Unclassified **DAF/COMP/WP3/M(2016)2/ANN4/FINAL**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18-May-2017

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Unclassified
DAF/COMP/WP3/M(2016)2/ANN4/FINAL

Working Party No. 3 on Co-operation and Enforcement

SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON AGENCY DECISION MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

29 November 2016

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Item IV of the 124th meeting of Working Party No. 3 on 29 November 2016.

More documents relating to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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JT03414400

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SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON AGENCY DECISION MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

By the Secretariat

The **Chair of Working Party No. 3 on Co-operation and Enforcement, Renata Hesse,** opened the roundtable, indicating that it would focus on the issues that arise when competition agencies are deciding whether to prohibit a merger, and the trade-offs between prohibition decisions and conditional clearances. To reach a decision, agencies must consider whether the likely anti-competitive harm can be cured by a remedy, or whether the transaction should be prohibited because the harm cannot be remedied. The Chair also indicated that the roundtable would look at remedy design, and how an agency decides that a proposed remedy is likely to cure the competitive harm (thus accepted), or unlikely to be effective (thus rejected). The Chair first turned to the **European Commission (Commission)** for an overview of their experience with merger prohibitions and remedies, and a discussion of a few recent cases.

The **Commission** described the basics of the European Union merger review system and presented some statistics. The test in the European Union to approve or prohibit a merger is whether or not it results in a significant impediment to effective competition (SIEC). In determining whether a transaction may lead to a SIEC, the Commission looks at the likely anti-competitive effects of the transaction, and takes into account efficiencies, with the parties having the burden to prove these efficiencies. If a merger has anti-competitive effects, and there are insufficient efficiencies, the only way for the transaction to be approved is for the parties to submit remedies that remove the SIEC. In Phase 1 of merger review, the Commission does not determine whether the merger may result in a SIEC, but whether the merger raises serious doubts that it may cause competitive harm. Thus, for the parties to get a Phase 1 clearance, they must submit remedies that clearly remove the Commission's doubts. The Commission then presented statistics that show that its total intervention rate in mergers (including prohibitions, Phase 2 withdrawals by parties which are considered to be tantamount to prohibitions, and conditional clearances with remedies) is between 6% and 8% of total notified mergers. This statistic has remained stable in recent years, thus belying claims that the Commission's approach to merger enforcement has become more relaxed or more aggressive in recent years. The most frequent Commission intervention in mergers is the imposition of remedies.

The Commission then discussed the effectiveness of their remedies. In 2005, the Commission conducted a study assessing the effectiveness of past merger remedies which look at remedies imposed in 40 merger cases at the end of the 1990s, and found that remedies were effective in 57% of cases, and ineffective, or partially ineffective, or that the study's results were inconclusive, in the rest of the cases. Lessons learnt from the 2005 merger remedies study fed into the 2008 Commission notice on remedies, which sets forth the principles for the acceptance of remedies by the Commission. This notice contains many provisions aimed precisely at combating the shortcomings found by the 2005 study: it states a preference for having an entire business divested, asks for safeguards to ensure that the divested business would be preserved at the moment of divestiture, lays down stricter conditions for a carve-out, and so on. The Commission believes that the remedies design and implementation has indeed improved, and past pitfalls have been avoided. Since 2005, the Commission has conducted only some small-scale ex post merger evaluations in a limited number of cases.

Finally, the Commission presented some recent cases. One was the proposed merger between O2 and Hutchison, two mobile network operators in the United Kingdom. The United Kingdom had four such mobile operators. The merger would have reduced them to three, and created a market leader. The Commission concluded that the merger would have reduced competition, led to higher prices and reduced innovation. Also, the remedies put forward by the parties were inadequate: some proposed remedies were behavioural and would have been very difficult to monitor, and others would simply not have been effective in restoring competition. Thus the Commission prohibited the merger in 2016. In another 2016 case, the Commission cleared the mobile joint venture between Hutchison and VimpelCom in Italy. In that case, market players were also reduced from four to three as a result of the joint venture, but the parties submitted a purely structural remedy: they divested spectrum and assets that a new mobile network operator would need to enter the Italian market as a new fourth operator. When the Commission raised concerns about whether this new entrant would materialise, the parties removed those concerns by identifying a purchaser during the merger review process, the French company Iliad. In 2016, the Commission also cleared the acquisition of beverage can manufacturer Rexam by rival Ball, subject to remedies that removed the competitive harm. In that case, the parties divested 12 can production plants, in a reverse carve-out, transferring entire entities to the buyer of the remedy, with the merging entities getting back some part of the business.

