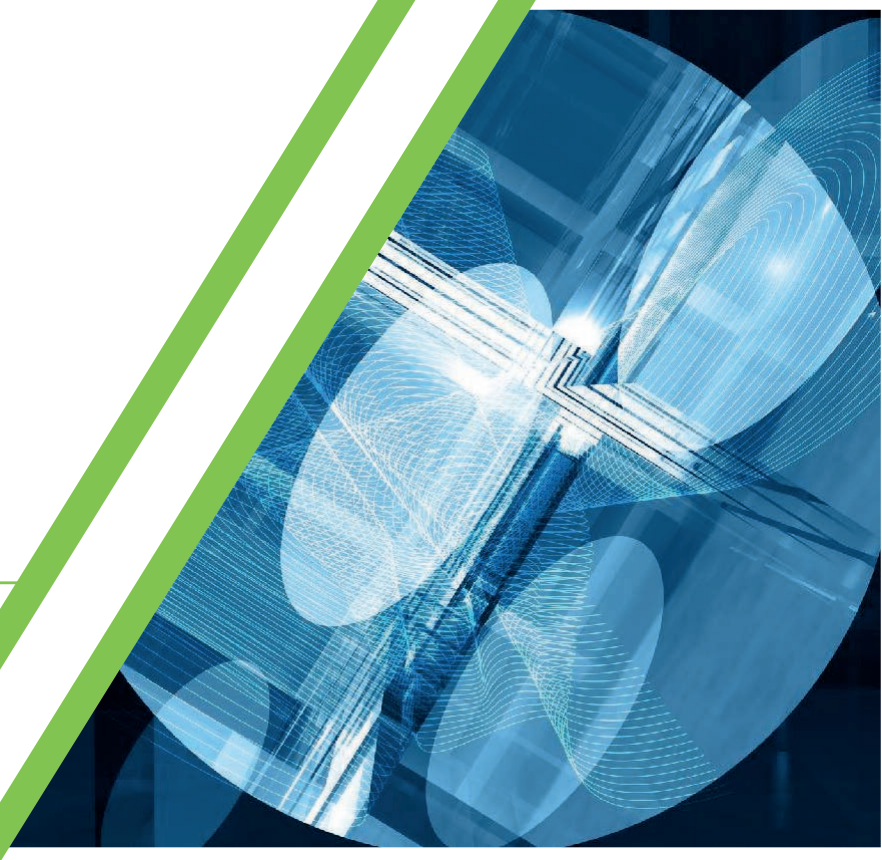
Recommendation of the Council on Merger Review



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Background Information

The Recommendation on Merger Review was adopted by the OECD Council on 23 March 2005 on the proposal of the Competition Committee. This Recommendation recognises that effective merger review is an important component of a competition regime as it can help to prevent consumer harm from anticompetitive transactions which likely would reduce competition among rival firms and/or foreclose competitors. This Recommendation should contribute to greater convergence of merger review procedures, including cooperation among competition authorities, towards internationally recognized best practices. It should thus help to make merger review procedures more effective, while at the same time helping competition authorities and merging parties to avoid unnecessary costs in multinational transactions.

THE COUNCIL,

HAVING REGARD to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14 December 1960;

HAVING REGARD to the Council's Recommendation concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade [C(95)130/FINAL], which recommended that, when permitted by their laws and interests, Member countries should co-ordinate competition investigations of mutual concern and should comply with each other's requests to share information;

HAVING REGARD to the suggestions in the study of transnational mergers and merger procedures prepared for the Committee on Competition Law and Policy [Merger Cases in the Real World, A Study of Merger Control Cases (OECD 1994)] and to the Committee's work related to merger review procedures, including the Report on Notification of Transnational Mergers [DAFFE/CLP(99)2/FINAL];

RECOGNISING that the continued growth in internationalisation of business activities, and the increasing number of jurisdictions which have adopted merger laws, correspondingly increase the number of mergers that are subject to review under merger laws in more than one jurisdiction;

RECOGNISING that reviews of transnational mergers can impose substantial cost on competition authorities and merging parties, and that it is important to address these costs without limiting the effectiveness of national merger laws;

RECOGNISING that co-operation and co-ordination among competition authorities with respect to mergers of common concern can enhance the efficiency and effectiveness of the review process, help achieve consistent, or at least non-conflicting, outcomes, and reduce transaction costs;

RECOGNISING the benefits that can result from the ability of competition authorities to share confidential information with foreign competition authorities with respect to mergers of common concern, and considering that most competition authorities may not be authorised by law or international agreement to share confidential information with foreign competition authorities in merger review proceedings, and therefore may do so only if the parties voluntarily waive their confidentiality rights;

RECOGNISING that confidential information must be protected against improper disclosure or use if competition authorities share such information;

RECOGNISING the important work by other entities in the area of merger notification and procedures, in particular that of the International Competition Network;

RECOGNISING that Member countries are sovereign with respect to the application of their own laws to mergers;

I. RECOMMENDS as follows to Governments of Member countries:

A. Notification and Review Procedures

1. Merger review should be effective, efficient, and timely.

    1. Member countries should ensure that the review process enables competition authorities to obtain sufficient information to assess the competitive effects of a merger.

