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SUMMARY OF THE DISCUSSION OF THE ROUNDTABLE ON INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

25 February 2014

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item III of the 118th meeting of Working Party No. 3 on 25 February 2014.

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

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SUMMARY OF DISCUSSION

By the Secretariat

Introduction

1. William Baer, the **Chair** of Working Party Nr. 3 (WP3) and Assistant Attorney General for the Antitrust Division of the United States Department of Justice (DOJ), opened the Roundtable discussion summarising the purpose of the session. Through the roundtable delegates will discuss the different approaches that competition authorities around the world have to the review of consummated mergers. The first important distinction is between countries which have a voluntary notification system and countries with a mandatory notification system. The difference between the two systems has a great impact on the powers that an agency has to review consummated mergers.

2. The **Chair** explained that the discussion would cover five main issues: (i) the treatment of consummated mergers in jurisdictions with a voluntary notification system; (ii) the review of mergers that fall below the notification thresholds; (iii) the review of mergers that should have been notified, because subject to pre-notification requirements, but were not; (iv) the subsequent review of previously cleared and consummated transactions; and finally (v) what remedies an agency should consider if a completed transaction is subsequently found to be anti-competitive.

1. The Treatment of Consummated Mergers in Voluntary Notification Systems

3. The **Chair** opened the discussion and invited jurisdiction with voluntary notification systems to take the floor and discuss how they treat consummated mergers. He called on Australia to take the floor first to illustrate its experience with consummated mergers.

4. The delegate from **Australia** noted that there are several ways in which merger can be brought to the attention of the regulator, but the primary one is an informal system which is probably unique around the world. The second, a formal review process, was introduced in 2007 but has never been used. There are then other provisions which allow a merger authorization on public benefit grounds. None of these procedures have any sort of threshold or mandatory requirement for notification. The ACCC can take an action against any merger that is believed to substantially lessen competition. Australia stressed that there has not been a problem for many years with consummated mergers, but that the ACCC has always shown willingness to act against mergers regardless of whether they have been notified or not.

5. The **Chair** turned to the United Kingdom since the UK also has a voluntary and non-suspensory merger notification system. The Chair asked to comment on the recent legislative reforms which gave to the Competition and Market Authority (CMA) new powers to remedy problematic mergers that have already been consummated.

6. The delegate from the **United Kingdom** first mentioned that when the government launched a public consultation on the reform of the competition system, it also surveyed stakeholders on the merits of moving to a mandatory notification system for mergers. The results indicated that a mandatory system could create some disproportional costs for both the authorities and the businesses, and therefore it was preferred to maintain the current voluntary system. However, to avoid some of the downsides that voluntary systems may have if the merger is already consummated when the agency becomes aware of it, in practice the UK is moving to a system where the CMA can issue initial enforcement orders to hold the merging parties' businesses separate while the merger is assessed. Concerning the new powers, the CMA has stronger powers to request and demand information from the parties in phase one of the merger review. The information provided upfront will help streamlining the process and dealing with completed mergers, since in that scenario the parties can be sometimes unresponsive.

7. To close the discussion on experiences with consummated mergers in voluntary notification systems, the **Chair** gave the floor to Chile to discuss advantages and disadvantages of voluntary system in its enforcement experience.

8. The delegate from **Chile** reported that although the theoretical pros and cons of any system are pretty clear, one has to assess how the system works in practice and in the context of its own economic and legal framework. Having had to deal with non-notified mergers for some time, Chile feels that the voluntary system may not necessarily be the best way forward. Chile put forward three reasons: (i) the so-called problem of unscrambling the omelette (i.e. it might be very hard to remedy an anti-competitive merger which has been consummated; (ii) the perverse incentives produced by a voluntary notification system (i.e. the firms may find it easier to ask for forgiveness *ex post* rather than ask for permission *ex ante*); and (iii) the quality of proof under a voluntary system. Taking these factors into consideration, Chile believes that in theory voluntary system can work well in some jurisdictions, but that in Chile a mandatory system might be more effective in the long run.

2. The Review of Mergers that Fall Below the Thresholds

9. Moving to the second item for discussion, the **Chair** asked the Slovak Republic to discuss the merger between animal plant operators mentioned in the submission, which seems to conclude that transactions which do not meet the notification requirements can nevertheless be investigated under general antitrust rules.

10. The delegate from the **Slovak Republic** confirmed that in this the turnover criteria for notification were not met and the transaction (a joint venture agreement) did not fall under the national merger control rules. However, following several complaints suggesting that the two companies coordinated their business conduct through the newly created joint venture, in particular in the price of processing of certain kind of animal by product, the competition authority decided to open an antitrust investigation. Following an investigation, both parties were fined because they were found to have restricted competition.

