



Merger control in the time of COVID-19

25 May 2020

One of the many consequences of the COVID-19 crisis is the risk that many firms will find themselves in financial distress and forced to exit the market or merge. This note focuses on competition issues relating to merger control. It serves as background material and raises issues for discussion for a webinar meeting with competition authorities on 26 May 2020. This note is part of a series of responses prepared by the OECD Competition Division that can help guide the actions of governments and competition authorities as they react to the challenges presented by the COVID-19 pandemic.

In times of acute crisis, such as the one provoked by COVID-19, competition authorities face a number of challenges relating to their review of mergers. These include: how to conduct a competitive assessment of mergers in times of significant and rapid change in market circumstances; how to implement remedies in such a severe crisis; how to evaluate the failing firm defence; and how to manage increased derogation requests for jurisdictions that have standstill obligations. Challenges may also arise in relation to the eventual increased use of public interest considerations by governments to promote or undertake mergers.

This note analyses all these challenges with examples from previous crises or applicable scenarios and presents open issues that require further research and discussion in the months and years to come.

1. Introduction

The COVID-19 crisis is an unprecedented economic shock that will have, as some of its consequences, a disruptive impact on the economy leading to the financial distress of many firms and forcing many firms to exit the market or merge. The role played by competition authorities in preserving competitive market structures by using their merger control powers might therefore become even more relevant. Without a thorough merger review, there is a serious risk that the economic crisis would result in higher market concentration and market power in several sectors, which might cause price increases, harm innovation



and productivity, and aggravate inequality.¹ At the same time, the unparalleled economic uncertainty will mean that competition authorities will face a number of key challenges in the exercise of their merger control powers. In particular:

- Increased uncertainty about how markets will evolve due to the crisis may make the forward-looking exercise of merger review particularly difficult (Section 2).
- The focus of merger control on efficiency might have to be reconciled with other public policy objectives. Governments may attempt to mitigate the impact of the crisis on their national economies by acquiring control of strategic companies or by encouraging or even promoting mergers between private parties (Section 3).
- Merger remedies may become even more important as a tool to prevent anti-competitive effects resulting from more highly concentrated markets. However, the uncertainty deriving from the COVID-19 crisis might amplify pre-existing issues and raise additional ones with regard to their design and implementation (Section 4).
- Failing firm defence claims may also become more frequent as firms try to acquire competitors in financial difficulty. The issue of whether current standards of proof and procedures are appropriate to address urgent mergers involving firms in financial distress is again under scrutiny (Section 5).
- Faced by an increase in crisis-driven M&A activity, competition authorities are likely to face increased pressure to speed up their merger reviews. Procedural mechanisms such as derogations from the standstill obligation might prove helpful to competition authorities when dealing with transactions requiring immediate implementation pending the merger review. (Section 6).

This note serves to inform discussions on key challenges to merger control which are expected to become more prominent during and in the aftermath of the COVID-19 crisis. The note also encourages greater consistency across jurisdictions as many mergers have a cross-border nature and produce effects that go beyond national territories. Increased cooperation between competition authorities will help to promote greater consistency of approaches and provide more predictability and legal certainty for businesses, thereby contributing to stimulating economic activity.

2. Merger assessment in rapidly changing markets

Some competition authorities have already observed that there will be no easing of standards of review for mergers resulting from the current crisis. In the words of the UK Competition Market Authority: “the Coronavirus pandemic has not brought about any relaxation of the standards by which mergers are assessed” ([CMA’s Guidance on Merger assessments during the Coronavirus pandemic](#)). Yet, the impact of the crisis will need to be factored into the substantive assessment, where appropriate. Key principles might remain unchanged, but their implementation may require adjustments considering the factual circumstances. This might prove difficult in an uncertain economic environment, where it is still unclear the extent to which markets (and possibly entire sectors) will be changed or even disrupted.

Following an established practice, in assessing the effects of a merger competition authorities typically compare the competitive conditions that would result from the merger with the conditions that would have been observed without the merger (the so-called counterfactual). In most cases, the counterfactual is based on the competitive conditions existing at the time of the merger, taking into account the future market changes that can reasonably be predicted.

A prospective analysis may be particularly challenging when there is uncertainty as to how the relevant sector will respond to this crisis and which of the many scenarios (the counterfactual) is most credible for

¹ See [OECD Roundtable on Market Concentration](#), June 2018.



the years to come. The possibilities for customers to switch to other suppliers, the impact on innovation or the relevance of efficiencies will be largely influenced by the degree of market changes. Competition authorities might need to ponder competitive effects of mergers against several alternative future scenarios. In this task they may reach out to other government entities and regulators who are following the specific market and the impact of the crisis closely.