The Commission concluded that its merger practice focuses on finding adequate remedies, rather than prohibiting transactions. This is not a recent phenomenon: remedies have always constituted the vast majority of the Commission's interventions. Nevertheless, while prohibitions are rare, they are used as a final stop to anti-competitive mergers when the proposed remedies are inadequate. The Commission posited that adequate remedies give the right signal in deterring anti-competitive mergers, whereas ineffective remedies give the wrong signal – that mergers which risk causing competitive harm may be approved. So the challenge is to only accept remedies that are truly effective, and once the remedy is in place, to strictly monitor compliance.

The Chair then called on **Nicholas Levy** of Cleary Gottlieb Steen & Hamilton, who was invited as an external speaker, to present the business side perspective on merger review. Mr Levy described how over recent years there has been considerable evolution in remedies practice. There is now more clarity on what competition agencies require to be satisfied that identified anti-competitive concerns have been countered and a transaction can be conditionally cleared; greater rigour is put into remedy design and implementation; and there is more reliance on trustees and fix-it-first remedies in Europe. Mr Levy cautioned that there is, however, a risk that in their attempt to pre-empt all possible issues, agencies may ask for remedies that are tougher than necessary, in the knowledge that parties will be keen to close their transactions. Agencies should only raise competition concerns when they are sure that they exist and can be substantiated.

Mr Levy supported the principle for merger remedies articulated by the International Competition Network (ICN) Merger Group, that the purpose of a remedy is "to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realisation of efficiencies and other benefits". He however expressed the opinion that the application of this principle in practice would be difficult. The reasons are that it is, firstly, difficult to quantify anti-competitive effects and predict the likely price impact of a merger secondly, it is even harder to predict the likely efficiencies of a merger; and thirdly, it is harder still to measure harm versus efficiencies when assessing a given remedy, particularly in the compressed timetable of merger review and with the requirement, in the European Union at least, to render a detailed motivated decision at the end of the review. Care must also be taken when asking for the views of third parties' in proposed remedies, as such third parties may have vested interests in encouraging an agency to "over-reach" in the remedies it requests.

Mr Levy stressed that agencies should be open, straightforward, and timely about the need for and scope of remedies. Moving the goalposts during the review process of the same case should ideally be avoided. It is however natural for an agency to learn from experience and thus change its approach from one case to another. In the two mobile operator cases mentioned by the Commission (takeover of O2 by Hutchison in the United Kingdom and the Hutchison/VimpelCom joint venture in Italy), the Commission took different views, prohibiting one and allowing the other, in part by learning from one case to the other. Mr Levy also stressed that agencies should be forthcoming in advising companies as soon as practicable where competition issues are incapable of being remedied, or may be addressed only with very far-reaching remedies, so that parties can save time and cost in pursuing transactions that will ultimately not go through. Providing regular guidance on agency practice and reviewing the effectiveness of past remedies are also extremely helpful for businesses, so that they can prepare and meet agency expectations. Finally, Mr Levy highlighted the importance of co-operation and co-ordination among agencies, to ensure consistency, avoid unnecessary duplication, and align procedures and timetables, noting that there has been remarkable progress in the last 10 years in particular in co-ordinating substantive assessment and aligning procedures. There is still scope for greater co-ordination in remedies, so that a single set of remedies can be agreed to enable a transaction to proceed with certainty.

The Chair thanked Mr Levy and remarked that he touched on points that agencies grapple with whenever they are trying to co-ordinate and co-operate across many jurisdictions in dealing with remedies involving global transactions. She then turned to **Canada** to ask their delegates to present its efficiencies defence.

