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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 Agency Decision-Making in Merger Cases: From a Prohibition Decision to a Conditional Clearance**

**Annex to the Summary record of the 124th meeting of the Working Party No. 3**

**29 November 2016**

*This Executive Summary by the OECD Secretariat contains the key findings of the discussion held during Item 4 of the 124th Meeting of Working Party No. 3 held on 29 November 2016. The discussion covered the standard of proof for merger prohibitions, the assessment of the sufficiency of merger remedies to eliminate competition concerns and the ex post evaluation of merger decisions and merger remedies.*

*More documents relating to this discussion can be found at*

*[www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm](http://www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm)*

Despina Pachnou, Policy Analyst, OECD Competition Division, Tel.: +(33) 1 45 24 95 25,  
Email: Despina.Pachnou@oecd.org.

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## *Executive Summary*

*By the Secretariat\**

Working Party No. 3 held a roundtable on 29 November 2016 on Agency Decision-Making in Merger Cases: From a Prohibition Decision to a Conditional Clearance. Considering the roundtable discussion, the delegates' written contributions, presentations from the expert panellists and the Secretariat's background note, the following key points emerge:

**1) Few mergers raise competition concerns. When competition authorities identify such concerns, these are usually addressed by measures that the merging parties undertake to remedy the competitive harm and enable the transaction to be cleared. Decisions to prohibit transactions are rare and only used when the proposed remedies are not likely to be comprehensive or effective.**

In competition authorities' merger-related practice, only a small minority of mergers are found to be likely to result in competitive harm. In these few cases, competition authorities have two options: approve the merger subject to remedies that are considered sufficient to address the identified potential competitive harm, or prohibit the merger if no remedy that can prevent the harm or restore competition is available or likely to succeed.

Imposing remedies or accepting remedies proposed by the parties constitutes the majority of the competition authorities' interventions in mergers, prohibitions being a measure of last resort, only used when the proposed remedies are inadequate.

**2) The standard of proof for merger prohibition decisions is the threshold beyond which competition authorities, applying the substantive merger control test, reasonably expect sufficient harm to competition to justify blocking a transaction. In most jurisdictions, this decisional threshold is the probability that the merger is more likely to be harmful than not.**

The standard of proof for merger prohibition decisions is the threshold beyond which the decision to block a transaction is justified, because sufficient harm to competition is reasonably predicted. Harm is assessed applying the substantive merger control test; the standard of proof is the level of certainty required to allow a decision to be taken.

The specific standard followed in each jurisdiction is usually set forth in legislation or guidelines, thus ensuring that the level of scrutiny that transactions will be subject to is understood and followed by enforcers and businesses. In most OECD jurisdictions, a merger can be prohibited when the competition authority finds that it is "more likely than not" harmful, i.e. likely to meet the substantive merger control test of substantially lessening, or significantly impeding, effective competition in a market. This likelihood standard is flexible enough to accommodate predictions of future market developments and establish an adequate level of probability of anti-competitive effects to justify a

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\* This executive summary does not necessarily represent the consensus view of Working Party No. 3. It does, however, identify key points from the discussion at the Roundtable on *Agency Decision-Making in Merger Cases: From a Prohibition Decision to a Conditional Clearance*, including the views of the panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

prohibition decision. The assessment of whether a particular merger will more likely than not harm competition will depend on the facts of the case.

**3) Competition authorities are willing to clear a transaction under remedies, when these are able to eliminate the projected competition harm and preserve competitive conditions in the market. Competition authorities are increasingly scrutinising closely the comprehensiveness, sufficiency and likelihood of success of remedies, and require a high level of certainty that measures will be both effective as well as able to be implemented.**

Competition authorities are willing to accept remedial measures that aim to allow a transaction to be cleared, if these measures are truly able to eliminate the projected competition harm. The finding that a remedy, or combination of remedies, is sufficient to justify a conditional clearance decision will be based on the authority's assessment of the remedies' ability to effectively and comprehensively address the identified concerns and preserve competitive conditions in the market. The challenge for authorities is to identify and agree to remedies that provide a high degree of confidence that they will be successful in preserving competition in the market, as well as make sure that these remedies can be put in place and followed by the undertaking parties.

The standard of proof for accepting remedies is usually the full elimination of competition concerns. During the roundtable discussion, some delegates clarified that elimination of concerns, and therefore an appropriate remedy for a projected substantial lessening of competition, involves restoring competition to a point where it is not substantially less than it would have been without the merger; thus, a remaining insignificant lessening of competition would not justify blocking a deal.