In addition, the COVID-19 crisis may have unprecedented effects on certain sectors. Even in markets where competition authorities have significant past experience, relying on precedents or historical data will present challenges. Therefore, they might need to gather not easily accessible information on recent (sometimes ongoing) developments as well as additional information that may help them to better understand market developments following the COVID-19 shock.

Furthermore, the crisis may call into question some elements of the traditional analytical framework of competition policy such as, for instance, the use of efficiency considerations. Some critical voices have argued that a narrow definition of efficiency might fall short to grasp the overall economic implications of mergers and that other factors such as resilience may improve responsiveness of the global economic system to radical shocks². It has been argued that environmental and social cohesion considerations should be taken into account. This debate may become heated when efficiencies as traditionally applied have to be reconciled with other public policy objectives, as discussed in the following section.

Open issues

- Should competition authorities refine their analytical tools and investigative approaches to reduce uncertainty in the decision making?
- Can past experiences with rapidly changing markets help to address the current issues?
- What is the correct timeframe to assess the effects of the merger in times of crisis?
- What factors can help to identify a more accurate counterfactual in uncertain times?
- How to deal with different alternative scenarios?
- Should the notion of efficiencies be expanded in merger review to also consider other factors that relate to market resilience or environmental sustainability?

3. Public interest considerations and mergers

Confronted with the COVID-19 crisis, many States will intervene to halt the economic slide, keep markets and the economy functioning, and safeguard the health and well-being of their citizens. In many economies, these initiatives may be framed within broader State measures to stimulate growth and to promote a more resilient and sustainable economic framework.

In this context, governments might undertake or encourage mergers in order to pursue public policy objectives such as employment protection, to rescue strategic companies, or to increase production and storage capacity of specific goods. They might also try to prevent companies considered key for national economies that are facing liquidity shortage from being prey to acquisitions by foreign firms.

² See, for example, [NAEC OMI Roundtable Shock-proof: Building Resilient Systems in the 21st Century, 23 April 2020](#).



It can be predicted that political pressure will escalate. Government will likely put pressure on competition authorities to soften their merger control assessment in order not to undermine public policy objectives that go beyond economic efficiency. Furthermore, it should be noted that, in a number of jurisdictions, governments have the power to apply public interest considerations to override the decisions of the competition authorities³.

Absent a thorough merger control scrutiny, there is a serious risk that any short-term benefits would result in long-term anti-competitive effects, including the following:

- Horizontal mergers may lead to the establishment of firms with strong market power that may facilitate price increases and deterioration of quality, or hinder incentives to innovate, thus insulating entire sectors from the benefits of competition and from a fast recovery after the crisis;
- Vertical mergers may be aimed, for example, at securing supply chains that have been disrupted by the crisis, but can also lead in the long term to input or customer foreclosure, insofar as the integrated firm may have an incentive to set a higher price in the market for the input or no longer source supply from independent upstream firms;
- Some mergers may also produce conglomerate effects. For example, governments might promote mergers between firms producing complementary products to allow for the combination of assets and know-how and to improve interoperability. However, if the post-merger firm enjoys strong market power, it might engage in bundling and tying leading to price discrimination or foreclosure⁴.

Box 1. Public interest considerations in mergers

Lloyds TSB/HBOS

In the context of the 2008 financial crisis, the acquisition of HBOS by Lloyds TSB was cleared by the UK Secretary of State on public interest grounds relating to the stability of the UK banking sector, notwithstanding that the UK Office of Fair Trading was of the view that the transaction would have resulted in a substantial lessening of competition in relation to a number of relevant markets. The financial stability consideration was introduced in the UK Enterprise Act specifically to approve this transaction, when HBOS's position in terms of share price and funding became increasingly vulnerable.

The clearance decision has been criticised by a number of academics, who argued that the merger's contribution to financial stability had been short-term as the new entity had to be bailed out again in 2009. Furthermore, as pointed out by the European Commission in the assessment of this latter bailout under the EU state aid framework (N428/2009 – Restructuring of Lloyds Banking Group), the merger created distortions of competition by allowing the merged entity to significantly increase its market shares and by eliminating a competitor on certain segments of the market, which were already concentrated. In order to secure approval of the aid, Lloyds/HBOS committed to take certain structural measures in the UK retail market to remedy this distortion of competition.