The delegates from Canada explained that in the vast majority of merger cases where the competition agency concludes that a transaction is likely to substantially prevent or lessen competition, a remedy is consensually negotiated between the agency and the parties to the transaction. The remedy is then registered with Canada’s Competition Tribunal (CT) and has the force of a court order. In Canada, efficiencies are an explicit defence that parties can raise to defend a merger that has been found to substantially lessen or prevent competition. In many other jurisdictions, the assessment of efficiencies is integrated into the assessment of whether a merger substantially prevents or lessens competition. Thus, in contested merger cases in Canada, there are three sequential steps: firstly the CT determines whether the merger will likely result in a substantial prevention or lessening of competition without regard to efficiency claims. Secondly, based on the substantial lessening of competition findings, the CT formulates an appropriate remedial order to address the competitive harm. Jurisprudence by Canada’s Supreme Court provides that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. If there is a range of potential remedies that would do so, the tribunal must choose the one that is least intrusive. Thirdly, after the tribunal has formulated an order, there is an efficiencies defence available to the merging parties. If the defence is raised, and the tribunal finds that the efficiencies would outweigh the anti-competitive effects of the merger, it is barred from blocking the merger. Thus, effectively the remedial result is binary in Canada, i.e. either the agency obtains a full remedy that addresses all concerns and all markets where competitive harm has been found, or the merger is allowed. One implication of this system is that there is no interplay between efficiencies considerations and remedial design. In the event that the CT finds that the efficiencies defence is substantiated, the transaction must be allowed and there is no option to consider an alternative remedy that would address some of the competitive concerns.

The Chair thanked Canada and turned to **Germany** to ask about their balancing of anti-competitive harm in one market with pro-competitive benefits in a different market.

Germany first of all gave some general statistics. Every year the Bundeskartellamt reviews about 1,000 mergers. Only a limited number of cases are prohibited after in-depth scrutiny (second phase proceedings). The number of commitment decisions is at a comparable level. In the last five years, one to three mergers per year were cleared with remedies, and one to two mergers per year were prohibited. The delegates from Germany then explained that, in German law, the so-called “balancing clause” allows clearing a merger, if, although it has negative effects on a market (the impaired market), it has pro-competitive effects on a different market (the improved market) that outweigh the negative effects on the impaired market. The burden to prove the improvements in a different market is on the merging parties. Since the result of accepting the balancing would be that anticompetitive effects on the impaired market are tolerated, this clause is applied very strictly. In principle, only improvements to the market structure are sufficient to justify the application of this clause; conduct or mere commercial benefits in another market are not sufficient. The improvements should also be significant. The Bundeskartellamt only accepts improvements on markets where one or several market players are already dominant before the merger. Furthermore, it must be shown that these improvements to the structure of the market would not occur without the merger. The delegates noted that this clause is applied very rarely.

The **United Kingdom** then explained their principle of proportionality for remedies. According to the Competition and Markets Authority (CMA) guidance on merger remedies, remedies must be no more onerous than is required to achieve the authority’s legitimate aim, and be the least onerous if there is a choice of equally effective measures. However, that means choosing the least costly and intrusive remedies that the CMA considers to be effective, not the least costly and intrusive remedies that the parties themselves put forward. The CMA believes that structural remedies are in general the most appropriate solutions to solve concerns, and that behavioural remedies, in view of their complexity and difficulty in monitoring and enforcement, are unlikely to be the most appropriate and effective. The United Kingdom Competition Appeal Tribunal has been supportive of the CMA’s efforts to come up with strong remedies, and, in cases where the CMA showed that the behavioural remedies put forward by the parties would not be effective, the tribunal found that the proportionality test had been satisfied in rejecting the proposed behavioural remedies and prohibiting the transaction. Finally, the United Kingdom pointed out that in designing remedies, in particular at Phase 2, they need to consider the possibility of relevant customer benefits (which could be benefits that would accrue as a result of the merger), in the form of lower prices or improved quality. To an extent this allows the balancing of efficiencies and harm, although it is not a strict efficiencies balancing act.

Spain then took the floor and described their experiences with merger review remedies. The Spanish competition authority has not taken a prohibition decision in the last five years. It can impose remedies designed by the competition authority itself, which requires an in-depth knowledge of the merging parties, their assets and the market. The authority is under an obligation of proportionality, so requires remedies that, while being effective, do not go beyond the extent necessary to address the competitive harm. The combination of the authority’s power to propose remedies as well as the requirement of proportionality makes it difficult to reach a prohibition decision, as this is considered to be, overall, a very strict and possibly disproportionate result.

