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

-- Note by BIAC --

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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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-- BIAC --

1. Introduction

1. The Business and Industry Advisory Committee ("BIAC") of the Organization for Economic Cooperation and Development ("OECD") is pleased to submit this paper to assist in Working Party 3's discussion on the issue of the trade-off between prohibition decisions and conditional clearances relating to mergers. This paper builds on BIAC's prior contributions, specifically *Public Interest Considerations in Merger Control* ("*Public Interest*").[1]

2. BIAC strongly favours competition agencies pursuing conditional clearances over prohibition decisions whenever possible. BIAC supports the principles for merger remedies recently articulated by the International Competition Network ("ICN") Merger Group[2], including the purpose of a remedy being "to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realization of efficiencies and other benefits", as well as the use of a remedy tailored to the harm in order to ensure the least intrusive remedy without compromising its effectiveness. Further, when considering whether to accept remedies that do not solve every competition concern raised by a merger, BIAC is of the view that the agency should be prepared to accept remedies that allow it to conclude that on balance, the efficiencies and other pro-competitive effects of the transaction outweigh the anti-competitive effects.

3. The apparent rise in merger prohibitions noted by the Secretariat in its background paper is cause for concern. In BIAC's view, conditional clearances are capable of addressing competition concerns associated with a proposed merger in the great majority of cases. Unlike prohibition decisions, however, conditional clearances can also take into account and permit the realization of additional benefits of a proposed merger sought by the parties, such as synergies in the merging entities' operations, thereby allowing for greater efficiencies. These benefits would be lost to the merger parties and indeed the economy as a result of a decision to prohibit the transaction. Furthermore, in multijurisdictional mergers, a decision validly taken by the competition authority in one country to prohibit a merger may destroy the benefits of the merger in other jurisdictions where the proposed transaction does not raise anti-competitive considerations that rise to the same level. BIAC recognizes that fashioning appropriate merger remedies can, in many cases, require the application of considerable resources by both the merging parties and the competition authority; however, the difficulties inherent in fashioning effective remedies should not, in and of themselves, drive the decision to prohibit a merger.

2. Fashioning an Appropriate Remedy

4. As recognized in the Secretariat's background paper, the specific standard followed in each jurisdiction is typically enshrined in legislation or set out in guidelines issued by the agency. However, when determining whether to accept remedies that do not solve every competition concern raised by a merger, BIAC is of the view that the agency should be prepared to accept remedies that allow them to conclude that on balance, the efficiencies and other pro-competitive effects of the transaction outweigh the anti-competitive concerns.

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1 Submitted in June 2016.

2 International Competition Network Merger Working Group, *Merger Remedies Guide 2016 ("Merger Remedies")*, at page 2.

5. The debate around remedies in merger cases has often been cast as a dichotomy between structural remedies and behavioral remedies.[3] In BIAC's view, however, the most important feature of an appropriate remedy is not the form that it takes but its tailoring to any anti-competitive harm raised by a proposed combination while preserving other benefits of the transaction that led the parties, in their business judgment, to seek to merge in the first place.

6. As the ICN Merger Group has recently written in *Merger Remedies*, "The purpose of a remedy is to maintain or restore competition otherwise lost due to the merger, while permitting, if possible, the realization of efficiencies and other benefits."[4] IAC supports the general principles listed in *Merger Remedies*, which include the following, which, in BIAC's view, support the use of conditional clearances rather than prohibition decisions in the vast majority of cases:

- "Once the need for a remedy has been determined in accordance with the above purpose, its form is likely to depend on the nature of competitive harm."[5] In BIAC's view, a prohibition decision would only be appropriate where there is no effective remedy available.

- "[C]ompetition authorities should require a merger remedy that is directed at and proportionate to ("tailored to") addressing the competitive harm. … Tailoring the remedy to the harm allows competition authorities to require the least intrusive remedy without compromising effectiveness."[6] In BIAC's view, a conditional clearance can be more tailored, and proportionate to the competitive harm than can a prohibition decision.

- "When assessing the effectiveness of proposed remedies, potential costs and burdens on competition authorities, merging parties and/or the marketplace should also be considered. This includes … foregone efficiencies or other pro-competitive benefits: Mergers that raise competition issues in one or more relevant markets may nonetheless generate efficiencies for the merging parties or have a pro-competitive impact such as increased quality, choice and innovation. In certain circumstances, jurisdictions that assess such pro-competitive benefits may want to consider how they are impacted by remedy design."[7] In BIAC's view, the ability of conditional clearances to take into account such efficiencies considerations and pro-competitive impacts are a major reason why these are to be preferred over prohibition decisions.

