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## REPORT ON NOTIFICATION OF TRANSNATIONAL MERGERS

-- Note by the Secretariat --

*The attached report was approved by the Committee on Competition Law and Policy on 5th February 1999.*

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## NOTIFICATION OF TRANSNATIONAL MERGERS

### Introduction

1. Markets in today's economy are becoming increasingly globalised, and concurrently the number of business enterprises operating across national borders is growing rapidly. Mergers of multinational companies are likely to be subject to the merger control laws of more than one country, and in some cases, to the laws of several countries. The application of more than one set of merger control laws to a single transaction poses special challenges for both the merging parties and the relevant national competition authorities.

2. The OECD's Competition Law and Policy Committee has studied different aspects of the subject in recent years. In 1994 it published a report under the responsibility of the Secretary General entitled *Merger Cases in the Real World - A Study of Merger Control Procedures*. The Report, prepared by two well-known experts in the field, Prof. Richard Whish, University of London, and Prof. Diane Wood, then of the University of Chicago, reviewed illustrative case studies of several transnational mergers as a means of highlighting regulatory problems raised by these transactions. The Report made several recommendations for improvements in international co-operation in merger control, one of which was the creation of "one or two model [merger notification] filing forms, which request common information in a single format, and which use different country annexes as appropriate."

3. The merger control procedures of most countries provide in some fashion for notification of mergers to the national competition authority. The notifications typically contain information describing the merger transaction, the parties to it and their operations in the notified country, which assists the competition authority in analysing transactions according to its competition law. There tends to be a "common core" of this information that is reported to most countries, but countries specify the information to be produced in different forms or quantities. These inconsistencies in notification requirements may in some cases interfere with the efficient review of transnational mergers and impose significant transaction costs on the merging parties.

4. Harmonisation of merger reporting requirements across countries could have at least two benefits: transaction costs for the merging parties would be reduced to the extent that the parties are able to prepare and present substantially the same information to the authorities of more than one country; and co-operation among national authorities examining a merger would be enhanced to the extent they are reviewing the same or similar information. Further, in the longer run, harmonisation of information requirements could contribute to enhanced international co-ordination of other aspects of merger control, such as convergence in waiting period requirements.

5. It must be recognised, however, that variations in merger notification requirements are substantially a product of differences in national laws governing such notifications. Even where the legal differences do not reflect significant policy differences, therefore, harmonisation of notification forms cannot be achieved simply by agreeing on some common definitions and formats.<sup>1</sup> Moreover, to the extent that differences in national laws reflect real differences in countries' views on how their premerger notification system should run, complete harmonisation can occur only when and if the underlying policy differences are resolved.

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<sup>1</sup> Appendix 6 of the 1994 Whish/Wood Report contains descriptions of the merger control procedures of then-OECD Member countries, including summaries of their notification forms.

6. The differences between the United States and the European Community are illustrative in this regard. The United States has relatively low size thresholds defining transactions that must be notified. Thus, a relatively large number of mergers are reported each year in the US. The thresholds in the EC, on the other hand, are much higher (Member States, of course, also have merger control laws), resulting in many fewer notifications to the Commission than to the US authorities. Thus, more than 3,700 mergers were notified in the US in the most recent year, while less than 200 were notified to the European Commission.

7. These differences in notification thresholds are reflected in the countries' respective notification forms. The US employs a two-step process. Relatively little information is reported initially, sufficient only to alert the competition agencies of possible competitive problems. A "second request" for additional information is issued in those relatively few instances (about 3 percent of all notified transactions in 1997) in which possible anticompetitive effects are identified and not resolved during the initial period. The EC, on the other hand, employs a "one-step" notification process; its notification form CO requires a much greater amount of information from the notifying parties, although procedures exist for waivers of unnecessary requirements on a case-by-case basis. The US Hart-Scott-Rodino notification form requires the parties to provide uniform, objective information to facilitate efficient review of the greater number of transactions that are notified. The EC's Form CO, on the other hand, specifies information on a more subjective basis, permitting the parties somewhat greater latitude in interpreting the form's requirements.

8. There are other differences in national merger notification laws that influence the content of their notification forms. In some countries, including Australia, France, Spain and the United Kingdom, notification of some or all mergers is voluntary. This aspect tends to permit more flexibility in the notification forms of these countries. Further, each country's laws are unique to some extent as to the types of transactions that are subject to notification. In some countries, relatively objective criteria control the notification requirement, such as acquisition of a given percentage of voting shares or assets of a given value, while in others, more subjective criteria are operable, such as acquisition of a "decisive influence" over the affairs of an enterprise. Differences in these rules, together with others, such as variations in the treatment of joint ventures, may also be reflected in the notification forms of those countries.