11. The **Chair** turned to Latvia and asked to elaborate on the reasons for the proposed amendments to the competition law which allow the authority to review mergers that are not subject to mandatory notification.

12. The delegate from **Latvia** explained that under the previous notification criteria a merger had to be notified if the market share of the newly created undertaking exceeded 40%. This criterion was not considered objective and easy to determine. Hence, Latvia considered amendments to this criterion, which consisted in replacing it with powers to control consummated mergers ex-post. The Latvian authority does not consider that there will be many cases that will require the use of such powers, but they might be a

useful tool in situations where a notification is not required but the transaction may nevertheless produce harmful effects in the market.

13. The **Chair** turned to Brazil and asked to clarify the consequences associated with the one year time limit to which the power of the authority is subject to, if it wished to review a consummated merger.

14. The delegate from **Brazil** explained that the new merger legislation, which took effect in 2011, eliminated the market share criterion which was previously used and retained only the gross revenue criterion. But the current threshold opens the possibility that some anticompetitive mergers at regional or municipal levels might not be subject to notification and therefore escape scrutiny. In order to deal with this situation, the new provisions enable CADE to request the notification of these transactions. The legislator, however, decided to limit this power to one year. CADE has not yet applied this provision but has created a specific unit within in charge to receive complaints and follow the media to identify transactions that may pose anti-competitive concerns.

15. The **Chair** referred to the contribution from Sweden which indicated that the possibility of requesting the parties a notification for transactions falling below threshold has been used more frequently in recent years by the Swedish competition authority. The **Chair** asked what were the reasons for such a development.

16. The delegate from **Sweden** replied that a notification can be required when a transaction which falls below the merger thresholds is likely to have an anti-competitive effect. This, for example, includes situations where an already strong player in a concentrated market acquires a new competitor that could challenge its market position. The reasons for a more proactive approach are the constant improvement of the working methods of the agency and the increased knowledge and insights in the theories of harm and economic analysis. As a consequence, this power which was used in exceptional cases in the past, was considered to be a tool that could be used more frequently if the appropriate circumstances arise.

17. The **Chair** turned to the Korean delegation and asked to present the KFTC experience with consummated mergers and to provide examples. Korea is one of those jurisdictions which allow the review of mergers which fall below the notification thresholds.

18. The delegate from **Korea** referred to a case where the KFTC investigated on a non-notifiable merger. This was a stock acquisition between the largest and the second largest companies in the domestic tax accounting software market. The KFTC merger division opened an *ex officio* investigation because the notification thresholds were not met but they thought that the transaction was likely to reduce competition in the market. In such a situation, the KFTC can review the merger based on the general provision in the law stipulating that no person shall engage in the combination of enterprises that substantially restrict competition in a certain line of trade. The case was ultimately cleared after the investigation because the full Commission concluded that the competition was not substantially restricted.

19. The **Chair** opened the floor for interventions on the discussions so far.

20. The delegate from **Ireland** asked for the floor to inform WP3 that that Irish Competition Authority (ICA) has been giving some thoughts to the appropriate level of merger notification thresholds and whether Ireland should adjust its existing notification thresholds accordingly. According to the Irish delegation, if an agency has the power to challenge only notified mergers, this creates tremendous incentives to pick thresholds that are low to avoid missing on potentially anti-competitive mergers but at the same time exposing the agency to a high cost for administering the merger control system. This cost could be reduced if an authority would have a fall-back position which would allow it to address transactions that are not subject to notification, which would allow notification thresholds to be set at a

higher level. The position of the ICA is that it has the power to apply sections 4 and 5 of the competition law, which are roughly equivalent to the TFEU 101 and 102 of the EU Treaty, to non-notified transactions. In 2012, the ICA took this official position regarding a non-notifiable merger which led the parties to abandon the transaction preventing the question of principle to be raised in court.

3. The Review of Mergers that Should Have Been Notified but Were Not

21. The **Chair** moved to the next item for discussion, i.e. what agencies can do regarding mergers that should have been notified by the parties but were not. The European Union was invited to describe the European Commission's powers against the infringement of the standstill obligation in the EC Merger Regulation.