- "Transparency and consistency in the design and implementation of remedies reinforce the fairness, legitimacy and effectiveness of remedies. To achieve these goals, competition authorities should be open and transparent with respect to both procedural and substantive considerations during the remedy process, subject to preserving confidentiality."[8] In BIAC's view, the transparent and consistent implementation of remedies can be critically important in allowing the merging parties – who are often the best positioned to design appropriate and effective remedies – to propose remedies that can achieve the purpose of merger remedies in the form of conditional clearances.

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3 Heyer, Optimal Remedies for Anticompetitive Mergers, Antitrust, Vol. 26, Spring 2012 ("Heyer").

4 Merger Remedies, at page 2.

5 Merger Remedies, at page 2.

6 Ibid.

7 Id, at page 5.

8 Ibid.

7. When fashioning an appropriate remedy, the competition authority should take into account not only the need to remedy any anti-competitive effects that it determines may result from the merger, but also consider other impacts of the remedial options available. However, competition authorities should avoid the temptation to seek non merger-specific remedies. It is clear that the merging parties are under significant pressure to achieve merger clearance, not least where there are financial liabilities (or "break fees") where transactions are not completed. There is concern that agencies may be using the merger clearance process to seek commitments from merging parties that either go beyond what was necessary to maintain competition or to impose remedies unrelated to the transaction (e.g. conditions on the seller, rather than the acquirer).[9]

8. In a few exceptional cases, a preference for conditional clearances may have led to remedies that have gone too deeply into determining the very structure or design of a particular market.[10] Indeed, given the increasing difficulty in setting precedent through prohibition decisions, whether in mergers or unilateral conduct, there has been a growth in the use of consent decrees and orders by competition agencies to push the boundaries of policy. This has been rightly criticized as an inappropriate vehicle to explore policy options and creates considerable questions as to the legal situation created thereby. Accordingly, BIAC would suggest that while always being open to consider conditional clearances, agencies should be aware of potential unintended negative consequences, including a reduction in sector-wide valuations.

9. On the other hand, while a prohibition decision would be certain to eliminate any anti-competitive effects of a merger, it might also have the effect of preventing any of the other benefits that a merger might have brought from being realized. As described in *Merger Remedies*, these benefits may include, but are not limited to, efficiency gains that might have driven the parties to propose a merger in the first place. As such, the negative impacts of a decision to prohibit a merger may go beyond the merging parties themselves and have an adverse effect on an entire industry.

10. Heyer cites the example of a merger that implicates a considerable volume of commerce, only a small share of which involves markets where competitive concerns arise. Under these circumstances, the author argues, ignoring non-trivial merger-specific efficiencies by prohibiting the merger outright would potentially be bad policy:

> In such cases, competition authorities are generally reluctant to block the entire deal based on competitive concerns that involve a relatively small piece of the merger. In the absence of any merger-specific efficiencies, one might legitimately argue that these deals should be blocked, as even the relatively small harm would not be offset by anything positive. In practice, however, this seems unlikely. A decision to enter into a very large merger is seldom motivated by the prospect of enhancing one's market power over a very small portion of the merging firms' overall operations. And if obtaining greater market power is not the goal, achieving efficiencies normally will be.

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9 See, for example, John "Jay" Jurata & Inessa Mirkin Owens, "*A New Trade War: Applying Domestic Antitrust Laws to Foreign Patents*", Geo. Mason L. Rev. (2015) Volume 22:5, "*The KFTC ultimately sought to limit certain Microsoft licensing practices that were established before its acquisition of Nokia's D&S business, and that had little to do with the transaction*". Available at http://www.georgemasonlawreview.org/wp-content/uploads/22_5_Jurata.pdf.

10 See, for example, Case M.7758 - Hutchinson3G Italy/Wind/JV (http://europa.eu/rapid/press-release_IP-16-2932_en.htm). See also Damien M.B. Gerard, "Negotiated remedies in the modernization era: the limits of effectiveness*", in* EUROPEAN COMPETITION LAW ANNUAL 2013: EFFECTIVE AND LEGITIMATE ENFORCEMENT (Ph. Lowe & M. Marquis eds., 2013) or Frederic Jenny, "Worst Decision of the EU Court of Justice: The Alrosa Judgment in Context and the Future of Commitment Decisions", Fordham International Law Journal (2015), Volume 38, Issue 3. Available at: http://ir.lawnet.fordham.edu/ilj/vol38/iss3/2/.

> In such circumstances, if one is willing to credit non-trivial merger-specific efficiencies in markets other than those where the competitive concerns arise (efficiencies that are "inextricably linked" to the potential harms), then stopping the deal in its entirety would be bad policy. Imposing even an imperfect remedy – one that goes a significant way towards resolving the competitive concerns while permitting efficiencies to be achieved – is arguably the optimal choice. And where this cannot be achieved through a structural remedy, a behavioral solution will at times be advisable.

11. As Heyer notes, the balancing of an appropriate remedy would include not only an assessment of the effectiveness of a remedy to resolve competitive concerns but also the ability of the remedy to permit other benefits of the transaction to be realized.