In previous discussions at the OECD in the aftermath of the 2008 financial crisis, there was recognition of the fact that competition authorities should use their advocacy tools to alert to the dangers of undermining market processes and ensure that the merger (even if anticompetitive) is proportionate and necessary to achieve the other policy objectives that the State is pursuing⁵.

In cases where public policy objectives are invoked by governments, the competition authority may provide guidance to policy makers on how anti-competitive risks of mergers driven by public interest considerations

³ See [Background Note for the OECD Roundtable on Public Interest Considerations in Mergers](#).

⁴ See [Background Note for the OECD Roundtable on Conglomerate Effects](#), June 2020.

⁵ See [OECD Roundtable on Competition Policy, Industrial Policy and National Champions](#) (2009).



may be minimised. This may mean that a transaction may be cleared subject to remedies to address the competition issues identified, for instance. Competition authorities may also advise governments to spell out ex ante, in detail and in a transparent manner the public policy objectives relied upon.

Indeed, more broadly applied also to State acquisitions, the OECD Secretariat has recently highlighted the role that competition authorities may have in the context of the current crisis to advise governments to consider alternative measures that are able to attain the same public policy objectives without producing structural, long-term competition problems⁶.

Open issues

- What is the role for competition authorities in advising governments in considering policy alternatives to state sponsored mergers to attain public policy goals?
- How can competition authorities ensure that they are able to review or timely express their views about mergers undertaken or promoted by governments in pursuit of public policy objectives?

4. Remedies to mitigate anticompetitive effects

As observed above, the COVID-19 crisis could rapidly change some sectors, with a long-term impact on their competitive dynamics. Therefore, competition authorities may have to review an increasing number of mergers in highly concentrated markets or in markets where exit of less efficient competitors is rapidly accelerated.

In this context, merger remedies may become an even more important enforcement tool to resolve and prevent the harmful effects to the competitive process that may result from a merger. Indeed, remedies allow for the approval of mergers that would otherwise be prohibited, by ensuring that the merger achieves the overall economic benefits it pursues but eliminating the risks that it may pose to competition. In particular, when the competition harm from a merger can be isolated to specific product markets, assets and know-how, or behaviour, remedies are a possible solution to address competition concerns. As such, remedies play an essential role in merger control, and their careful crafting is of the utmost importance to competition authorities carrying out their review.

Merger remedies are either **structural**, if they require the divestiture of a (physical or non-physical) asset, or **behavioural**, if they impose an obligation on the merged entity to engage in, or refrain from, a certain conduct for a given period following the consummation of the merger. Moreover, in some instances, competition authorities may subject transactions to a combination of both structural and behavioural remedies. The COVID-19 crisis might not only increase the importance of remedies, but also raise issues with regard to both their design and implementation. Many of these issues are “pre-crisis” issues that could be possibly amplified by the COVID-19 crisis.

Structural remedies

In principle, structural remedies such as divestments are preferred because (i) they are considered clear-cut; (ii) they directly address the (problematic) structural change in the market resulting from the merger; and (iii) they can be easily monitored. That said, the rapid changes that will be observed in certain sectors as result of the COVID-19 crisis could make the design of an effective structural remedy particularly challenging, as well as its implementation.

⁶ See [OECD competition policy responses to COVID-19](#).



As to the design, determining the exact scope of the assets to be divested may present additional challenges. Competition authorities may be confronted with an increased number of cases in which structural remedies considered “less burdensome” by the merging parties could fail due to rapid crisis-driven depreciation of the value of assets or of the business being divested. Therefore, alternative divestiture commitments may be observed more frequently in conditional clearance decisions.

As to the implementation, the carrying out of a divestiture by the merging parties and, in particular, the search of a suitable buyer (with the means and expertise to be a “viable competitor”) could take more time than usual, even during the recovery phase of the economy. This may mean that the period granted to the merging parties to seek a suitable buyer for the committed divestiture (in many jurisdictions, this period ranges from six to 12 months) may be extended. Consequently, competition authorities would have to give particular attention to the (already existing) safeguards imposed to preserve the viability of the business being divested, increasing also their direct or indirect (through independent third parties) monitoring and divestiture activities during such phase. This may increase the risk that the target may need to adapt its business plan, including with regard to the assets being divested, due to unexpected changes to the market. In jurisdictions where this is possible the question may also be whether and how such situations require hold separate managers or trustees to engage more directly to help ensure that the relevant businesses remain viable.

Solutions requiring the competition authority’s approval of an identified purchaser of a specific package of assets before a merger is consummated (also called “fix-it-first” and “up-front buyer” solutions) could help mitigate such risks. However, the assessment of a suitable buyer would still be particularly difficult due to uncertainty as to future market developments.