22. The delegate from the **European Union** emphasized that the standstill obligation and the obligation to notify a merger before the transaction is put into place is a corner stone of the EU merger regime. In the 25 years of the merger regulation the European Commission had to impose fines for the violation of the standstill clause in only three cases. The latest one was in 2009 when a company failed to notify a transaction while in fact it had already *de facto* acquired control of the target company. The interesting thing about this case was that the transaction was cleared one year before the fine was imposed. This shows that the need to impose a sanction for breach of the standstill clause was considered a matter of principle. The fine was relatively high, but could have been higher if the company had not cooperated with the European Commission in terms of exchanging information. The EU noted that the European Commission has also other ancillary powers that it could use in these circumstances, such as the possibility to assess the conduct on the basis of Article 101, especially if there is a suspicion that the parties have exchanged sensitive information.

23. The **Chair** thanked the EU delegation and asked the Portuguese delegation to comment on the consequences faced by the merging parties if they fail to comply with the notification requirement.

24. According to the delegate from **Portugal**, the competition authority has a set of administrative and sanctioning powers that it can use against mergers which meet the notification thresholds but are not duly notified. On the administrative side the competition authority may open an *ex officio* proceeding to review the non-notified merger and in these cases the merging parties are subject to double filing fees. At any time during the *ex officio* proceeding the authority may also order measures including divestitures of subsidiaries or of any aggregated asset, or it can order the release of the control powers over the target. So far the authority has used these powers only in a "pedagogical" way, mostly issuing reprimands to the companies and threatening the use of these powers to ensure that mergers were ultimately notified. Portugal noted that the non-notification of mergers above threshold prevents the timely assessment of the effects of such operations in the markets concerned. These effects may potentially be difficult to reverse *ex post* and this may increase the cost of the regulatory intervention.

25. The **Chair** followed up on the Portuguese intervention and asked Turkey to discuss the consequences of failing to notify a notifiable transaction in turkey. He also asked what are the general powers on which Turkey can rely in these cases.

26. **Turkey** explained that if the parties fail to notify a merger, the authority can impose a fine on the companies of 0.1% of their annual turnover. He clarified that this is an exact and definitive amount which leaves no discretion to the competition authority. The law also states that if there is an anti-competitive merger consummated before notification, the competition authority can order that the transaction be terminated and it can take measures to eliminate all *de facto* consequences of the consummation. This means that any shares or assets acquired must be returned to the previous owners if possible; and, if not possible, they have to be transferred to a third party and the original acquirer cannot participate in the

management of the target company. Additionally, there is also the possibility of imposing a fine up to 10% of the company's turnover.

27. The **Chair** turned to Israel to provide some background on the ability of the Israeli Antitrust Authority (IAA) to prosecute criminally or administratively companies who fail to notify a merger that requires prior authorization by the IAA.

28. The delegate from **Israel** noted that the administrative fines have been in place since 2012 but if the merger in question is a horizontal merger, the IAA prefers to resort to criminal sanctions. For other types of mergers the IAA will consider the imposition of administrative fines. Besides criminal prosecution and administrative fines, consent agreements are sometimes used. The decision to go for criminal and then administrative fines or to make use of consent agreements is made on a case-by-case basis and depends on factors like the duration of the infringement or whether the companies were informed of their legal obligations or not.

29. The **Chair** mentioned that the contribution from Ireland states that a failure to notify a transaction implies that the transaction is "void". He asked Ireland to elaborate on the meaning of this provision.

30. The delegate from **Ireland** responded that on paper there are very severe consequences if the parties fail to notify a merger, as individuals can be criminally prosecuted and the statute states clearly that the merger is to be considered void. However, in practice the authority has never proceeded against individuals and non-notified mergers have been ultimately reviewed and cleared. But recently the ICA policies were adjusted and the revised policies state that as soon as a merger is considered to be void because of lack of notification, this will be publicly announced even if ultimately the merger will be cleared. The Irish delegate stressed that the parties will be concerned by this development and that the risk of having the deal declared void will be a very effective deterrent.

31. The **Chair** turned to Estonia where individuals can be subject to a misdemeanour charge in case of failure to notify a reportable merger. He asked the Estonian delegation to discuss experiences with this procedure.

32. The representative from **Estonia** responded that in order to impose a fine on a company in a misdemeanour case the responsible individual should be clearly identified and this is a serious challenge in many cases. The procedure is a very exceptional one and individuals may refuse to give testimony with regards to their actions. Also, the possibility to file a misdemeanour case expires three years after the merger is enforced. This time limit can be quite tight as it includes also not only the time of the court proceeding but also that of the procedure conducted by the competition authority. A final weakness of the procedure is the level of monetary fines that can be imposed which is quite low, leaving room for strategic and opportunistic behaviour by the companies.

