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OECD Global Forum on Competition

INTERNATIONAL CO-OPERATION IN MERGERS

SUMMARY OF RESPONSES TO QUESTIONNAIRE TO INVITEES AND SUGGESTED ISSUES FOR DISCUSSION

-- Note by the Secretariat, Session IV --

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**INTERNATIONAL CO-OPERATION IN MERGERS
SUMMARY OF RESPONSES TO QUESTIONNAIRE TO INVITEES
AND SUGGESTED ISSUES FOR DISCUSSION**

1. This note will summarise the responses to a questionnaire issued to invitee and observer jurisdictions on international co-operation in merger and cartel investigations, and will then offer a brief analysis of the responses relating to mergers and suggestions for discussion of this topic. The questionnaire is attached as an annex to this note.

The questionnaire

2. The questionnaire was in three parts. The first part requested

- copies of all international co-operation agreements to which the respondent jurisdiction was a party; and
- a description of the respondent's laws or regulations that relate or affect the competition agency's ability to exchange information or to co-operate with another competition agency.

3. The second part contained the same questions that were asked of Member countries in a separate questionnaire on co-operation in cartel investigations. Those responses are described in the note for item V. of the agenda for the Global Forum, CCNM/GF/COMP(2002)3. The third part of the questionnaire related to international co-operation in merger investigations. It requested the following information, for the period 1 January 2000 to the present:

- the identification of each merger reviewed by the respondent that was, to the knowledge of the respondent, also reviewed by the competition agency of another country;
- information about each merger investigation or proceeding in which the responding competition agency communicated with a foreign competition agency, including: the identity of the merging parties and the foreign agency with which there was communication, a description of the communications, whether the merging parties agreed to a waiver permitting the exchange of confidential information, and the effect of the communications on the respondent's investigation or proceeding;
- identification and description of any merger investigation or proceeding in which the responding agency sought the either the assistance of a foreign competition agency or a confidentiality waiver from the parties; and
- identification of merger investigations or proceedings in which co-operation would have been beneficial but it was not undertaken because the agency knew that it was not possible.

Description of responses

4. Twelve observer and invitee jurisdictions responded to the questionnaire: Brazil, Bulgaria, Chile, Estonia, Israel, Kenya, Indonesia, Lithuania, Romania, Russian Federation, Chinese Taipei, and Tunisia.

International co-operation agreements

5. Several observer and invitee jurisdictions are parties to one or more international co-operation agreements. Brazil has agreements with the Russian Federation and the United States. Bulgaria has signed co-operation agreements with Macedonia, Romania and the Russian Federation. Chile recently entered into an agreement with Canada. Israel and the United States are parties to an agreement. Lithuania is a party to bilateral agreements with Estonia, Latvia, Poland and the Ukraine. Romania reported that it has co-operation agreements with Belarus, Bulgaria, the Czech Republic, Georgia and the Russian Federation. The Russian Federation reported that it has bilateral agreements with Finland, Korea, Italy, France, Slovak Republic, Romania, the Czech Republic and Hungary. It also noted that within the framework of the Commonwealth of Independent States there exists a treaty on international co-operation in competition enforcement. Chinese Taipei has agreements with Australia and New Zealand.

Laws that affect ability to exchange information or co-operate

6. Not all jurisdictions responded to this question in the same way. Many did not discuss how their laws that restrict the use of confidential information affect their ability to co-operate with foreign competition agencies. Thus, Brazil stated that “Brazilian antitrust law does not impose any significant restriction on our ability to co-operate.” Bulgaria listed its Europe Agreement with the European Communities and implementing rules. Chile stated that its agency, the FNE, has the power to sign agreements and make other commitments with foreign agencies regarding international co-operation. The FNE can designate specific information as confidential, but in general its investigations are public and the parties have full access to them unless they are declared reserved, in which case certain notifications and authorisations are required.