9. Nevertheless, there are many more similarities than differences among national merger notification forms. The Competition Law and Policy Committee has undertaken a review of its Members' notification practices and has synthesised the common elements of notification forms in a "Framework for a Notification and Report Form for Concentrations," contained in the Appendix to this report. The Framework is structured as a typical notification form might be, although it does not closely resemble the form of any single country. It contains specifications (in italic type) calling for information of the kind that many countries currently require. Accompanying the specifications is explanatory text (in normal type). Recognising the differences that do exist among some forms, alternative provisions are provided where appropriate.

10. The Framework could be used in different ways. It is internally consistent and complete, and with the addition of a few definitions and instructions, its specifications could be adopted as written, if appropriate within a country's legal framework. Alternatively, countries might decide not to use all or any of the specifications as drafted, but the model could serve as a guide to the substantive content of relevant specifications.

11. The Committee believes that publication of this Framework could have two principal benefits. In the longer run, as countries adopt new or amended reporting forms, the Framework could promote harmonisation in notification forms. (This Report does not deal with the question of when it is appropriate for a country to institute merger notification procedures.) In the shorter run, to the extent that competition agencies have discretion to modify information requirements on a case-by-case basis, the Framework may assist them in this process, thereby enhancing efficiency in merger enforcement.

## APPENDIX

### FRAMEWORK FOR A NOTIFICATION AND REPORT FORM FOR CONCENTRATIONS

#### A. Identify the parties to the transaction.

The notification should identify the parties to the transaction clearly and precisely. In this regard, the person or persons actually making the notification (for convenience, the “Notifying Person”) may be only one entity within a larger group that should be considered as a single competitive entity (for convenience, the “Notifying Group”). The following specifications elicit information about the Notifying Person and the larger group of which it may be a part. (Throughout the document the name of the country to which the notification is made could be substituted for “Notified Country.”)

1. *State the name of the Notifying Person, its principal business address and the telephone and fax numbers and e-mail address (if available) at its principal business address.*
2. *State the name, business title, address, telephone and fax numbers and e-mail address (if available) of an individual located in the Notified Country who is authorised to receive communications on behalf of the Notifying Person regarding this notification and related proceedings.*
3. *State the name and principal business address of each person*
  - a. *directly or indirectly controlled by the Notifying Person;*
  - b. *which directly or indirectly controls the Notifying Person;*
  - c. *directly or indirectly controlled by a person referred to in b.*

*The persons referred to in a-c and the Notifying Person collectively are the “Notifying Group.” If available, provide a chart showing the relationships between the persons in the Notifying Group.*

The concept of “control,” of course, is a key element in the determination of a Notifying Group or similar concept. “Control” also has important jurisdictional implications in merger notification regimes, affecting the coverage of the notification rules and the parties and transactions that are subject to them. For these reasons every country carefully defines the concept in its notification rules. The definitions vary to some degree, but virtually all contain at least the following elements in substance:

- a. *Effective ownership of 50 per cent or more of the outstanding voting securities issued by a person; or*
- b. *having the power to appoint a majority of the board of directors, the supervisory board, the administrative board or bodies legally representing a person.*

Many countries also incorporate into the definition of control the following concept.

- c. the ability to exert decisive influence on the affairs of another person through the ability, for example, to impose or prevent the imposition of significant or fundamental business or operating policies or decisions.*

In place of a “decisive influence” component like *c.* above, a country might instead require identifying information about significant minority ownership interests held by any member of the Notifying Group in another entity, or by another entity in any member of the Notifying Group. Such provisions might read:

*1. For each person not within the Notifying Group which owns ten per cent [or other appropriate percentage] or more of the voting securities of any person within the Notifying Group, state:*

- a. that person’s name and principal business address;*
- b. the name and principal business address of the person within the Notifying Group in which the securities are held and the class of securities and the percentage held by that person.*

*2. For each person not within the Notifying Group in which any person within the Notifying Group owns ten per cent [or other appropriate percentage] or more of its voting securities, state:*

- a. that person’s name and principal business address;*
- b. the name of the person within the Notifying Group which owns the securities and the class of securities and the percentage held by the person within the Notifying Group.*

*Persons with total assets of less than [specify minimum amount] need not be separately identified.*

**B. Describe the transaction that is the subject of the Notification.**

Of obvious importance is information about the form of the transaction, the means by which it will be accomplished, the time frame within which it is to be accomplished and the business purpose of the transaction.

