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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 INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

25 February 2014

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during Item III of the 118th meeting of Working Party No. 3 on 25 February 2014.

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

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EXECUTIVE SUMMARY

*By the Secretariat**

1. Considering the discussion at the roundtable, the Note by the Secretariat as well as the delegates' written submissions, several key points emerge:

(1) *Competition authorities follow different approaches to the review of consummated and non-notifiable mergers, as jurisdictions have different powers in this area. The most important distinction arises from the fact that some jurisdictions have voluntary notification systems for mergers whereas others have mandatory notification systems. In a voluntary system, the authority's jurisdiction over a completed merger that was not notified is an intrinsic part of the merger system. That is often not the case in countries with mandatory notification systems. In most of those jurisdictions, the authority can only review transactions which are subject to notification requirements.*

2. Today more than a hundred jurisdictions have merger control regimes as part of their competition laws. In most jurisdictions, mergers are subject to antitrust scrutiny before their implementation, if the transaction meets the notification thresholds in the law. These jurisdictions assume that preventing a competition problem from arising can be more effective than fixing it afterwards. For this reason, merger control is used as an *ex ante* scrutiny tool. In systems with a pre-merger mandatory notification system, the notification generally has a suspensory effect, i.e. the merging parties need to obtain regulatory clearance or approval before they can close the deal and integrate their businesses.

3. In a limited number of jurisdictions, the notification of a transaction to the competition authority is voluntary. If they wish so, the parties can decide to inform the authority of the transaction and seek legal certainty to avoid that the transaction is exposed to the risk of an *ex post* investigation and that it can be potentially subject to remedial actions to restore the competitive situation existing before the merger was consummated. But "unscrambling" a merger is a difficult task and may result in significant costs for the parties. Hence, the competition authorities which operate in a voluntary notification system usually provide guidance as to when the merging parties should consider a notification, with the decision of whether to file resting solely on them.

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

(2) ***In jurisdictions with a mandatory notification system, there are several scenarios concerning the powers of competition authorities to review consummated mergers. Mergers may fall below the mandatory notification thresholds or above them. In the latter case, mergers may be notified and cleared but subsequently found to have anti-competitive effects; or the parties may simply fail to notify a merger which meets the notification thresholds. Finally, for notified mergers there may be cases in which parties consummate the merger prior to receiving approval by the authority (gun jumping).***

4. Mandatory notification systems may involve the review of a large number of transactions, most of which have positive or neutral effects on competition. The review process imposes a high burden in terms of administrative costs to both the notifying parties and the reviewing authorities. These costs are compensated by the legal certainty afforded by the system and by the reduction of the risk that potentially anti-competitive transactions might escape antitrust scrutiny. In most jurisdictions with mandatory notification systems, if a transaction does not meet the notification thresholds, it falls outside the authority's jurisdiction. Exceptions to this rule are rare and they are usually time constrained, e.g. action must be initiated within a certain period (usually one year) from the moment the merger has been executed. The United States is a jurisdiction where the competition authorities can investigate a consummated merger that is not subject to notification thresholds without any time constraint.

5. Mergers which are below notification thresholds do not escape antitrust scrutiny completely. These transactions remain subject to general antitrust prohibitions on anti-competitive agreements and abuses of dominant position. Nevertheless there are important limits to the enforcement of general antitrust rules against mergers, which make this possibility rather rare in practice.

6. In a mandatory notification system, once a merger has received clearance it cannot be investigated again under the merger rules except in exceptional circumstances. The most obvious exceptional circumstance is when clearance was granted on the basis of false or misleading information supplied by the merging parties to the reviewing authority. Similarly, an authority can revisit a transaction that was previously cleared subject to conditions if those conditions were not fulfilled by the merging parties within the time period established in the original decision. If the merging parties fail to notify a reportable transaction, they are usually subject to administrative or civil fines and the competition authority can open an investigation to assess the anti-competitive effects of the transaction. Authorities can also adopt interim measures to ensure that competition is preserved.