7. Israel reported that its competition agency, the IAA, is considered to have “broad authority to exchange information and co-operate with foreign competition authorities to the extent deemed necessary for carrying out the IAA’s statutory tasks.” It can enter into bilateral co-operation agreements like that with the United States. Interestingly, Israel’s International Legal Assistance Law provides for extensive co-operation with other states and organisations in both civil and criminal matters, and does not require the foreign entity to be a party to a specific co-operation treaty. The areas of co-operation that are permitted include service of documents, collection of evidence, searches and seizures, investigative activities, transfer of information, verification of documents, confiscation of property and other legal actions.

8. Kenya’s competition agency cannot itself enter into a co-operation agreement. Only the Permanent Secretary of the Ministry of Finance and Planning can do so. Chinese Taipei provided excerpts from several of its laws – the Criminal Code, the Business Secrets Law, the Administrative Procedure Law and the Fair Trade Law – which together impose strict prohibitions against unauthorised disclosure of business or professional secrets or other confidential information relating to administrative or public affairs.

Identification of mergers also reviewed by another competition agency

9. Not all jurisdictions could respond to this question with specific answers, as competition agencies are not always aware that a given transaction may be subject to review elsewhere. Of the responding countries, seven reported that they had reviewed one or more mergers within the relevant period (2000 and 2001) that to their knowledge were also reviewed by other jurisdictions: Brazil, Bulgaria, Chile, Israel, Lithuania, Chinese Taipei, and Tunisia. Some jurisdictions reported several such mergers, notably Bulgaria (9), Israel (20) and Chinese Taipei (9). Lithuania reported five such transactions, Chile three and Tunisia two. Included among the mergers listed in these responses were some well-known, multi-jurisdictional mergers such as GE/Honeywell, Citicorp/Traveller Group, Chevron/Texaco, Exxon/Mobil, Glaxo Wellcome/Smith Kline Beecham, Nestle/Ralston Purina, Coca-Cola/Cadbury Schweppes, Swissair/Sabena, El Fi SA/Moulinex, Dow Chemical/Union Carbide and Philip Morris/Nabisco.

Co-operation in merger investigations

10. Five jurisdictions reported that they had engaged in communications with another competition agency about a merger, but none identified more than two such transactions. Brazil replied generally to the question, stating that it had had useful exchanges with other countries regarding market definition, competitive impact and remedies. Israel reported that it had engaged in informal communications with both the U.S. and the EC regarding the Dow Chemical/Union Carbide transaction, which all three jurisdictions were investigating. The exchanges were of a general nature, between staff employees, relating to policy considerations and potential competitive effects. The exchanges proved useful to the IAA.

11. Lithuania described co-operation in two cases. One involved the Carlsberg/Orkla beer merger, which affected several markets, including Denmark, Finland, Norway, Sweden and others, in addition to Lithuania. The Lithuanian Competition Council had communications with the Swedish competition authority, in which general information regarding market definition and remedy was exchanged. Confidentiality restrictions limited the exchanges, however. The second case involved the SEB/FSB bank merger in Sweden, which was reviewed by DGCOMP. The merger, which was ultimately abandoned by the parties, had potential anticompetitive effects in Lithuania and Estonia, as well as Sweden. The Lithuanian Competition Council consulted with both Sweden and DGCOMP in the period before the merger was abandoned.

12. Romania described an interesting case involving a merger of two Romanian cement companies, which were owned, respectively, by a Hungarian and a German company. The Romanian Competition Council engaged in discussions with the Hungarian Office for the Protection of Competition regarding the cement market in Hungary, which proved useful to the Romanian agency in its case, in which it imposed certain conditions upon the acquiring company. The Russian Federation provided the only description of attempted co-operation that was denied. The Rostov Territorial Office of the Ministry for Antimonopoly Policy was reviewing a merger in the metals sector, and sought information from the Donetsk Regional Office of the Ukrainian Antimonopoly Committee regarding holdings of the stock in one of the parties by Ukrainian interests. Ukraine denied the request, stating that the requested information was confidential under the laws of that country and could not be disclosed.