The Chair then asked **Sweden** to discuss the issue of burden of proof. The Swedish Competition Authority (SCA) reviewed a merger in the chicken market (Kronfågel proposed acquisition of Lagerberg), where it found that since there was no certainty that a new entrant would replace existing competition that would be lost through the merger, proposed remedies were not effective in all aspects and would not eliminate the competition concerns entirely. The SCA thus sued to block the transaction, which was abandoned thereafter.

The SCA confirmed that they follow the same standard as the European Union, i.e. remedies should be fully effective to eliminate competition concerns identified. The SCA conducts a forward looking assessment of the likely effects of both the merger and the proposed remedy. The standard of proof is a balance of probabilities, in terms of the effects of both the merger and the proposed remedies.

Chinese Taipei then described how they market test remedies. The Fair Trade Commission (FTC) solicits opinions from other relevant authorities, experts, related businesses and scholars. The FTC may send letters to request written opinions, or invite such third parties to a seminar. The purpose of the seminar is to check the accuracy of information submitted by the merging parties, learn about whether the merger will cause competitive concerns upstream or downstream, and understand any concerns that other public authorities may have in relation to the proposed merger.

The Chair then asked the **Netherlands** to explain how, for the purpose of market testing remedies, they make sure that the proposed remedy is clear and understandable to third parties.

The Dutch Authority for Consumers and Markets (ACM) explained that they require parties to describe the competition concerns and the countervailing remedy in a clear and understandable way, to ensure the effectiveness of market tests, as well as minimise the risk of different interpretations in the enforcement of remedies. Every proposed remedy is market tested. To conduct the test, the ACM prepares a description of the competition concerns, and they ask the merging parties to describe their proposed remedy. Both the competition concerns and the proposed remedies should be clear and easy to understand by third parties who are not necessarily competition experts. In the ACM's experience, the effort put into the clarity of the description of the competition concern and the remedy has paid off, and the ACM is satisfied with the way that market tests are conducted: parties are more focused on providing clear remedies, participants in the market test give better answers, and the ACM receives fewer requests for clarifications. The ACM would not reject a complex remedy just because it is not presented in a clear and understandable way. If however the remedy is overly complex, the ACM is more reluctant to accept it, as it may be more difficult to enforce. In a recent case where the ACM blocked a merger between hospitals, the parties had proposed a price cap as a remedy. The ACM did not accept it, as it is not a price regulator.

The Chair concurred that the difficulties of assessing, accepting or rejecting complex remedies are shared by jurisdictions around the globe, as it is not easy to show in advance that a complex remedy will work.

Mexico's Federal Telecommunications Institute (IFT) then spoke about how they go about imposing remedies. The IFT does not publish all remedies, for example behavioural remedies such as the prohibition to suspend a commercial relationship, as publication may lead to price increases. In the majority of the cases where the IFT imposed remedies, these were behavioural or a mix of behavioural and structural.

The Chair then invited **Paula Riedel**, of Kirkland and Ellis, who was invited as an external speaker to present her views on the issues discussed in the roundtable.

Ms Riedel began by highlighting that merger control results in less transactions in ways that are not always obvious. Many transactions are abandoned when a competition authority refers the case for an in-depth Phase 2 review, when the parties (in particular the seller) cannot afford the time and cost of Phase 2 proceedings, and the risk to the target business during Phase 2. The parties thus usually negotiate a contractual right to withdraw from the deal if Phase 2 investigations are initiated. There is also the risk of Phase 1 remedies being stricter than necessary, in cases where parties offer far-reaching remedies to avoid getting into Phase 2; this risk is exacerbated by the fact that in many regimes Phase 1 remedies are not appealed, so their proportionality is not checked. Also, if the investigation is very long, the parties' views of the desirability of the transaction can change, and they may no longer want the deal even if it can be cleared. Ms Riedel mentioned that in the case of Ball/Rexam and AB Inbev/SABMiller transactions, the remedies imposed were actually prohibitions in some markets, while in the BskyB/ITV acquisition, BskyB was ordered to divest shareholding to below material influence, which amounted almost to a prohibition. The result is that deals that may have brought synergies and efficiencies do not happen, because the risks associated with the length of the investigation and the strictness of remedies are not attractive, particularly to the seller.