7. "Gun-jumping" can occur when the merging parties fail to observe mandatory requirements but also when they fail to observe waiting period requirements. If the parties coordinate their competitive conduct prior to the actual consummation of the transaction or start acting in the market as an integrated company, this can amount to gun-jumping. Establishing gun-jumping is a delicate exercise since many forms of pre-merger coordination between parties are reasonable and necessary, such as the due diligence process. The key issue is that the merging parties should not act as a single business unit before the merger is approved. The enforcement activities of competition authorities against gun-jumping are increasing, and pre-clearance coordination is often viewed as a serious infringement of the merger rules.

(3) ***When a competition authority has jurisdiction over a consummated merger, the criteria to select cases to investigate are important. Price increases appear to be the most common reason that leads authorities to open this type of investigations.***

8. Competition authorities become aware of potentially anti-competitive, consummated and non-reportable mergers in different ways. They closely monitor the media and the press: pre- or post-closing press statements from the merging parties, filings of securities or bankruptcy statements, etc. are all sources of relevant information for authorities. Third party complaints and key customers complaining

about possible price increases are additional valuable sources of information. In some cases, a significant price increase far exceeding inflation or any reasonable cost increase has been used as a red flag for identifying potentially problematic consummated mergers.

(4) *The assessment of consummated mergers has specific features that are not present in normal merger control. The main feature of these cases is that the competition authority has the possibility to identify and measure the actual effects that the consummated merger had on the market. This can make the task of the competition authority easier. It is important, however, for the competition authority to establish a connection between the consummated merger under investigation and possible anti-competitive effects in the market.*

9. The availability of post-merger evidence and data can make market definition and proving anti-competitive effects easier. Differently from standard merger control which takes place before the merger is consummated and is as such prospective and speculative, the assessment of a consummated merger can rely on the analysis of the actual effects that the transaction had on the market. However, it is not sufficient for the authority to identify “any” anti-competitive effect.

10. Authorities face the great challenge of establishing a causal link between the consummated merger and the identified anti-competitive effects in the market. The longer the transaction has been consummated, the more difficult it will be to establish such causal link. Some authorities have also highlighted that the lack of anti-competitive effects does not automatically mean that the consummated merger is pro-competitive because the merged firm may have adapted their behaviour with the recognition of a possible investigation.

(5) *The business community is concerned of the impact that the excessive powers of competition authorities have to pursue consummated and non-notifiable mergers on incentives to merge and to engage in pro-competitive M&A activity. Merger activity is driven by legal certainty and predictability of the regulatory environment in which the merging parties operate. Excessive and non-time bound review powers of consummated mergers increase uncertainty and may have a chilling effect on merger activities, discouraging possible pro-competitive transactions.*

11. The broad review powers of consummated mergers of competition authorities translate in increased transaction costs for the merging parties, in a higher degree of legal uncertainty and in increased commercial risks of loss in competitiveness for the merging parties. If the *ex post* review powers are overly broad, pro-competitive merger activity might be chilled. When a consummated merger is challenged, the chances of litigation are significantly higher. The reasons for this are two-folds: (i) the merging parties will be more inclined to litigation simply because the stakes are higher, since the merger has already been implemented, and (ii) the competition authority might be less reluctant to resist litigation especially if it will be able to rely on strong evidence of actual effects on the market, which will allow it to tell the compelling story to the court.

(6) *The question of the appropriate remedies in the context of consummated mergers raises an interesting parallel with the types of remedies on which competition authorities usually rely for non-consummated mergers. Competition authorities generally favour structural remedies over behavioural remedies. However, for consummated mergers the use of structural remedies may not be feasible in all cases, especially if the integration of the merging businesses has already taken place. In these cases, conduct or behavioural remedies have been used instead.*

12. The policy on remedies for consummated mergers is usually not different from the standard policy used in the context of non-consummated mergers. Authorities have stated their general preference for structural remedies and divestitures for both consummated and non-consummated mergers. However,

in the case of consummated mergers, the fact that the merging parties have at least partially integrated their operations may make structural remedies difficult to implement. There may be cases where restoring competition in the market by restoring the market position of the acquired firm as an independent competitor may be nearly impossible and additional conduct or behavioural remedies will be necessary.