In this context of rapidly-changing markets, the long-term effectiveness of structural remedies may be also questioned because such remedies are irreversible and, once implemented, they do not adapt to market circumstances. As a result, rapid changes in market conditions may make a remedy inadequate to address the competitive concerns identified during the merger review. The remedy imposed might turn out to be disproportionate, but it may also turn out to be insufficient when competitors of the merged entity rapidly exit the market post-merger.

In sum, in markets affected by the crisis, structural remedies may not always be a viable option due to (i) deteriorating performance of the assets, (ii) difficulties in identifying suitable buyers, and (iii) ineffectiveness to respond to rapid evolution of market circumstances. Consequently, competition authorities may need to be creative to prevent structural remedies from becoming less practicable due to the crisis’ impact. Moreover competition authorities will have to be more alert to the risks of such remedies not being as effective as during normal times and be ready to either impose structural remedies implemented before the merger consummation, reject proposed remedies and prohibit the merger.

Behavioural remedies

With regard to behavioural remedies, it is argued that, despite their greater flexibility, they have more significant limitations than structural remedies because they are difficult to design well and require burdensome monitoring by competition authorities. Behavioural remedies should thus be limited in time (i.e. include a sun set clause or a revision clause) so as not to require monitoring for an undefined or long period of time into the future.

With all the risks and costs that behavioural remedies entail, it remains to be seen whether they may become more frequent during the current crisis context, since such remedies are more flexible and can be modified over time to adapt to rapidly changing market circumstances.

In a moment of a severe crisis such as the COVID-19, and if the authority can identify a small window of time that will allow a behavioural remedy to have the desired effects of impeding the anti-competitive effects identified in its assessment then perhaps such a remedy may be used as a bridge solution.



An instance for when behavioural remedies may be used more often is in cases such as in non-horizontal mergers taking place in regulated sectors. This may be the case where there is scope for strong co-operation between the competition authorities and sector regulators for the monitoring and implementation of the behavioural remedies imposed.

Revision of remedies

Finally, a last observation on remedies is that rapid changes in some markets may trigger parties' (motivated) request – in jurisdictions where this is contemplated – to re-consider the scope of (both structural and behavioural) remedies already imposed due to “change of circumstances”. This issue may not be limited to mergers approved before the COVID-19 outbreak, but it may also extend to cases being assessed during the current crisis.

It must be noted that such requests often require an ex novo competition assessment, increasing the burden on competition authorities. In this regard, for the review or adjustment clauses to be effective, it could be important to determine in advance the trigger events that would automatically modify the remedy provisions or fully release the parties from the obligations imposed by the remedy. However, this may be difficult in practice in times of crisis.

Box 2. Waiver and revision of remedies due to change of circumstances

European Union

In May 2020, the European Commission has partially waived the commitments made by Nidec to obtain clearance of its acquisition of Embraco, Whirlpool's refrigeration compressor business. The Commission had approved the transaction, subject to conditions, in April 2019. The partial waiver concerned the non-reacquisition clause relating to a manufacturing line, which was part of the divestment business that Nidec committed to sell. Following a market investigation, the European Commission determined that the waiver was justified in light of the changed market conditions. In particular, the structure of the relevant markets for variable speed and fixed speed refrigeration compressors for household applications had changed to such an extent that the absence of influence over the concerned part of the divestment business was no longer necessary.

France

In 2012, the French Autorité de la concurrence cleared the acquisition of free-to-air TV channels Direct 8 and Direct Star by Vivendi and Groupe Canal Plus (GCP), subject to several commitments. These included the organisation of a competitive bid for the divestiture of free-to-air broadcasting rights for major sporting competitions. In 2017, as part of the re-examination of the commitments made, the Autorité de la concurrence modified the framework of commitments. For instance, regarding rights to major sporting events, the Autorité de la concurrence concluded that GCP was no longer able to hold back a substantial portion of the broadcasting rights for major sporting events from free-to-air channels. Moreover, the situation was not likely to change, insofar as GCP faces increasing competitive pressure on the acquisition market for these rights. Consequently, this commitment was waived.

United States

In 2018, the Federal Trade Commission (FTC) approved an application by Teva Pharmaceuticals Industries to reopen and modify its decision and order concerning the merger of Watson Pharmaceuticals and Actavis in 2012. Under the previous decision and order, the merged company was required to divest a generic drug, supply it to Pfizer for no more than four years after the relaunch of the drug and assist with a technology transfer to a third party for manufacturing the drug. The drug was relaunched in 2015, and in 2016 Teva assumed the rights and obligations of Actavis through another acquisition. At Pfizer's request, Teva requested to extend the supply agreement for an additional period because Pfizer had not yet completed the technology transfer.



