public interest considerations come into play. Public interest clauses are jurisdiction specific, and thus, more likely to differ in their concept, interpretation and application than core competition goals, therefore increasing the risks of divergent outcomes. Such differences make the assessment of cross-border transaction more complex and increase complexity in the design of effective remedies. Consultation and co-ordination among competition authorities become critical when public interest clauses are used.

Increased reliance on public interest considerations also redefines the role of the State in the market place, as it allows governments to intervene in markets of significant national importance through merger control rather than through other tools, like foreign investment rules. One potential effect of governmental intervention is the lack of predictability of the overall merger assessment. To reduce this risk, jurisdictions could consider adopting checks and balances into their procedures to ensure that government intervention is exercised under exceptional circumstances and in a transparent manner; and that there is effective judicial review of how the merger-specific public interest concerns outweigh the drawbacks in competition.

Legal certainty, transparency and predictability can be helped with the adoption of soft law documents, such guidelines or notices on the assessment of public interest provisions in merger regulation.