12. Significantly, these potential benefits of mergers are not limited to the realm of static efficiency. As previously noted by BIAC, most economists generally favour a total welfare standard. This standard recognizes the significant importance that should be placed on investment, innovation and dynamic efficiencies more generally for achieving a sustainable economy. Therefore, dynamic efficiency, including investment and innovation, is another objective of competition law, which is sometimes subsumed or defined as another type of efficiency, where invention, development and diffusion of new products increase social wealth as a whole.[11]

13. Accordingly, when considering whether a prohibition decision or conditional clearance is the more appropriate remedy in a specific case, the impact of these remedial options on the achievement of these broader objectives of competition law should be taken into consideration.

14. In its 2005 study of merger remedies, the ICN analyzed remedies from 17 different competition authorities from which it was apparent that the preferred outcome for cases raising competitive issues was to craft a suitable remedy rather than resort to prohibition or abandonment:

15. The key contribution of remedies is to enable a modified outcome to merger transactions which restores or maintains competition while permitting the realization of relevant merger benefits, thus achieving a better outcome than straightforward prohibit or permit decisions.[12]

16. In contrast to conditional clearances, prohibition decisions, which are solely driven by a competition authority's focus on eliminating the anti-competitive effects of a merger, threaten to "throw the baby out with the bathwater", by eliminating other benefits that a merger may present for the parties and for society's welfare more generally as well as having a chilling effect on investment decisions.

3. Role of Transparency and Consistency

17. Decisions on remedies are not made in a theoretical vacuum and must take into account procedural considerations. Fashioning an appropriate remedy that not only addresses the negative anti-competitive effects of a merger but also permits the realization of pro-competitive efficiency gains can take both significant time and effort on the part of both the merging parties and the competition authority. This must also occur under significant time-pressure, as recognized by Bill Baer, who wisely advocated early and constructive engagement of the merging parties with the competition authority regarding remedies:

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11 Public Interest, at page 3.

12 Merger Remedies Review Project, Report for Fourth ICN Annual Conference, ICN Merger Working Group: Analytical Framework Subgroup, 2005.

> In most cases, we are able to work with the parties and preserve competition through a consent decree that separates the anticompetitive parts of a transaction from the remainder. One caveat: negotiating a decree that leave us confident that consumers will be protected usually is not an overnight exercise.[13]

18. BIAC supports this view, and echoes the recommendations in *Merger Remedies* on the importance of transparency and consistency. Cooperation among agencies in cross-border merger cases too, is important. As was advocated by BIAC in 2013:

> … enforcement agencies should engage and cooperate with their counterparts early in the merger review process with coordination informed by the following principles. First and foremost, competition authorities should not impose remedies without considering potential extraterritorial implications and approaches of other agencies to the remedy question.[14]

19. While it remains incumbent on the merging parties to work pro-actively to efficiently and effectively address any competitive concerns raised by their proposed transaction, competition authorities can facilitate and direct this process:

> Identifying the factors used by competition authorities in their analyses and decision-making processes allows for greater consistency and predictability in the design of remedies. The use of guidelines or other policy statements that describe established criteria (for example, for finding a suitable purchaser in a divestiture remedy) and model texts containing provisions that are generally applicable to certain types of remedies promote transparency and may make the remedy design process more efficient.[15]

20. The merging parties and the agencies will have to work together and each share in the burden of fashioning appropriate remedies. For example, if absolutely necessary to avoid a prohibition decision, in an appropriate case agencies should consider requiring, and the merging parties should consider offering, "fix it first" solutions.

21. The choice of remedy should not be determined solely by procedural considerations, nor should it be based on a one-size-fits-all approach; rather, the appropriate remedy in a given case should always depend on an application of economic principles to the specific facts of a transaction.

4. Conclusion

22. BIAC strongly favours competition agencies pursuing conditional clearances over prohibition decisions whenever possible, and particularly where the pro-competitive benefits of a transaction outweigh any anti-competitive effects not capable of being remedied. In BIAC's view, conditional clearances are capable of addressing competition concerns associated with a proposed merger in many cases. Unlike prohibition decisions, however, conditional clearances can also take into account and allow for additional benefits of a proposed merger sought by the parties. These may include static efficiencies generated by synergies in the merging entities' operations and broader, dynamic efficiency benefits. All of these benefits would be lost to the merger parties and indeed the economy as a result of a decision to prohibit the transaction.

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13 Bill Baer, *Remedies Matter: The Importance of Achieving Effective Antitrust Outcomes*, Georgetown Law 7th Annual Global Antitrust Enforcement Symposium, September 25, 2013.

14 *Roundtable on Remedies in Cross-Border Merger Cases*, submitted October 29, 2013.

15 *Merger Remedies*, at page 5.