Co-operation not attempted

13. Competition authorities were asked to describe instances in which a merger investigation would have benefited from international co-operation but it was not attempted because the authority knew that it

would not be granted, and to assess the significance to the investigation of the absence of the co-operation. No jurisdiction responded specifically to this question.

Analysis and suggested topics for discussion

14. It would be useful first to review the lessons learned from the roundtable discussion on international co-operation in merger cases held in Working Party No. 3 on 29 May 2001. That roundtable disclosed that among Member jurisdictions there is a growing practice of exchanging information and informal discussions among national competition agencies on mergers that are under review in more than one jurisdiction. (A compilation of the documents resulting from that roundtable discussion was provided for the October meeting of the Global Forum. See CCNM/GF/COMP/WD(2001)1). Competition officials are also more frequently consulting one another on general issues that arise in the context of merger investigations. For example, an agency conducting an investigation of a merger in a given sector may informally ask its counterpart in another jurisdiction about its experiences in investigations and cases in that sector.

15. The discussion disclosed that the most productive way to co-operate in merger investigations is on a frequent, informal basis, including direct communications between the case handlers as well as between their supervisors. This method of co-operation requires that a level of trust and confidence exist between the co-operating agencies. It takes time and experience to build such a relationship. Thus, co-operation is not universal among Member jurisdictions. It tends to occur most frequently between jurisdictions that have certain things in common: geographic proximity (but this is not always true), a strong trading relationship, a history of having been affected by the same mergers, and an existing competition co-operation agreement. Examples of ongoing, strong co-operative relationships are: Canada – U.S., European Commission – U.S., Nordic countries, Australia – New Zealand, and among various EU Member States.

16. Meaningful co-operation in merger investigations is often dependent upon another factor: the willingness of the merging parties to grant waivers of confidentiality protections, permitting enforcement officials to exchange confidential information and to engage in discussions and analysis of such information. Parties tend to grant waivers permitting disclosure only to jurisdictions that have a reputation for sound and fair merger control and for protection of confidential information. Thus, jurisdictions new to merger control that have not acquired such a reputation are less likely to benefit from co-operation with other competition agencies.

17. The questionnaire responses from observers and invitees bear out the proposition that jurisdictions world-wide are at different places in their development of competition policy. Some, of course, do not yet have a competition law; in others a competition law was only recently enacted. Some jurisdictions are heavily involved in merger control; others, especially those in which the competition law is new, do little or none of it. The responses show that virtually all observer and invitee jurisdictions that are active in competition policy have entered into co-operation agreements with one or more other jurisdictions. Indeed, within this set of jurisdictions the number of such agreements is comparable to that which exists among Member jurisdictions. Like Member jurisdictions, observers and invitees tend to enter into agreements with jurisdictions that are geographically close and/or that are close trading partners. The responses relating to confidentiality protections were not sufficient to permit generalisations about such laws in observer and invitee countries. Assuming that most countries do have adequate protections for such information, it seems that the framework is in place for enhanced international co-operation involving both Members and those observers/invitees whose competition policy is relatively more developed.

18. The questionnaire responses indicate, however, that observers and invitees tend to engage in international co-operation in merger investigations and cases infrequently. A majority of the respondents reported that they had reviewed one or more mergers that to their knowledge were also reviewed by other jurisdictions. A few countries listed several such transactions that occurred within the relevant two year period, but others listed only a few. Only five countries, however, reported that they had engaged in any communications with another competition agency about a merger, and none identified more than two such transactions.

19. The questionnaire responses were not helpful on the issue of whether the invitee jurisdictions would have liked to have engaged in more co-operation. Unquestionably, in some cases co-operation was not considered necessary or desirable. In others, however, observers and invitees might have welcomed it, had it been possible. It would be useful, therefore, to discuss the extent to which jurisdictions – Members, observers and invitees – could benefit from enhanced co-operation with one another in merger investigations, and the means for bringing that co-operation about.

