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

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN CROSS-BORDER MERGER CASES

-- Note by the Secretariat --

29 October 2013

The attached document is submitted to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 29 October 2013.

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1. Introduction

1. “*Cross-border merger remedy*” is a situation where a competition authority is seeking a remedy in a merger case, but the merging parties and/or their assets are located abroad. These types of remedies require the sale of assets or certain conduct of the merged entity in another jurisdiction from the one that is deciding about the merger. In such cases, competition authorities may face considerable challenges in different steps of the remedy process:

- First, it is possible that two or more competition authorities reviewing the same merger reach conflicting conclusions concerning the need for remedies, especially if the “centre of gravity/nexus” of the merger¹ is located in a jurisdiction which has decided not to take action against the merger.
- Second, it is possible that two competition authorities could identify competitive concerns with respect to different aspects of the same merger, in which case the remedies deemed necessary by one authority might not match the remedies sought by the other authority, and they may be inconsistent with one another.
- Finally, even if the competition authorities involved agree on the competitive concerns raised by the merger, they may have different views as to how to address these concerns by way of a remedy.

2. In his letter of 26 July 2013 calling for country contributions (COMP/2013.133) the WP3 Chair suggested to focus the discussion on the monitoring and implementation of cross-border remedies, and on issues arising when such remedies may need to be revised. The issue of cross-border mergers has been discussed in several roundtables with respect to different aspects in recent years.²

2. Cooperation and coordination: benefits and challenges

3. Over the last years, merger enforcement has become increasingly more cross-border, and which remedial actions should be taken to counteract the anti-competitive effects of cross-border mergers is a key element of the decision-making process. Conflicts can arise at all stages of the remedy process; from the decision on which remedy to impose (e.g. an agency may consider that it has not the power to order and enforce a remedy involving assets outside its jurisdiction) to its monitoring for compliance (e.g. an agency may not have the legal tools to require the information it needs to monitor the implementation and compliance with the remedy if the information is located outside its jurisdiction). Conflicts can also arise if remedies are changed or reviewed after the transaction has been approved by all reviewing jurisdictions. In this case, the potential modification of remedies in one jurisdiction can result in inconsistencies with remedies applied in another jurisdiction, especially if there is no need to review the remedies previously agreed in this other jurisdiction.

¹ The centre of gravity of the transaction may be determined by reference to the nationality of the parties, location of productive assets, or preponderance of sales.

² See Merger Remedies in 2003 [DAF/COMP(2004)21], Cross-Border Remedies in Merger Cases in 2005 (documents are available only on OLIS), Cross-Border Merger Control: Challenges for Developing and Emerging Economies in 2011 [DAF/COMP/GF(2011)13], and Remedies in Merger Cases in 2011 [DAF/COMP(2011)13]. See also the 2012 OECD Competition Committee to the OECD Council on the 2005 Merger Review Recommendation [C(2013)72].

4. In cross-border merger enforcement, consultation and co-operation between competition authorities is crucial. Lack of cooperation and communication between enforcers who are reviewing the same transaction might lead businesses to restrict their merger activity to transactions that will be acceptable to all jurisdictions in which they are likely to be notified, potentially creating a chilling effect as pro-competitive and other efficient mergers are not proposed. Co-operation and co-ordination are also important in order to avoid strategic gaming by merging parties reaching a settlement with one authority and trying to use that commitment as leverage in settlement negotiations with other authorities. If the parties are aware that regular contacts between enforcers occur, it will be harder to play one authority against another.

5. Bilateral co-operation in these contexts brings a number of important benefits to both the competition authorities and the merging parties. The benefits to competition authorities are not limited exclusively to benefits in administrative terms, but in practice, translate into benefits also for consumers and for local markets. This is the case when co-operation enhances the prospects for effective design and implementation of a remedy in a particular case. Co-operation between competition authorities in the remedies phase is, therefore, of critical importance. This is especially so for the purposes of enhancing consistency between these authorities. International discussions at the OECD and elsewhere have considered different options³ for co-operation, most notably the idea of ‘work sharing arrangements’ between competition authorities.

6. Over the years, co-operation between competition authorities in merger investigations has increased significantly, due to the increasingly more common practice of merging parties granting waivers allowing for the reviewing authorities to share information (including confidential information) and discuss the merits of the case. The increased use of waivers has certainly helped agencies coordinating remedies in a cross-border context. When WP3 was dealing with Information Exchanges in International Cooperation in Merger Investigations in May 2003, it found that very few jurisdictions had had experience with waivers. Most of the jurisdictions had no experience at all with waivers and only the United States reported use of waivers to have been “common practice”. However by 2011, most OECD jurisdictions reported using waivers regularly.

Possible questions for discussion

(1) Please briefly describe a few important mergers your agency has reviewed in the last 5 years that involved cross-border remedies (e.g., remedies that include asset divestitures or conduct outside your jurisdiction, or involve a matter investigated by another authority).

³ The ICPAC Report in 2000 examined the possibility of work sharing arrangements in the remedies phase in great detail and concluded that employing these cooperative approaches more frequently could have significant benefits. It considered different scenarios in which these arrangements could be used: (i) joint negotiation, where each interested jurisdiction would identify its concerns regarding the likely anti-competitive effects of a proposed transaction, and separately implement jointly negotiated remedies; and (ii) designating one jurisdiction as “lead jurisdiction” which negotiates remedies with the merging parties that will address the concerns of the “lead jurisdiction” as well as other interested jurisdictions. The second case can include a situation in which the competitive concerns of all jurisdictions involved in the review are identical, but also a situation in which the “lead jurisdiction” seeks remedies that go beyond what it necessary to satisfy its own concerns in order to address competitive concerns of other cooperating jurisdictions. ICPAC was the International Competition Policy Advisory Committee to the US Attorney General and the Assistant Attorney General for Antitrust. It was formed in November 1997 to address the global antitrust problems of the 21st century and concluded its works in June 2000. The ICPAC recommendations and conclusions are included in a report published on 28 February 2000. The full report is available at <http://www.justice.gov/atr/icpac/finalreport.html>.

