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Organisation de Coopération et de Développement Économiques
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English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Belgium --

28-29 November 2016

This document reproduces a written contribution from Belgium submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

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

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BELGIUM

1. **Please provide a short description of i) mergers that your agency has prohibited in the last 5 years, detailing reasons, as well as whether remedies were offered and not accepted and the reasons for this and ii) a few important mergers your agency has cleared subject to remedies in the last 5 years.**
 1. The BCA has not prohibited a merger in the last five years.
 2. The BCA has cleared subject to remedies e.g.
 - The merger between Ahold and Delhaize (upon referral by the European Commission). Decision of 15 March 2016, with divestment remedies.
 - The acquisition of Sanoma magazines by De Persgroep. Decision of 4 August 2015, with behavioural remedies in respect of maintenance of titles and formats.
 - The establishment of the Mediahuis JV between Corelio and Concentra bringing together the publishing of newspapers. Decision of 15 October 2013 with behavioural remedies in respect of the maintenance of titles and independent redaction teams.
2. **Is your practice regarding prohibitions and remedies reflected in ‘best practice’ documents or in other guidelines? If yes, please describe the main factors/circumstances to be considered according to your soft law document. If not, are you planning to issue guidance in the near future?**
 3. N/A
3. **What challenges have arisen in the design of remedies? How do you decide which remedy, or combination of remedies, is unable to cure the competition harm? Which remedies have not worked in practice or not worked as effectively as anticipated?**
 4. Limiting remedies to what is required in the public interest notwithstanding the pressure of third parties.
 5. We imposed one sanction for non-compliance with certain behavioural remedies by Nethys (cable operator and newspaper publishers) and imposed a fine amounting to EUR 63 296 (Euros). Decision of 26 March 2016.

4. Has your agency's approach to accepting and/or rejecting remedies been tested in the courts? If yes, please describe the main points of the court's decision which upholds or rejects the agency's i) prohibition decision, ii) decision to clear the merger subject to remedies, and/or (iii) the agency's approach or analysis of proposed remedies.

6. Two clearance decisions with remedies were appealed in court by third parties. In one case the Court of appeal of Brussels has upheld the decision of the BCA without qualification (Court of appeal of Brussels, 11 March 2015, VAB). In the other case the appellant has dropped the case.

5. To what extent does your agency consider the opinion of third parties/public in i) deciding whether to prohibit a merger, and ii) designing and implementing remedies? In your reply, please specify the role of market testing in your process. What is, in your view and experience, an effective market test and which lessons have been learnt over time to improve market testing? What other tools have you used to consider opinions of stakeholders in your analysis of remedy effectiveness?

7. The BCA, supported by an earlier judgement of the Hof van Cassatie/Cour de Cassation, considers that merger control procedures are administrative authorisation procedures between the notifying parties and the competition authority. Third parties are heard if they have a sufficient interest (article IV.60 §2 CEL) or if they can provide information that is useful to the authority. They can be granted a limited access to the draft decision prepared by the Investigation and Prosecution Service (equivalent of Statement of objections) and are asked to leave the hearing after they made their statement and answered questions of the Competition College, the Investigation and Prosecution Service and the notifying parties. The Competition College tries to avoid remedies primarily aimed at protecting the interests of competitors.

8. Except in simplified procedures, market definitions, impact on competition and remedies are market tested by sending out requests for information. The Competition College tends to give significant weight to views expressed by customers and positive views of competitors, and to be rather sceptical with regard to negative views expressed by direct competitors.

6. In your experience, what mechanisms minimise the risk of ineffective implementation of remedies? In your reply, please specify the role of divestiture/hold separate/monitoring trustees in your process.

9. The answer depends in our opinion very much on the nature of the remedy and the culture of the sector. E.g.:

- With regard to divestment remedies, we have considered a divestiture trustee necessary in order to ensure a correct implementation of the remedies. But whether a hold separate trustee is required, depends in our opinion on the extent to which it may also be in the interest of the parties to keep the assets and businesses separate and the likelihood of complaints in case they fail to do so.
- When behavioural remedies are designed to protect actors who can easily see whether the remedies are implemented correctly, complaints are seen as the most effective enforcement mechanism.
- In other cases a reporting obligation may be sufficient to verify the implementation of behavioural remedies.
- The BCA tends, however, to consider a monitoring trustee often necessary in order to ensure the correct implementation of behavioural remedies.