- What types of co-operation in merger investigations and cases have been most useful for observer and invitee jurisdictions. Have they, like their counterparts in Member jurisdictions, developed ongoing, co-operative relationships with specific jurisdictions, and if so, what are the characteristics of these relationships?
- Can observers and invitees benefit from more frequent co-operation with other jurisdictions in merger investigations, and can Members profit from enhanced co-operation with their less experienced counterparts? If so, what are the obstacles to doing so, and how can they be overcome?
- If co-operation between less experienced and more experienced jurisdictions at the most intensive level is not possible, for example by exchanging confidential information (as permitted by the parties through waivers) or by discussing deliberative process information, what levels of co-operation are practical and useful?
- How can the parties to a merger be encouraged to grant waivers for disclosure to smaller, less experienced jurisdictions if such a waiver would be useful?

ANNEX
QUESTIONNAIRE TO INVITEES ON INTERNATIONAL CO-OPERATION
IN CARTEL AND MERGER INVESTIGATIONS

This questionnaire covers the period from 1 January 2000 to the present.

If you are unable to provide all of the information requested, either because it would impose too great a burden or because of confidentiality constraints, please provide as much as reasonably possible.

1. Provide a copy of each formal co-operation agreement between your country or your competition agency and a foreign country or competition agency relating to competition investigations or cases.
2. Describe your country's laws or regulations that relate to or affect your agency's ability to exchange information or co-operate with a foreign competition agency.

Cartels

3. If your agency issued one or more formal requests to a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

1. the number of such requests;
2. the requested country or countries;
3. descriptions of the requests, such as the type of information or assistance required;
4. the number of requests that were granted, and for those that were not, the reason(s) given, if any, by the requested country for the refusal; and
5. for the requests that were granted, your assessment of the usefulness and importance of the information or assistance received, and for those that were not granted, your assessment of the impact of the refusal on the investigation or case.

4. If your agency received one or more formal requests from a foreign competition agency for information or assistance in an investigation or case involving a hard core cartel, please provide the following information about such requests (you need not identify specific cases):

- a. the number of such requests;
- b. the requesting country or countries;
- c. descriptions of the requests, such as the type of information or assistance required;
- d. the number of requests that were granted, and for those that were not, the reason(s) for the refusal.

5. Please describe any other instances of co-operation with a foreign competition agency in a hard core cartel investigation or case not described above, such as meetings, telephone or email communications, including, if possible, the co-operating country or countries, the nature of the co-operation and the importance or significance of the co-operation to your agency.

6. State the number of instances in which a hard core cartel investigation or case could have benefited from information or co-operation from a foreign competition agency but your agency did not request such assistance because you knew that it could not or would not be granted. Describe the type of assistance that would have been useful and the impact of its unavailability on your enforcement effort.

Mergers

7. Identify each merger that your agency reviewed that, to your knowledge, was also reviewed by the competition agency of another country.

8. For each investigation or proceeding involving a merger in which there was communication between your competition agency and the competition agency of another country during the course of the investigation or proceeding, please state or describe:

- a. the identity of the merging parties;
- b. the foreign competition agency or agencies with whom there was communication;
- c. the nature of the communications, including the means of communication, the parties to the communications, the subject matter of the communications and the type of information exchanged, if any;
- d. whether the merging parties agreed to a waiver of confidentiality restraints, permitting the exchange of information directly between your agency and a foreign agency, and if there was such a waiver, its terms and the type of information that was exchanged;
- e. the effect of the communications on your investigation or proceeding.

9. Describe any instances in a merger case or investigation

- a. in which your agency sought the assistance of a foreign competition agency but it was denied;
- b. in which your agency sought a waiver of confidentiality restraint from one or more of the merging parties but it was denied.

10. Describe any investigation or proceeding involving a merger that would have benefited from co-operation with a foreign competition agency but your agency did not pursue such co-operation because you knew that it would not be possible. Describe the type of co-operation that would have been useful and the impact of its unavailability on your enforcement effort.