(2) Have you had any diverging views concerning the need for remedies with the jurisdiction that can be considered as the centre of gravity for the transaction?

(3) Please share your agency's experiences coordinating and cooperating with any other agencies in connection with these remedies, particularly with respect to:

- Whether waivers were obtained from parties, and if not, why;
- Coordination/cooperation mechanisms used if waivers were not available, and how well those mechanisms worked;
- Identifying or evaluating assets to be divested;
- Evaluating potential acquirers and market testing the proposed remedy;
- Designing behavioural remedies, if any: and
- Using or selecting divestiture/hold separate/monitoring trustees, including utilizing a common trustee reporting to both agencies.

3. Monitoring and implementation of cross-border remedies

7. After an appropriate remedy is designed, authorities must determine the best means of monitoring its implementation by parties. Trustees and third party stakeholders can be called upon to assist in ensuring compliance with merger remedies. Monitoring the implementation of remedies also differ according to the type of remedy. Merger remedies are generally classified as either *structural*, if they require the divestiture of an asset or licensing of intellectual property rights, or *behavioural* (or conduct), if they impose an obligation on the merged entity to engage in, or refrain from, a certain conduct.

8. For structural remedies, the use of hold separate arrangements and monitoring trustees, fix-it first remedies, upfront buyer requirements and crown jewel provisions has helped the timely implementation of the remedy. For behavioural remedies, which require an on-going monitoring effort, the use of arbitration clauses has proved useful in certain jurisdictions to alleviate the cost of monitoring the implementation. When a dispute on the implementation of the remedy arises, the arbitration panel is empowered to grant the aggrieved party private law remedies, while the authority maintains the power to impose sanctions such as fines. The possibility to resort to arbitration offers all potential beneficiaries an incentive to ensure the accurate implementation of the remedies by the merged entity. This could potentially be more effective than any monitoring activity by the competition authority.

9. Cross-border structural remedies are difficult to enforce (e.g. if assets are outside the jurisdiction, the national competition authority may not have the power to enforce the remedy in case of non-compliance or partial compliance). On the other hand, for behavioural cross-border remedies, the challenge lies in the access to information to monitor the on-going compliance with the behavioural commitment; this may require assistance from the local jurisdiction who may not have an interest to do it (e.g. it did not impose the remedy, hence has no monitoring obligations).

Possible questions for discussion

(4) What challenges can arise in the design or implementation of cross-border remedies, and how have agencies, on their own or through cooperation or coordination with one or more agencies, overcome them?

(5) When it comes to implementation and monitoring, which type of remedy (structural or behavioural) is preferable in the case of cross-border mergers?

4. Revision of agreed remedies because of unforeseen circumstances or subsequent developments

10. It is possible that changes to the remedy might become necessary after the remedy has been agreed with the competition authority. When remedies are changed or reviewed after a cross-border merger has been approved by all reviewing jurisdictions, conflicts could arise. The potential modification of remedies in one jurisdiction could result in inconsistencies with remedies applied in another, especially if there is no need to review the remedies previously agreed in this other jurisdiction.

11. As a general principle, it is desirable for a competition authority as well as the parties to have some means of seeking the modification of a remedy either to reflect changes in circumstances or problems in the initial design of the remedy.⁴ The importance of such mechanisms increases with the duration of the remedy. If the merger regime of a country does not provide for tools to revise remedies after the merger decision is taken, the possibility to include a “review clause” in the remedy package can turn useful.

12. Review clauses in remedy packages allow agencies to extend the periods specified in the commitments for the implementation of the remedy in case unforeseen circumstances affect the successful implementation of the agreed remedy. They also allow the agency to waive or modify the undertakings in case an unexpected change in market circumstances requires it. The clauses can be relied upon by the merging parties if they can show good cause.⁵

13. Some agencies can review the remedy package by amending the original merger decision. In this case, however, the authority’s discretion on how to shape the revised remedy will be limited. Third parties opposing the decision must normally be consulted and the notifying parties will have the burden of proof to justify that circumstances have changed to such a degree that an amendment of the whole merger decision is required. Considering these difficulties, this option is rarely followed.

Possible questions for discussion

(6) Have you encountered situations where cross-border remedies had to be revised because of unforeseen circumstances or subsequent developments? How did you handle cooperation and coordination in these cases?

(7) In your agency’s view, are there any legal/practical obstacles that hinder your ability to review a remedy after a transaction is approved?

⁴ See the 2005 ICN report on Merger Remedies Review Project.

⁵ The European Commission Model Texts for Divestiture Commitments includes the following review clause:
 “34. *The Commission may, where appropriate, in response to a request from [X] showing good cause and accompanied by a report from the Monitoring Trustee:*
 (i) *Grant an extension of the time periods foreseen in the Commitments, or*
 (ii) *Waive, modify or substitute, in exceptional circumstances, one or more of the undertakings in these Commitments.*

Where [X] seeks an extension of a time period, it shall submit a request to the Commission no later than one month before the expiry of that period, showing good cause. Only in exceptional circumstances shall [X] be entitled to request an extension within the last month of any period.”