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OECD Global Forum on Competition

MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION

-- Note by the Secretariat --

This document provides background information and suggested issues for the discussion concerning mergers that will take place at the Global Forum on Competition on 18 October 2001.

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English - Or. English

OECD GLOBAL FORUM ON COMPETITION

MERGER ENFORCEMENT AND INTERNATIONAL CO-OPERATION (Note by the Secretariat)

Introduction

1. The OECD Global Forum on Competition will discuss merger law enforcement and international co-operation on 18 October 2001. Although the discussion is intended to focus primarily on co-operation in transborder merger investigations, this session will also contain some discussion of issues involved in establishing a merger review programme. Submissions specifically for this session will be put on OLIS and on the Forum website as they are received.

2. The Forum's discussion of international co-operation in merger cases is intended to build on a "roundtable" discussion of the same topic that was held on 29 May 2001 in Working Party No. 3. For Members and Forum Invitees, this note provides a very brief summary of the previous documentation and identifies a number of issues that may not have been fully explored in May or merit additional discussion in the context of the Forum. As background for Invitees, the Secretariat is drafting a Working Document containing relevant documentation relating to that meeting, including (1) a Secretariat note that presents the central issues, (2) six submissions by Members, and (3) an aide memoire that summarises the discussion.

The previous roundtable

3. The issues paper for the May meeting raises several topics relevant to international co-operation in merger investigations and cases, including the types of transactions and issues that benefit from co-operation, the methodology of merger co-operation, means of engaging the merging parties in the co-operation process and issues relating to the development of specific bilateral co-operative relationships.

4. The paper notes that "horizontal" mergers, or those that involve parties that compete against one another in a given market, are most commonly the subject of investigations by competition agencies, in both the domestic and international contexts. Parties can co-operate on almost every relevant issue in a merger investigation, but one that has seen especially fruitful co-operation in recent cases is the remedy phase, in which the national competition agencies co-ordinate their decisions on divestitures to ensure consistent results across countries.

5. Co-operation between competition agencies usually occurs informally. It is important to begin the process as early as possible in the course of the investigation. Rules governing the protection of confidential information forbid the exchange of much non-public information developed by national competition agencies in the course of their investigations, but co-operating agencies can and do discuss "deliberative process" information, relating to their analysis and conclusions about certain issues in the case, such as market definition.

6. When more than one competition agency investigates a merger there is a convergence of interests of the merging parties and the agencies in completing the investigation quickly and with consistent results. Thus, the merging parties are often willing to consent to the exchange of otherwise confidential information by co-operating agencies by granting waivers of confidentiality restrictions. Obtaining such waivers can be critical to the success of the co-operative effort. Merging parties sometimes express misgivings about granting waivers, but the record of national agencies in protecting against unauthorised

disclosure of confidential information has been excellent to date. Different types of waivers are granted by the parties, depending on the circumstances of each case.

7. Finally, the issues paper discusses the different types of co-operative relationships that have developed in recent years. The most notable and most successful bilateral co-operative relationship is that between the European Commission and the United States. There are several examples of successful co-operation between other countries, however, often on an ad-hoc, case-by-case basis. In a potentially important development, the three Nordic countries of Denmark, Iceland and Norway have recently entered into a formal agreement that provides for the exchange of confidential information between the competition agencies of those countries. This agreement, which is supported by underlying laws of the three countries that permit such exchanges, could substantially enhance the ability of the signatory countries to co-operate meaningfully in merger investigations.

8. The country submissions for the roundtable discussion discuss specific cases in which there was co-operation with another agency or agencies, describing the means by which the co-operation was accomplished. The papers describe specific bilateral co-operative relationships that have been created in recent years. They list factors that contribute to the success of co-operation in merger investigations, the lessons learned from past cases, and some of them provide suggestions for the future enhancement of international co-operation in merger cases.

9. The aide memoire is a detailed description of the roundtable discussion. Several themes were developed in the discussions. Timing is important to successful international co-operation in merger control. Co-operating competition agencies should begin their discussions as early as possible in the process. While the exchange of confidential information is sometimes important, there can be meaningful co-operation without it, as countries can exchange and discuss publicly available information as well as their theories and conclusions, for example about market definition and remedies. Finally, the roundtable established that while the structure of co-operation – bilateral and multilateral international agreements – can be useful in establishing a framework for co-operation, far more important is the development of a productive working relationship between competition agencies, which is nurtured by frequent, informal contacts between professionals at all levels in the agencies.

Possible issues for further discussion

10. The following issues are suggested for discussion during the Forum's consideration of co-operation in transborder mergers.

- *International co-operative relationships tend to develop over time, between countries that most often are jointly affected by the same mergers. The most active international relationships among OECD Member countries include: EC – U.S., Nordic countries, Canada – U.S, Australia – New Zealand, and among various EU Member States. What factors contribute to the development of such relationships, e.g., size of economy, geographic proximity, significant trade relationships? What other working relationships have been developed between economies worldwide?*
- *Almost all of the cases discussed in the May roundtable involved co-operation between two, or at most a few, countries. Some mergers can affect many countries, however. A few of these have been investigated by many competition agencies simultaneously or closely in time. Coca-Cola/Cadbury Schweppes is a recent and perhaps the best example of such a transaction. Have there been others? What are special issues relating to these transactions that affect co-operation? How can simultaneous co-operation among more than a few countries be enhanced?*

- *The May roundtable established that the willing participation of the merging parties is important to the success of the co-operative effort, most often in the form of their granting waivers of confidentiality protections. The private sector expresses concerns about granting such waivers in situations where the parties are uncertain about the ability of the receiving country to protect confidential information. What has been the experience when a waiver was requested by or on behalf of a developing country or one that has only recently begun exercising merger control? What can be done to enhance the parties' confidence that the information will be protected in these situations?*
- *There can be co-operation when only one country has competitive concerns about a merger, for example when the investigating country requests the assistance of another country in obtaining evidence or in analysing a case or issue. Such assistance can be especially useful to developing countries or countries new to merger control. What experiences have there been in this type of co-operation? What can be done to enhance it in the future?*

Documentation reproduced from prior roundtable

12. The following documents relating to the prior roundtable will be reproduced in a Working Document [CCNM/GF/COMP/WD(2001)1]:

- Issues paper by the Secretariat DAFFE/CLP/WP3(2001)5
- Country submissions for the discussion
 - Canada DAFFE/CLP/WP3/WD(2001)20
 - Czech Republic DAFFE/CLP/WP3/WD(2001)21
 - European Commission DAFFE/CLP/WP3/WD(2001)25
 - Germany DAFFE/CLP/WP3/WD(2001)19
 - Norway DAFFE/CLP/WP3/WD(2001)22
 - United States DAFFE/CLP/WP3/WD(2001)23
- Aide Memoire of the discussion DAFFE/CLP/WP3/M(2001)2/ANN2/REV1