33. The **Chair** invited the Russian delegation to describe how FAS imposes fines in situations where a merger is consummated either in violation of the pre- or the post-merger notification rules.

34. The delegate from **Russia** described the types of liabilities that companies and individuals may face in case of a violation of the merger filing rules. He described the procedure to impose administrative fines, to order the dissolution of a company and the restructuring of the company upon the decision of a commercial court. Finally, he explained what actions the antimonopoly authority can take if the non-notified merger also leads to a restriction of competition in which case the transaction can be declared invalid.

4. The Review of a Merger with Anti-Competitive effects which were Cleared by the Authority and Consummated

35. The **Chair** move to the next item for discussion, i.e. the question of what powers competition authorities have to review a merger that was previously cleared and consummated, and ended up generating anti-competitive effects in the market. This is a power that many agencies do not have under their merger review law. The United States are the main exception.

36. The delegate from the **United States** explained that the number of challenges to consummated and non-notifiable mergers has increased since 2000, partly as a result of the annual increase on the notification thresholds. It is very important to note that in the US, there is no agency clearance or approval of a transaction, but the agency in charge of the case simply decides not to challenge the transaction in court. This means that agencies are not precluded from later challenging that transaction in court if there are anti-competitive effects. Therefore, even after a merger has been consummated the agencies may always bring suit to remedy a likely competitive harm. In this respect, the applicable procedures and laws are just the same as if the merger had not been reportable in the first place. An important point in this regard is that proof of post-merger anti-competitive effects is not required, and the agencies need only to establish that the merger may have substantially lessened competition.

37. The **Chair** turned to Colombia and asked under what circumstances the *Superintendencia Industria y Comercio* (SIC) may reverse a merger clearance review.

38. The delegate from **Colombia** responded that the SIC currently has the power to reverse a consummated merger and to impose a sanction for the non-reporting of the transaction. The amount of this sanction was recently increased severely to insure effective deterrence. SIC can also reverse a merger if the merger is not submitted for review, although it should have been, or if there were remedies imposed but the parties did not comply with them. In addition, the SIC can open a new investigation of the mergers if it finds that the parties had not provided a complete set of information about the merger.

39. Following the last remarks of Colombia, the **Chair** asked Mexico to discuss its experience with companies submitting false information to the authority.

40. The delegate from **Mexico** presented the Sanborns Hermanos merger from 1994. When the merger was notified, the parties tried to hide the fact the merger had been already carried out, thus submitting false information. This was enough for the agency to impose a fine on the companies. Since that case, the competition law was reformed twice and the powers of the Mexican Competition Commission (COFECE) have been strengthened. It is now possible for COFECE to open an investigation in order to challenge a merger that has been cleared on false information. In some cases, it is also possible to initiate a criminal action against the individuals who have committed the offense. These powers have not yet been used.

41. The **Chair** asked the German delegation to clarify the approach that the Bundeskartellamt (BKA) is able to take for subsequent investigations of a previously cleared transaction.

42. The representative from **Germany** reminded that in Germany concentrations which are subject to merger control may only be implemented after clearance by the BKA and that transactions which do not respect this rule have no effect. German merger rules do not provide for a subsequent review of cleared transactions and the BKA has no authority to review transactions which are below the notification thresholds. The merger provisions apply also to full function joint ventures and to acquisitions of at least 25% of the shares or voting rights in a company by several parties. Merger control proceedings however do not cover an assessment of whether or not the transactions violate other competition law provisions, e.g. Articles 101, 102 of the Treaty on the Functioning of the European Union. Agreements that infringe

antitrust law are invalid and void, no corresponding decision of the authorities is required. Accordingly, there is no ex-ante assessment, no standstill obligation and no regime of strict deadlines. If the transaction gives rise to concern in this regard the Bundeskartellamt applies the prohibition of agreements restricting competition alongside merger control even though it is not obliged to do so. Where possible and appropriate the Bundeskartellamt aims to conduct the assessment in parallel with its merger investigation. If need be the joint venture can be broken up at a later stage in extreme cases. Cases where the BKA had to disband a joint venture which did not meet merger control thresholds or were cleared are extremely rare and concern extraordinary circumstances.

5. Possible Remedies if a Consummated Merger is found to be Anti-Competitive

43. The **Chair** asked to the United States to discuss the challenges of achieving effective relief once a merger is consummated.