*1. Briefly describe the transaction that is the subject of this notification. Include:*

- a. the name and principal business address of each of the parties to the transaction, and the role of each party to the transaction, e.g., whether it is an acquiring person, an acquired person, or both;*
- b. the form of the transaction, including whether the transaction is to be a merger, an acquisition of voting securities, an acquisition of assets, a tender offer for voting securities, an acquisition of control by some other means, and/or a joint venture;*
- c. the consideration that will be received by each party;*
- d. the proposed or expected dates of any major events required to bring about the completion of the transaction, and the scheduled consummation date of the transaction;*
- e. the intended structure of ownership and control after completion of the transaction.*

2. *If the transaction is to be an acquisition of voting securities, for each class of securities to be acquired, state the percentage of shares that will be acquired and the percentage that will be held after the acquisition.*
  
3. *If the transaction is to be an acquisition of assets, describe all general classes of the assets to be acquired. Examples of general classes of assets are cash, securities, land, intellectual property, merchandising inventory, manufacturing plants (specify location and products produced) distribution facilities and retail stores.*
  
4. *If the transaction is to be a joint venture, state:*
  - a. *the name and principal business address of the joint venture;*
  
  - b. *the contributions that each person forming the joint venture has agreed to make, including a description and the value thereof, and the consideration that each contributing person will receive for its contribution;*
  
  - c. *a general description of the business in which the joint venture will engage, including the location of its principal assets, its principal types of products or activities and the geographic areas in which it will do business;*
  
  - d. *the duration of the joint venture.*
  
5. *Describe the business purpose or purposes of the transaction.*

For purposes of co-operation among countries that may be reviewing a single transaction it is useful to learn the identity of all countries in which the transaction has been or is to be notified.

6. *Identify each country or jurisdiction other than the Notified Country in which a notification of the transaction that is the subject of this notification has been or, to the best of the Notifying Person's knowledge, will be filed.*

### **C. Describe the operations of the parties in the Notified Country**

The notification should provide essential information about the operations of the parties in the notified country, for the purpose of permitting at least an initial assessment of possible competitive effects of the transaction. There are conflicting policies that affect this part of the notification, which have caused countries to approach the problem in different ways. Competition agencies require sufficient information to make an informed, albeit in many countries preliminary, judgement about possible anticompetitive effects from the transaction, but they do not wish to require too much material to be produced, in order to minimise burdens both on the parties in assembling and reporting information and on the agency in reviewing it. Likewise they wish to acquire information that is reliable and objective, but also that is useful in competition analysis and relevant to the transaction at hand.

Many countries require the parties to describe their operations generally in their notifications and to report turnover in relevant business categories for the most recent year or few years. In these systems the business classifications in which the information is reported are for the most part left to the

discretion of the parties. This system has the advantages of permitting the parties to use information that already exists, thus minimising burden, and of producing information that directly applies to the parties and their merger transaction and that is therefore directly relevant to the competition analysis that the agency must conduct. A drawback to this system is its relative subjectivity, resulting in inconsistency of information across enterprises, possibly including the merging parties, thus potentially masking horizontal or vertical aspects of the transaction. A means of introducing some consistency to such a system is to require operating information to be reported according to a defined concept, here called "line of business."

*Line of Business is a category or classification of business operations as employed by a person in the regular course of business for accounting or reporting purposes.*

The following specifications employ this methodology.

1. *Describe the world-wide operations of the Notifying Group and state the world-wide turnover of the Notifying Group in the most recent year. Identify those countries from which at least 10 per cent of the world-wide turnover was derived in the most recent year and state the total turnover for each such country.*
2. *Identify each line of business in which the Notifying Group operated (assets in, sales in or into and/or shipments in or into the Notified Country) in the most recent year in the Notified Country, and state the turnover derived in each such line of business in the Notified Country in the most recent year. Describe the geographic region or regions within the Notified Country in which the Notifying Group operates each line of business, if smaller than the Notified Country.*

Instead of a system employing the accounting classifications of the notifying parties, business activity could be reported according to a standard classification system, thus ensuring consistency across all transactions and all notifying parties. One such method, employed in the United States, is to require turnover to be reported according to "Standard Industrial Classifications (SICs)," which are employed nationally for purposes of statistical reporting of business activity. Almost all countries use some form of SIC system, and the classifications are similar in most countries, although they are not identical. An advantage of employing SICs in a merger notification regime, as noted above, is the objectivity and consistency of the system, which facilitates comparisons of the operations of the merging parties. Because aggregate data are published for SIC classifications, this system may offer the competition authority an initial glimpse of the structure of the relevant sector, if not of an actual market. A drawback to the system is that SICs usually do not correspond to relevant markets for the purpose of competition analysis.