Open issues

- Do competition authorities already have well-functioning tools and procedures to impose effective remedies in times of crisis?
- Should competition authorities be more open to behavioural remedies in those cases where structural remedies give rise to additional challenges due to the specific circumstances of the crisis?
- Would the COVID-19 crisis result in having more frequently alternative divestiture commitments in conditional clearance decisions?
- To mitigate risks of uncertainty, should competition authorities have a clear-cut preference for solutions requiring the approval of an identified purchaser of a specific package of assets before a merger is consummated (also called “fix-it-first” and “up-front buyer” solutions)?
- Should competition authorities contemplate longer periods for the merging parties to comply with a remedy decision or extending ongoing divestiture periods?
- Should competition authorities consider introducing (more often) review clauses that allow the remedy to adapt (or be waived due) to changing market conditions?

5. The failing firm defence

Dynamically efficient markets are the natural outcome of entry of innovative or more efficient new firms and the corresponding decline and exit of less innovative or less efficient firms (as happened, for instance, in several sectors disrupted by digitalisation over the last few years). In normal conditions, mergers and acquisitions are one way for firms to exit the market. However, the current crisis has slowed the global economy abruptly and affected several sectors at once. Entire industries, such as aviation, transportation, hospitality and tourism, are undergoing an unprecedented crisis on a global scale. This may drive out of the market companies that would have been profitable and viable absent the crisis.

In the short term, competition authorities may be called to scrutinise alleged rescue mergers, whereby the parties will put forward a so-called failing firm defence (FFD) to obtain merger clearance for transactions that should otherwise be prohibited. The rationale of the failing firm doctrine is that, if an asset would inevitably exit the market, the merger may be more pro-competitive than just letting the target firm go bankrupt, despite the increased market power of the resulting entity, since no less anti-competitive alternative is available.

There is general consensus that a FFD should only be accepted when three cumulative conditions are met: (i) absent the merger, the failing firm would exit the market in the near future as a result of its financial difficulties; (ii) there is no feasible alternative transaction or reorganisation that is less anti-competitive than the proposed merger; and (iii) absent the merger, the assets of the failing firm would inevitably exit the market. Since the market share and the assets of the target would be entirely acquired by one competitor (i.e. the acquirer), the fulfilment of these high requirements appears necessary to exclude that a less restrictive option is available.

The failing firm doctrine is case specific and relates to non-transitory financial difficulties that would force the company out of the market in the near future. General claims regarding negative economic performances or declining profits do not fall within the scope of the failing firm defence. In other words, the economic and financial contingency is certainly a relevant factor in the merger review but, in and of itself, it is not sufficient to push for the approval of anti-competitive transactions. Not surprisingly, the number of cases in which the FFD has been invoked and accepted is very limited over the years.



Box 3. Failing firm defence

Aegean/Olympic

A notable example of the acceptance of FFD in a difficult financial situation is the unconditional clearance by the European Commission of the Aegean/Olympic merger in 2013. The merger consisted of the acquisition of the Greek airline Olympic Air by its main domestic rival Aegean Airlines. The European Commission's assessment revealed that the transaction was likely to significantly impede effective competition due to the merging parties' horizontal overlap on various domestic airline routes. However, as the investigation confirmed the merging parties' claim that, without the proposed merger, Olympic would likely exit the market due to the continuing Greek crisis and its very difficult financial situation and that there was no other credible potential purchaser, the European Commission concluded that the FFD requirements were met. For its FFD assessment, the European Commission relied on contemporaneous evidence demonstrating that (i) Olympic's parent company would most likely have had no financial incentive to continue funding Olympic due to its own financial difficulties, (ii) the emergence of an alternative purchaser for Olympic in the immediate future was unlikely since unsuccessful attempts had to been made to sell Olympic and (iii) absent the merger, Olympic's assets would have inevitably exited the market.

Amazon/Deliveroo

The Amazon/Deliveroo case is reportedly one of the first FFD case during the COVID-19 crisis. In April 2020, the Competition and Markets Authority (CMA) provisionally approved the proposed acquisition by Amazon of certain rights and a minority shareholding in Deliveroo, a UK-based online food delivery company. The CMA provisionally concluded that (i) Deliveroo, which has experienced a significant decline in revenue as a result of the COVID-19 crisis, was likely to exit the market unless it received the additional funding available through the transaction in question; (ii) no less anti-competitive investor was available; and (iii) the loss of Deliveroo as a competitor would have been more detrimental to competition and to consumers than approving the transaction.