Ms Riedel remarked that regimes for merger control are now mature, and the framework for intervention is clear and well established, but outcomes of merger review are not easy to predict, in particular since the economic techniques used in merger analysis can vary and be applied differently. Also, competition authorities should critically evaluate the information collected through market tests, since competitors may not have the incentives to disclose all their information on the market. Finally, Ms Riedel mentioned that the complexity of a proposed remedy should not bar the remedy from being accepted. External advisors can be brought in for specific knowledge in complex deals. There is also great value to having specialised remedies units within the competition authorities.

The Chair thanked Ms Riedel and turned the discussion to behavioural versus structural remedies, the latter being the preferred remedy in most jurisdictions participating in the roundtable. However, a divestiture may be difficult when no suitable buyer can easily be found, particularly in smaller economies.

Estonia took the floor to discuss its experience in remedies. The Estonian competition authority has prohibited two concentrations since merger control was introduced, and does not have a great deal of experience with structural remedies. Since 2013, the authority has the ability to suspend the proceedings for up to two months to review proposed remedies, so they have more time for a proper assessment.

Norway then highlighted that in proposing remedies, the incentives of the merging parties are not aligned with those of the competition authority. The parties have no incentive to offer remedies that are likely to establish a strong competitor. They do have incentives to offer the divestment of their less profitable assets, identify weak potential buyers (such that they cannot exert strong competitive pressure after the divestment), delay the remedy process, or deteriorate the divestiture package before the divestiture is complete. The Norwegian Competition Authority (NCA) has had cases where the divestiture was not completed or took more time than expected. In order to address these issues, the NCA now asks for more upfront and fix-it-first solutions together with standstill obligations, in cases where it is difficult to assess the viability or timing of a proposed divestiture package. For example, in 2015, a big merger in the grocery retail market, the acquisition of Ica Norge by Coop Norge, was cleared under the condition of selling 93 stores in 90 different markets, and the conditions included identifying upfront buyers, which were found. In the acquisition of Smart Fuel by St1 Nordic, clearance was conditional upon the divestiture of St1's 39 unmanned petrol stations. There was no upfront buyer condition, and in the end the proposed buyer did not meet the NCA's requirements in terms of independence and of incentives to exert competitive pressure on the parties. The NCA rejected the proposed buyer, and the parties appealed; the case is currently before the courts.

The Chair then asked **Australia** about behavioural remedies, and in particular about the Sea Swift/Toll Marine Logistics merger, where the Australian Competition Tribunal (Tribunal) accepted a behavioural remedy that the Australian Competition and Consumer Commission (ACCC) had rejected.

The ACCC explained that the Sea Swift/Toll Marine Logistics merger involved two suppliers of marine freight services to remote communities in northern Australia. They were the only two suppliers that provided a scheduled service. The merging parties offered behavioural remedies (an access undertaking to a port lease, and removing exclusivity clauses from customer contracts) and sought authorisation from the Tribunal. Even though the ACCC argued at trial that the remedies would not guarantee good competitive solutions and there were opportunities for a new entrant, the Tribunal accepted to clear the deal, under the proposed remedies. The reason was that the Tribunal accepted Toll's statement that it would exit the market within 60 days and therefore no new business could enter the market within that timeframe.

The Chair then turned to the **United States** and asked the **US Federal Trade Commission** (FTC) and the **US Department of Justice** (DoJ) to describe cases where complex remedies were not accepted after lengthy investigations, and the agencies challenged the transaction.