    2. Member countries should, without limiting the effectiveness of merger review, seek to ensure that their merger laws avoid imposing unnecessary costs and burdens on merging parties and third parties. In this respect, Member countries should in particular:

        1. Assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction;

2. Use clear and objective criteria to determine whether and when a merger must be notified or, in countries without mandatory notification requirements, whether and when a merger will qualify for review;

3. Set reasonable information requirements consistent with effective merger review;

4. Provide procedures that seek to ensure that mergers that do not raise material competitive concerns are subject to expedited review and clearance; and

5. Provide, without compromising effective and timely review, merging parties with a reasonable degree of flexibility in determining when they can notify a proposed merger.

3. The review of mergers should be conducted, and decisions should be made, within a reasonable and determinable time frame.

2. Member countries should ensure that the rules, policies, practices and procedures involved in the merger review process are transparent and publicly available, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger.

3. Merger laws should ensure procedural fairness for merging parties, including the opportunity for merging parties to obtain sufficient and timely information about material competitive concerns raised by a merger, a meaningful opportunity to respond to such concerns, and the right to seek review by a separate adjudicative body of final adverse enforcement decisions on the legality of a merger. Such review of adverse enforcement decisions should be completed within reasonable time periods.

4. Merging parties should be given the opportunity to consult with competition authorities at key stages of the investigation with respect to any significant legal or practical issues that may arise during the course of the investigation.

5. Third parties with a legitimate interest in the merger under review, as recognised under the reviewing country's merger laws, should have an opportunity to express their views during the merger review process.

6. Merger laws should treat foreign firms no less favourably than domestic firms in like circumstances.

7. The merger review process should provide for the protection of business secrets and other information treated as confidential under the laws of the reviewing jurisdiction that competition authorities obtain from any source and at any stage of the review process.

B. Co-ordination and Co-operation

1. Member countries should, without compromising effective enforcement of domestic laws, seek to co-operate and to co-ordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavour to avoid inconsistencies with remedies sought in other reviewing jurisdictions.

2. Member countries are encouraged to facilitate effective co-operation and co-ordination of merger reviews, and to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to co-operation and co-ordination.

3. Member countries should encourage merging parties to facilitate co-ordination among competition authorities, in particular with respect to the timing of notifications and provision of voluntary waivers of confidentiality rights, without drawing any negative inferences from a party's decision not to do so.

4. Member countries should establish safeguards concerning the treatment of confidential information obtained from another competition authority.

C. Resources and Powers of Competition Authorities

Member countries should ensure that competition authorities have sufficient powers to conduct efficient and effective merger review, and to effectively co-operate and co-ordinate with other competition authorities in the review of transnational mergers. They should be cognisant that competition authorities need sufficient resources to fulfil these tasks.

D. Periodic Review

Member countries should review their merger laws and practices on a regular basis to seek improvement and convergence towards recognised best practices.

E. Definitions

For purposes of this Recommendation:

“Competition authority” means a government authority or agency charged in general with the review of mergers under the merger laws of a Member country. "Competition authority" does not include a government authority that is responsible for the review of mergers only in a specific industry sector.

“Merger” means a merger, acquisition, joint venture, or any other form of business amalgamation, combination or transaction that falls within the scope and definitions of the competition laws of a Member country governing business concentrations or combinations.

“Merger laws” means the competition laws of a Member country applied by competition authorities in the review of mergers, and the procedural rules governing such reviews.

“Transnational merger” means a merger that is subject to review under the merger laws of more than one jurisdiction.

II. INSTRUCTS the Competition Committee:

1. To explore further means to enhance the effectiveness of merger review, reduce the costs of reviewing transnational mergers, and strengthen co-ordination and co-operation among agencies, including by co-ordinating with other international organisations addressing these issues;

2. To periodically review the experiences under this Recommendation of Member countries and of non-member economies that have associated themselves with this Recommendation; and

3. To report to the Council as appropriate on any further action needed to improve merger laws, to achieve greater convergence towards recognised best practices, and to strengthen co-operation and co-ordination in the review of transnational mergers.

III. INVITES non-member economies to associate themselves with this Recommendation and to implement it.

Adherents*

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Canada	
Chile	
Czech Republic	
Denmark	
Estonia	
Finland	
France	
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Hungary	
Iceland	
Ireland	
Israel	
Italy	
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Latvia	
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Mexico	
Netherlands	
New Zealand	
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*Additional information and statements are available in the Compendium of OECD Legal Instruments: http://legalinstruments.oecd.org

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- **Declarations**: OECD legal instruments which are prepared within the Organisation, generally within a subsidiary body. They usually set general principles or long-term goals, have a solemn character and are usually adopted at Ministerial meetings of the Council or of committees of the Organisation.

- **International Agreements**: OECD legal instruments negotiated and concluded within the framework of the Organisation. They are legally binding on the Parties.

- **Arrangement, Understanding and Others**: several ad hoc substantive legal instruments have been developed within the OECD framework over time, such as the Arrangement on Officially Supported Export Credits, the International Understanding on Maritime Transport Principles and the Development Assistance Committee (DAC) Recommendations.