The CMA asked for public comments on its provisional approval and will make a final decision shortly.

The COVID-19 crisis might make FFD applications more frequent and, in some cases, more justifiable. In deeply disrupted markets, the three conditions will be more likely to occur. Nevertheless, this would not necessarily facilitate the assessment by competition authorities. Even though the burden to prove that the three conditions are met lies on the merging parties, the exercise of distinguishing between firms that have been permanently impaired versus those that are able to recover after a short-term shock may prove to be demanding.

A thorough knowledge of accounting and bankruptcy rules might be also necessary to duly analyse the company's books and review possible assumptions regarding future cash flows and rates of return. Cooperation with bankruptcy institutions (e.g. liquidators, curators) and specialised courts might be necessary. Furthermore, building a solid counterfactual might require a prospective analysis of the competitive dynamics at that time and of their likely evolution, in light of a crisis whose impact and time frame might remain unclear. Specific knowledge and information about the sector and additional investigations are necessary to verify merging parties' claims.

There might also be an issue of timeliness. Failing firm arguments require scrutiny, which may require some time, while the decision might need to be taken urgently if the value of the firm in distress is expected to quickly deteriorate. The interaction of FFD with procedural mechanisms to mitigate such risks (see, for instance, derogations from the standstill obligation described below) should be considered.

In previous discussions at the OECD in the aftermath of the 2008 financial crisis, competition authorities found no justification for relaxing the standards of the FFD and argued that there are other policy instruments available (e.g. bankruptcy law and State interventions such as subsidies) to help failing firms



through the crisis. Nevertheless, they recognised that procedural changes might be justified to ensure a speedier review⁷.

The need for effective tools and expertise to respond to the current crisis might provide additional arguments for reflection about the failing firm doctrine and its implementation. For instance, an issue that may arise in the FFD implementation is whether competition authorities should also consider the financial conditions of the seller's group or whether the financial distress of the relevant subsidiary/business that is the target of the transaction may be sufficient to qualify it as a "failing firm", irrespective of the financial health of the parent company.

Finally, although not meeting the standards required for FFD, competition authorities may be confronted with more cases involving target companies that would not be able to exert significant competitive pressure in any case, due to their poor financial health, whilst other players in the market may not be as affected as the target. These may be key considerations in assessing the counterfactual. At the same time, when assessing the counterfactual, aspects such as the impact of the crisis on a whole industry/sector cannot be disregarded, in particular where competitors of the merging parties may fail and/or exit the market, or otherwise not be able to compete as aggressively as they might have been prior to the crisis. This should feed into the competitive assessment of the transaction.

Box 4. Substantial decline in competitive significance

Boeing/McDonnell Douglas

In the United States Federal Trade Commission's (FTC) 1997 investigation of Boeing's acquisition of McDonnell Douglas, the FTC determined that McDonnell Douglas' significance as an independent supplier of commercial aircraft had deteriorated to the point that it was no longer a competitive constraint on the pricing of Boeing and Airbus for large commercial aircraft, even though McDonnell Douglas was not a failing firm. McDonnell Douglas' decline in competitive significance stemmed from the fact that it had not made the continuing investments in new aircraft technology necessary to compete successfully against Boeing and Airbus, and many purchasers of aircrafts indicated that McDonnell Douglas's prospects for future aircraft sales were close to zero. The FTC did not find any evidence that this situation was likely to be reversed and closed the investigation without taking any action.

Open issues

- Should the current very strict standards on FFD be maintained to ensure that no less restrictive option than increasing market concentration is feasible, or are there any reasons for reviewing the established criteria in times of an extraordinary crisis?
- Is it appropriate to accept the FFD when the failing target company belongs to a financially healthy parent company?
- Is additional expertise necessary or advisable for competition authorities to better cope with FFD? Can this best be achieved in-house or via institutional arrangements and co-operation?
- Should procedural changes be introduced to ensure a speedier review of FFD mergers?

⁷ See Background Note for the [OECD Roundtable on Failing Firm Defence](#).