The FTC described Sysco's proposed acquisition of its rival US foods for USD 8 billion (US dollars). Sysco and US foods are the two largest food distributors in the US and the only national players in the relevant market with an extensive nationwide network of distribution centres. This, according to the FTC, made them the best option for a certain group of customers that have operations across the country (like national restaurant and hotel chains, food service management companies and hospital systems) and have needs for national supply from a broad line distributor that could service all of their locations with consistent products and services. During the course of the investigation, the parties proposed a very significant remedy involving the divestiture of 11 distribution centres to Principal Food Group (PFG), the number 3 player in the relevant market. They argued that this divestiture, and a very significant commitment to PFG to substantially expand their network in order to allow PFG to become an important national player, would replace the competition that would be lost due to the acquisition of US Foods. The FTC examined whether the proposed remedy would be enough to maintain the pre-merger level of competition and concluded that it would not, because PFG would still have significant geographic gaps in its distribution system, would be at a cost disadvantage due to smaller scale, and have a much smaller array of products. Also, PFG would be dependent on the merged firm for several years after the deal. PFG estimated that within five years it would only achieve half of US Foods sales and only 20% of the national market. The FTC decided to reject the remedy in a split decision, and challenged the merger in court. The court issued a preliminary injunction against the merger, causing the parties to abandon the transaction.

The DoJ then described their challenge of the Halliburton acquisition of Baker Hughes, worth USD 35 billion. Halliburton is the largest oilfield services company in the United States, and Baker Hughes, its closest rival. This merger was unprecedented in terms of its complexity and scope, not only of the antitrust issues but also of the proposed remedy. The DoJ found that the merger would cause a substantial lessening of competition in 23 different product and services markets, and that there would be significant loss of innovation, as they two companies would no longer compete to develop technological solutions in the oil and gas industry. The remedy proposed was both extremely complex and risky. The parties proposed a complicated mix of partial divestitures and licensing, that involved separating out business units, dividing facilities, and allowing some, but not all, necessary assets and customer contracts to go to the remedy's buyer. That would leave the buyer in a worse position than either of the parties and would not have maintained the pre-merger level of competition. It also would have required significant oversight by the courts and the DoJ to enforce the remedy. Therefore the DoJ sued to block the deal. The parties subsequently abandoned the transaction and Halliburton had to pay Baker Hughes USD 3.5 billion as break-up fee. The case was unprecedented in terms of the deep and sustained co-operation among many agencies around the world.

The Chair then asked **Japan** why the Japan Fair Trade Commission (JFTC) has not issued any cease and desist orders against proposed transactions in the last 50 years. The JFTC explained that one of the reasons is that, before 2011, the JFTC had a system of informal consultation with companies, before any formal notification of a transaction. During this consultation phase, the JFTC conducted an almost full review of the transaction, and shared its main conclusions with the parties. Thus, when the parties anticipated that the JFTC would reject proposed remedies, they abandoned the transaction. After 2011, the JFTC changed the process. While it still accepts prior consultations mainly for procedural matters, such as how to make entries in the notification forms, full review only takes place after the parties submit a notification. Since 2011, there have been cases where transactions were abandoned after their notification; in fact, out of 295 cases notified to the JFTC in 2015, 8 were abandoned during Phase 1 review. The JFTC prefers structural remedies. However, when behavioural measures are appropriate, the JFTC accepts behavioural remedies if they counter the competition concerns.

Korea described a merger of the two largest optical lens makers (Essilor-Daemyung Optical) in the Korean market that the Korea Fair Trade Commission (KFTC) had blocked. The KFTC's market investigation showed that the parties' combined market share would amount to 66% in the market for single vision lenses and 46% in the market for progressive multi-focal lenses. Considering market concentration levels, the prices of the merging parties' products and the results of the consumer survey, the KFTC concluded that the proposed transaction would likely give the merged entity incentives to raise prices in the relevant markets, and that the offered behavioural remedies would not solve this concern. Thus, the KFTC blocked the transaction. The KFTC accepted behavioural remedies in another transaction, a semiconductor lithography vertical merger, in order to preserve considerable efficiencies that would otherwise be lost. The difference between the two cases and the KFTC's approach to behavioural remedies, was that the merger of the optical lens makers was horizontal, while the semiconductor lithography merger was vertical. Since in the vertical merger the biggest concern was foreclosure rather than price increase, the merged entity was banned from cutting on existing trade volumes with trade partners and was required to set trade conditions on objective criteria for five years after the transaction. Also, the KFTC found that blocking the deal might delay innovation in the industry, and that that new technology or entrance was likely in the five year period covered by the remedies.