The following specification requires the reporting of turnover according to SICs.

*State the turnover of the Filing Group derived from operations (assets in, sales in or into and/or shipments in or into the Notified Country) in the most recent year in the Notified Country according to the following Standard Industrial Classification system: \_\_\_\_\_.*

**D. Identify and describe markets in which the transaction could have horizontal or vertical effects.**

In countries whose systems require the submission in the initial notification of only enough information to permit the competition authority to identify potentially harmful transactions, it could be



sufficient to require only a description of the operations of the parties as in part C. above, along with a few reports and documents from the parties' files, as discussed further in part E. below. From this information, together with that which is readily available from other sources, the competition agency will identify possible anticompetitive effects that would be the subject of further inquiry. Other countries require the parties to submit preliminary information about competitive effects. These countries employ some concept of "affected markets," which is used to define those situations about which more information must be provided. The following definitions could be used to define such markets.

*A Market is a collection of goods and/or services considered by buyers as reasonably interchangeable or substitutable and a geographic area in which are located sellers considered by buyers as reasonably interchangeable or substitutable.*

*A Horizontal Relationship exists when two or more persons both operate as sellers or both operate as buyers in the same market.*

*A Vertical Relationship exists when a person operates in a product market that is immediately upstream or downstream of a product market in which another person operates, such that the two persons are in an actual or potential buyer-seller relationship.*

The following specifications require information about horizontal and vertical relationships and the markets, as determined by the parties, in which they occur. Again, a conflict exists between the desire for information sufficient to assist in making a preliminary judgement about a transaction and the need to minimise reporting and reviewing burdens. Therefore, countries may decide not to seek all of the following types of information in the initial notification in the interest of minimising burdens.

*1. State whether, to the knowledge or belief of the Notifying Person, two or more parties to the transaction (in different Notifying Groups) were in a horizontal relationship in a market including any part of the Notified Country in the most recent year (or in the case of a joint venture, will be in a horizontal relationship). If the answer is in the affirmative, state for each horizontal relationship:*

- a. the market or markets in which the horizontal relationship exists;*
- b. estimates of the total turnover in each such market and the market shares of each party to the transaction, and the identity and estimated market share of each other person whose estimated market share is 10% or more; and*
- c. if both parties are sellers in the market, the identity of the five largest customers of each party in the market; if both parties are buyers in the market, the identity of the five largest suppliers of each party in the market.*

*Explain the bases for your responses to this item and the sources of information used in your responses.*

*2. State whether, to the knowledge or belief of the Notifying Person, two or more parties to the transaction (in different Notifying Groups) were in a vertical relationship in a market including any part of the Notified Country in the most recent year (or in the case of a joint venture, will be in a vertical relationship). If the answer is in the affirmative, state for each vertical relationship the market or markets in which the vertical relationship exists, the estimated total turnover in each such market and the turnover of the selling party and the purchases of the buying party in that market in the most recent year.*

*Explain the bases for your responses to this item and the sources of information used in your responses.*

**E. Submit the following documents.**

Almost all countries require the submission of a few, basic documents relating to the transaction and the operations of the parties, as in the following specifications.

1. *Submit the final or most recent versions of all documents constituting the transaction agreement.*
2. *Submit annual reports for the most recent two years and the following reports [specified by each country according to its national laws and customs relating to reporting of business activity].*

As in part **D.** above, some countries may require the submission of additional documentary material relating to the competitive effects of the transaction. Again, the goal of minimising burdens is important.

*All analyses, reports, studies and surveys submitted to or prepared by or for any member(s) of the board of directors, the supervisory board, or the shareholders' meeting, for the purpose of assessing or analysing the transaction with respect to competitive conditions, competitors (actual or potential), markets or market conditions in any part of the Notified Country or in an area including the Notified Country.*

**F. CONFIDENTIALITY**

National laws strictly protect the confidentiality of information submitted in merger notifications, making it difficult for competition agencies to co-operate meaningfully when two or more are investigating the same transaction. It may in fact benefit the merging parties to facilitate such co-operation, however, thereby promoting consistent and expeditious review of their transaction in different countries. The notification form could include a form by which the parties could voluntarily waive confidentiality restrictions if it is in their interest to do so, assuming the laws of the country permit it.

*The Notifying Person:*

\_\_\_\_\_ *authorises officials of the Notified Country to disclose the information contained in this notification to the competition authority of each country identified in response to [ the specification requiring identification of all countries in which notification has been or will be filed, in this case item B.6].*

\_\_\_\_\_ *authorises officials of the Notified Country to disclose the information contained in this notification to the competition authorities of the following countries only:*

*(Signed)* \_\_\_\_\_