6. Procedural adjustments when time is of the essence

As an immediate reaction to the COVID-19 outbreak, many competition authorities issued guidelines and clarifications to businesses on practical aspects of notification and review of mergers. These are procedural adjustments that aim at mitigating the impact of lockdown measures on merger control reviews. In the medium/long term, however, the COVID-19 crisis may increase the pressure on competition authorities to speed up their merger control review, while the standard of review should remain unchanged. Some competition authorities were already under resource constraints before the crisis. Therefore, a likely increase in the number of mergers in highly concentrated markets requiring an in-depth assessment and of rescue mergers with potential anti-competitive effects can make speedy review challenging.

Most jurisdictions impose mandatory pre-merger notifications for transactions meeting filing requirements. A pre-merger control regime typically involves a duty on the merging parties to notify the transaction prior to closing (which in case of failure may result in a so-called “gun jumping” violation), coupled with a standstill obligation, i.e. the obligation not to implement the transaction for the “waiting period” or until the merger is approved. Even in (the few) pre-merger control regimes without a standstill obligation, merging parties would often wait to receive merger clearance before consummating a transaction.

Standstill obligation

Financial distress situations might increase the merging parties’ incentive to engage in conduct in violation of the standstill obligation. The rationale of the standstill obligation is to ensure that the merging parties continue to act independently, pending the merger review, and to prevent anti-competitive conducts such as exchange of competitively sensitive information, customer allocation, and collusion on prices or other commercial terms. To preserve competition and the integrity of merger control review, many competition authorities have the power to impose fines and to order the unwinding of transactions for breach of the standstill obligation.

At the same time, in exceptional circumstances, many competition authorities may grant merging parties derogations from the standstill obligation. A derogation may prove a useful tool, especially where it is not possible to speed up the review process. Derogation requests can usually be justified by (i) serious threats (e.g. severe financial distress), and (ii) the lack of negative effects on competition of the transaction being reviewed. In the current crisis (as in past crises), such mechanisms may be triggered in case of target companies facing severe liquidity issues or insolvency/bankruptcy.

In practice, derogations from the standstill obligation remain rare. That said, similar to what observed in Europe during the last financial crisis, exceptional circumstances resulting in a derogation from the standstill obligation may arise in more cases due to the COVID-19 crisis.

With rescue mergers, competition authorities may face increasing requests by merging parties to be exempted from the standstill obligation. In assessing these requests, competition authorities would have to look at the likely effects of a continued suspension and at the overall effect on competition the merger is likely to have, which may prove difficult in rapidly changing markets. Moreover, they may be requested to respond rapidly to such requests, in cases where the threat is imminent.



Box 5. Derogation from the standstill obligation

Santander/ Bradford & Bingley Assets

In 2008, the European Commission granted a derogation from the standstill obligation with respect to Santander's acquisition of certain assets of Bradford & Bingley, a UK-based financial services institution providing mortgages and savings products, and retail banking services.

In this case, the European Commission received a request for a derogation on Sunday 28 September 2008 and completed its assessment on the same day. The transaction was completed on the following day. In deciding on the derogation, the European Commission noted that, *inter alia*, a financial failure of the target business, which was in serious financial distress with a real likelihood of ceasing to be a viable business, would have had a serious impact on the stability of financial markets and consequently on third parties. It also found that the transaction was not *prima facie* likely to pose a threat to competition.

Furthermore, as explained above, the requirements for granting a derogation remain quite strict and competition authorities favour derogations in the absence of material competition issues arising from transactions (e.g. in cases treated under simplified procedures). However, it should be noted that in some of these cases derogations could be avoided by simply accelerating the merger review process.

Finally, derogations from the standstill obligation may be limited in scope, allowing only for a partial implementation/acquisition of control prior to clearance, sufficient to prevent the irreparable damage to the viability of a merging party and, consequently, to the feasibility of the transaction. For instance, competition authorities may consider derogations limited to the “sufficient control” needed to be able to take specific strategic decisions such as securing immediate financing or allowing for the transfer to the acquirer of certain contracts between the target and third parties (e.g. lease agreements). Such derogations may also be used for cases where the transaction cannot be consummated until a remedy is implemented (e.g. a divestiture) and the target needs to adapt its commercial strategy to ensure its viability during the divestiture phase. Nonetheless, such derogations are unlikely to allow acquirers take strategic control over the whole target's business until the clearance is obtained – and if such full derogations are conceded this requires that the competition authority has the legal powers to unwind the merger post-implementation.

Duty to notify

In case of rescue mergers, financially distressed merging parties might also have additional incentives to attempt to circumvent merger notifications by artificially structuring transactions so that acquisition of control (for merger control purposes) does not arise. Therefore, competition authorities may have to pay close attention to attempts of “staggered transactions” (also called “creeping acquisitions” or “serial transactions”), i.e. situations where a firm acquires either parts of a company or complementary businesses through consecutive and interrelated transactions each of which, taken separately, would not meet the criteria for merger notification, but would do so if they were considered together as one single deal.