Latvia was asked to comment on the duration of behavioural remedies imposed by the Latvian Competition Council. In one case (the RPK/VP merger in the dairy market), the Competition Council imposed behavioural remedies for a three year period, and in another (the RP/SFA merger in the pharmaceutical industry), it imposed a three year remedy, which was extended for a second three year period. Latvia explained that they have no specific guideline of how to set the duration for behavioural remedies. Many behavioural remedies are open-ended. In certain situations the term is fixed, for example when in order to balance the buying power of the merged entity, this is required to contract with suppliers on specific terms (that was one of the remedies in the dairy market merger). The extension of the remedy period in the pharmaceutical industry was to allow the authority to continue monitoring the competitive situation of the market.

The **Slovenian Competition Protection Agency** (SCPA) then described its use of behavioural remedies, and difficulties encountered in monitoring them. The SCPA confirmed that it relies more on behavioural remedies. In a 2015 passenger bus merger, two behavioural conditions were imposed: the first was granting fair access for competing bus operators to key infrastructure owned by the merging parties; the second was that the parties notify the SCPA of bids, and decisions not to bid, for long-distance bus concessions, along with the method of calculating the value of concessions. The SCPA finds that monitoring these remedies may prove difficult. However, as no new tenders for road transport concessions have been published since the imposition of the remedy, the SCPA has not tested whether or how the second remedy works.

The **Belgian** competition authority then explained that remedies are market tested by sending out requests for information. The authority gives more weight to views expressed by customers and positive views of competitors, than to negative views by direct competitors.

The **Italian** competition authority took the floor, on the difficulty of evaluating remedy proposals in a short time frame. In Italy, the Phase 2 in-depth merger review has to be concluded in 45 days with the possibility of an additional 30 days extension. To gain time, the authority encourages parties to start the discussion on the theory of harm and the remedies as soon as possible in a pre-notification phase, and share all of the information they have. This has proven effective in a number of mergers. Likewise, the authority tries to be very straightforward and open in spelling out its concerns. They also prefer structural over behavioural remedies, as the latter require lots of monitoring and this raises questions on their effectiveness. The authority is in a process of strengthening internal teams; in merger assessment, staff from the chief economist's team work with sector specialists.

The Chair turned to the **Business and Industry Advisory Committee** to the OECD (BIAC) for comments. BIAC highlighted the value of agency guidelines on merger review and the assessment of remedies, and that its members are supportive of further guidance. BIAC stressed the importance of taking into account efficiencies when evaluating remedies; thus agencies should accept remedies that allow them to conclude that, on balance, the efficiencies outweigh the anti-competitive effects of the transaction. When efficiencies are not taken into account, there is a risk that the merger may not be allowed to proceed, thus resulting in a waste of resources and economic loss. BIAC also mentioned the cases of mergers that raise competition issues in one jurisdiction but not in another. These are difficult cases, because an agency must decide on the basis of its own jurisdictional requirements, even if overall that same transaction might result in efficiencies elsewhere. Also BIAC drew attention to the potential for extraterritorial effects of remedies and, in general, repercussions that a remedy might have on market circumstances outside the jurisdiction of the agency.

The **European Commission** took the floor again to clarify that they require a higher standard for Phase 1 remedies: remedies should provide a clear solution to a readily identifiable but not fully investigated competition concern. Phase 1 remedies have overall been unproblematic. The Commission also stressed that to be accepted, efficiencies should be merger-specific and passed on to consumers in terms of better prices or better quality, not just benefit the merging firms. Efficiency claims have been brought forward in many cases, but have often been unsuccessful when they did not meet the merger specificity and consumer benefits requirements. In some cases efficiencies were accepted: in the UPS/TNT merger and although the Commission blocked the merger, it accepted that in some markets cost efficiencies would be passed on to customers.

To conclude, **Nick Levy** highlighted the usefulness of an integrated approach regarding efficiencies (so that they are part of the merger assessment test), and the need for clarity on the standard that agencies apply to efficiencies. He specified that in principle it should be the same balance of probabilities standard that applies in the assessment of mergers, though in this case, the burden to prove the efficiencies is on the merging parties. **Paula Riedel** then mentioned that behavioural remedies are better suited to regulated sectors, as their implementation is more easily monitored in such sectors, and that more guidance on remedies in sectors would be useful.

The Chair closed the roundtable by thanking delegates for the fruitful discussion.