Over recent years there has been considerable evolution in the approach of competition authorities to evaluating and accepting remedies. Authorities are increasingly thorough in their assessment of available solutions, review in depth their details and test whether they will produce the desired results. The discussion showed that remedy design and implementation have improved, and there is now more clarity on what competition agencies require to be satisfied that identified anti-competitive concerns will be countered and a transaction can be conditionally cleared. In few recent cases discussed at the roundtable, competition authorities decided to block a transaction when no remedy package was found to be capable of preserving competition or provide comfort that it would be effectively implemented.

The expert panellists noted the progress made, and observed that it remains important for authorities to adequately substantiate their competition concerns, be open, straightforward and timely as to what they would require to allow a deal, and ask only for the least onerous remedies that are necessary to overcome clearly identified issues. Several delegates underlined the importance of market testing proposed remedies to make sure are clear, understandable, likely to be effective and unlikely to cause competitive concerns in upstream or downstream markets. When market testing remedies, many delegates concurred that it is good practice to check the accuracy of views offered by third parties, as these may have an interest in encouraging an agency to require strict remedies against other businesses, in particular competitors.

The experts also observed that agencies should advise companies as soon as practicable where competition issues are incapable of being remedied, or may be addressed only with very far-reaching remedies, so that parties can decide whether to dedicate time and costs in deals that may be unlikely to succeed. In general, clarity and predictability is very

important for businesses, in particular in transactions where speedy completion is critical and the parties would opt to abandon the deal if it takes too long to be closed. Thus, providing regular guidance on agency practice helps businesses to prepare and meet agency expectations.

BIAC suggested that when agencies review proposed remedies, they should take into account efficiencies that the deal, as remedied, would create, and allow it if, on balance, the efficiencies to be created outweigh the likely anti-competitive effects of the transaction; the burden to prove the efficiencies to be created will be on the merging parties. When efficiencies that the remedial measures may generate are not taken into account, there is a risk that an overall pro-competitive merger may not be allowed to proceed. Delegates commented that efficiencies should be clear, merger-specific and passed on to consumers in terms of better prices or better quality.

**4) Delegates concurred that structural remedies are clearer, easier to implement and monitor. Behavioural measures may however be suitable, and have been used, in vertical mergers or rapidly changing markets.**

The discussion at the roundtable showed that structural measures are the preferred remedy in most jurisdictions, as they provide a clearer solution to the competition concern. There was consensus that behavioural remedies can raise uncertainty as regards their effective implementation and monitoring. Behavioural remedies can however sometimes be suitable in rapidly changing markets, or in vertical mergers, where the gained efficiencies from allowing the merger may be high and risks of foreclosure can be countered by behavioural remedies.

Delegates noted that, when divestitures are proposed, ensuring that a buyer will be ready and able to acquire the divested assets and restore competition in the market in a timely manner can be challenging. In recent cases discussed at the roundtable, authorities asked for upfront remedies, fix-it-first solutions and hold separate measures, as conditions to clear transactions. Some agencies noted that when the remedies package is overly complex, they may be reluctant to accept it, as it would require considerable monitoring, and may prove very difficult or impossible to enforce.

Some delegates raised a concern that there may be no acceptable purchasers for divesting assets in small economies. Also, while a large multijurisdictional merger may cause significant harm to competition in a small concerned economy, this economy can be an insignificant part of the global deal. In these cases, the competition authority is faced with the options of blocking the transaction or imposing strict remedies, which could lead to withdrawal of the firm from the market and thus loss of competition, or, alternatively, imposing behavioural remedies applicable to the local market only.

In the case of large cross-border mergers, both delegates and experts pointed out the value of co-operation and co-ordination among agencies to ensure consistency, avoid unnecessary duplication, and align procedures and timetables.

**5) Ex post evaluations of authorities' merger decisions and merger remedies can guide future decisions, helping to identify mergers that are more likely to cause harm, and remedies that can successfully eliminate anti-competitive effects or, conversely, are unlikely to be effective.**

Ex post evaluations of authorities' merger practice help to show which mergers have harmed competition in the market, which remedies succeeded or failed to bring about the desired results. Such review of past merger practice can thus lead to changing the future

approach of an agency to merger review and remedies, and enable targeting problematic transactions, identifying risks and agreeing to remedies that are more likely to succeed.

For example, in 2005 the European Commission conducted a study which looked at remedies imposed in 40 merger cases at the end of the 1990s, and found that they were successful in 57% of cases, and that Phase 1 remedies were overall more effective. Findings from this study fed into the 2008 Commission notice on remedies, which sets forth the principles for accepting remedies. Indicatively, in order to avoid past shortcomings and help improve remedies design and implementation, the notice states a preference for having an entire business divested, asks for safeguards to ensure that the divested business would be preserved at the moment of divestiture, and lays down strict conditions for a carve-out.