44. In response to the **Chair**'s request, the **United States** referred to the Bazaarvoice case, a lawsuit challenging the June 2012 acquisition of PowerReviews. The court issued an opinion finding that the acquisition was unlawful based on a complaint alleging that the acquisition eliminated the only significant rival in the market for Internet product ratings and reviews platforms. This case illustrates some of the challenges with defining remedies in the context of consummated mergers. The DOJ was concerned that PowerReviews' assets may have deteriorated significantly in the time between the acquisition and the litigation because Bazaarvoice had transferred some PowerReviews' customers to its own platform. To address this concern, the DOJ's remedy would have required Bazaarvoice to license a copy of its latest platform in the event the PowerReviews' customer base had diminished substantially since the merger. However, if a sufficient number of customers remained on the PowerReviews' platform, the DOJ remedy would have required the divestiture of the PowerReviews' platform. The potential license of a copy of Bazaarvoice's latest platform was not necessary because a significant number of customers remained on the PowerReviews' platform. Ultimately, to restore the status quo ante, Bazaarvoice had to sell all of the PowerReviews assets and agree to other provisions designed to compensate for the deterioration of PowerReviews' competitive position.

45. The **Chair** turned to Japan and asked to describe the remedies that are available under the antimonopoly act if a non-notified transaction is found to have adversely affected competition.

46. The delegate from **Japan** explained that the first available remedy is to order the parties to dispose of all or some of their shares or to divest their business to eliminate the concern, in a very similar way as for a notifiable merger. In addition, there is the possibility to request a court order for the temporary suspension of the transaction. So far, there have been no cases where a non-notifiable merger has been subject to a cease and desist order or where the JFTC had to file a court request for a temporary suspension.

47. The **Chair** gave the floor to Canada to explain their remedies policy and how they have applied it in actual merger cases.

48. The representative from **Canada** stated that the remedy policy of the Competition Bureau does not differentiate between notifiable and non-notifiable transactions. There have been, however, changes to the Bureau's ability to challenge mergers and today the competition Act allows a challenge only within one year of the closing of a transaction. When the Bureau determines that there has been a substantial lessening of competition or prevention of competition, two tracks can be pursued: (i) remedies can be negotiated with the merging parties on a consensual basis or (ii) the merger can be challenged before the competition tribunal. The general approach is to negotiate first and leave the litigation for the most problematic cases. The Bureau has a very sensitive approach in cases of non-notifiable mergers and uses a variety of activities

to preserve the potential for a future remedy including timing agreements, preservation agreements, hold separate agreements and going to the tribunal to seek orders against the implementation of the transaction. In 2011, the Bureau challenged a non-notifiable merger signalling the market that Canada will challenge potential anti-competitive mergers even if they are below the notification thresholds.

49. The **Chair** referred to the submission from Spain and asked for more details on how the Spanish authority decides when a behavioural remedy or a structural remedy is required.

50. The delegate from **Spain** referred to the three cases discussed in the submission, in the insurance, telecom and electronics and IT markets. In the first two cases, behavioural remedies were preferred, although one of the mergers in the end was not implemented, and in the third case the parties implemented a structural remedy by divesting the business in Spain to a third party. The divestment process was supervised by the Spanish competition authority. In the insurance market case, behavioural remedies were considered while in the telecom case, structural remedies could not be considered because the target company only had one broadcasting network in the Madrid region which could not be fragmented.

51. The **Chair** turned to BIAC to share with WP3 their observations on the roundtable discussion.

52. **BIAC** supported the vigilant enforcement of merger laws but also emphasised that enforcement has to be balanced against the principle of legal certainty. Pre-merger notification regimes are meant to insure an efficient review of mergers before they are closed and this is mainly for two reasons: (i) the high cost for the parties if they are asked to undo a consummated merger, and (ii) the difficulty of re-establishing the *status quo ante* (i.e. the degree of competition existing pre-merger). BIAC supported a thorough review of merger notification thresholds and merger regimes to ensure their effectiveness. Considering materiality and priority, deals below thresholds should not be an area of concern for competition authorities. BIAC supported the fact that numerous jurisdictions have adopted suspensory obligations which allow the parties to execute the deal once a notified transaction is cleared or the waiting period is expired. This gives the parties legal certainty. In cases where the agency has the power to go back and review a transaction after its closing, the concept of a statute of limitation is preferable. The question whether it is better to seek forgiveness *ex post* or permission *ex ante* is quite relevant in voluntary regimes, but in suspensory regimes with pre-notification obligations, if the transaction has already been cleared, the parties should not be required to ask for forgiveness and they should be able to get on with their business without the uncertainty of possible future competition actions against the deal.

53. The **Chair** thanked all the participants for the lively and interesting debate and brought the roundtable to a close.