Other cases that may arise more often than usual as result of the COVID-19 crisis are “warehousing arrangements” or “interim buyer transactions”, where a firm is “parked” with an interim buyer (often a bank) with an agreement to be further sold to an ultimate acquirer, who often bears the economic risks and may be granted specific rights. Many competition authorities have the power to impose fines and to order the unwinding of transactions against circumventions of the filing obligation.



Box 6. Warehousing arrangements

Canon/Toshiba Medical Systems Corporation

This case concerned Canon's acquisition of Toshiba Medical Systems Corporation (TSMC). The transaction had a "warehousing" two-step structure involving an interim buyer. In this case, the interim buyer (a special purpose company) acquired 95% in the share capital of TSMC, whereas Canon acquired the remaining 5% and an option to acquire the interim buyer's stake (first step). This first step was implemented before the transaction was notified to, or cleared by, some competition authorities. Following the approval of the transaction, Canon exercised its option, acquiring 100% of TSMC's shares (second step).

This scheme was adopted in order to address, inter alia, the financial difficulties of the seller (Toshiba), which needed the transfer of the full purchase price at the completion of the first step. The parties were subject to fines in China, Europe and the United States.

Open issues

- Is there a need for competition authorities to reiterate or clarify whether certain deal structures/arrangements are in breach of procedural rules (i.e. gun jumping) and the consequences that businesses may incur in case of violation?
- In jurisdictions where there is a standstill derogation mechanism in place (but not largely used) should competition authorities remind businesses of the existence of such tool, stating that reasoned applications and derogations may be granted if the relevant criteria are met?
- Should competition authorities limit derogations from standstill obligation to transactions raising no material competition issues? Should competition authorities remain reluctant to concede such derogations for mergers between competitors and for vertical/conglomerate mergers raising concerns?
- Should derogations from the standstill obligation (continue to) be limited in scope? Would an effective limitation of the scope be more difficult for transactions in markets affected by economic shocks?

7. Conclusions and recommendations

The COVID-19 crisis will require thoughtful and consistent responses by competition authorities with regard to merger control. Although it does not seem appropriate to depart from the traditional guiding principles, the actual implementation will need to factor in the impact of the crisis on the economy and increased uncertainty about future market developments.

This note has raised a number of potential issues for competition authorities to consider. It is far too early to draw any firm conclusions on the best way to approach the forthcoming challenges. Nevertheless, some initial indications may be proposed. In particular:

- Competition authorities should not relax the standards for merger assessment and continue to prevent structural changes that would lead to long-term harm; at the same time, they need to monitor market conditions closely, including in co-operation with other government entities or regulators, to ensure accurate merger scrutiny in the face of higher uncertainty resulting from the crisis;
- When applicable and where governments are undertaking, promoting or considering public interest objectives in mergers, competition authorities should provide governments with general guidance on how to minimize anti-competitive risks resulting from the merger and advocate for a transparent identification of the public policy objectives pursued;



- Competition authorities should be creative in designing remedies as traditional remedies may become less practicable or not be implemented due to the crisis' impact, continue to carefully evaluate risks of non-implementation and be prepared to re-consider the scope of remedies already imposed, where this possibility is contemplated and relevant due to significant changes in market conditions;
- Competition authorities should maintain rigorous review of failing firm defence applications but consider whether substantive, investigative or procedural changes might be justified to ensure an appropriate and speedier review;
- Competition authorities should look out for attempts to circumvent merger notifications; and – where strict conditions are met – consider derogations from the standstill obligation.

Related OECD work

[OECD Roundtable on Conglomerate Effects of Mergers \(2020\)](#)

[OECD Roundtable on Merger Control in Dynamic Markets \(2020\)](#)

[OECD Roundtable on Barriers to Exit \(2019\)](#)

[OECD Roundtable on Gun Jumping and Suspensory Effects of Merger Notifications \(2018\)](#)

[OECD Roundtable on Market Concentration \(2018\)](#)

[OECD Roundtable on Public Interest Considerations in Merger Control \(2016\)](#)

[OECD Roundtable in Remedies in Merger Cases \(2011\)](#)

[OECD Roundtable on Failing Firm Defence \(2009\)](#)

[OECD Roundtable on Competition Policy, Industrial Policy and National Champions \(2009\)](#)

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