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Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMMITTEE ON COMPETITION LAW AND POLICY

Working Party No. 3 on International Co-operation

PROPOSALS FOR FURTHERS STUDY OF PROCEDURAL ISSUES INVOLVED IN THE REVIEW OF TRANSNATIONAL MERGERS.

Note by the Secretariat

The attached note is submitted FOR DISCUSSION at the next meeting of Working Party No. 3 to be held on 23 October 2000.

This new version includes a discussion of possible ways to consider harmonising merger rules.
PROPOSALS FOR FURTHER STUDY OF PROCEDURAL ISSUES INVOLVED IN THE REVIEW OF TRANSNATIONAL MERGERS

1. In the meeting of Working Party No. 3 on 8 June 2000 the delegates considered a background note prepared by the Secretariat [DAFFE/CLP/WP3(2000)5] that discussed several procedural issues that are common to the review by competition agencies of transnational mergers. The note contained suggestions for future work by the Working Party in this area. The Working Party expressed the greatest interest in studying Members’ practical experience in international co-operation on transnational mergers, possibly resulting in a report containing some “best practices” in the area. Although the Working Party decided not to pursue creating a more complete database on transnational mergers, the Secretariat was invited to expand on its suggestion that some standardisation of annual reports might be a low cost way of obtaining some more useful data about such mergers, and about Members’ merger review in general. These two topics are developed further below.

Practical experience in international co-operation on transnational mergers

2. In the past few years there have been noteworthy examples of effective co-operation between national competition agencies in merger control. Some have involved large mergers and large countries or jurisdictions, notably the U.S. and the EC, but there may have been less visible instances of co-operation as well. This might be a good time for a review of the experiences of competition agencies in such co-operation. The topic appears to be quite timely; the business press regularly reports on large mergers that are under review simultaneously in more than one country. Member countries have developed most of the experience in this area, and this Working Party and the Committee are in a unique position to explore the topic. Several issues could be developed:

• the frequency with which co-operation is occurring and in what types of transactions;
• the types of co-operation in which countries are engaging, e.g., joint investigation, information sharing, consultations on competitive analysis or on remedies;
• processes and techniques that work well in a co-operative environment and those that are less effective;
• means of enlisting the merging parties in the co-operation effort;
• practical impediments to effective co-operation;
• reasonable and practical measures that can be taken in the short run to enhance co-operation in a given case.

These issues all relate to practical aspects of international co-operation in merger control, not on structural or legal issues, such as national laws prohibiting disclosure of confidential information, which are already well documented.

3. One possibility for such a study is to work toward a formal report by the Committee on the topic, which would be targeted for completion in 2001. There could be three phases: 1) The Secretariat could develop a short questionnaire focusing on the topics enumerated above, or others identified by the delegates, the responses to which would be returned prior to the next meeting of the Working Party. 2) A roundtable discussion of the topic could be held at the next meeting on the basis of the questionnaire responses and notes prepared by delegates discussing their own experiences in this area. 3) The
questionnaire responses and roundtable could form the basis for a report, which would be drafted by the Secretariat before the spring meetings and completed in the fall.

4. Instead of deciding to provide questionnaire responses and work toward a formal CLP report, the Working Party could decide at this point simply to hold a roundtable discussion in February based on notes submitted by delegates. In that case, if delegates desire, delegates’ submissions and an executive summary of the discussion could be prepared and released in the usual manner.

5. In either case, of course, a roundtable discussion would be the central part of the exercise, and it would be important that country submissions discuss actual experiences in merger co-operation. It would be both useful and interesting for the discussions to include in-depth experiences in specific cases. The Whish-Wood Report was notable in that regard. It described some significant transnational mergers in detail and drew general conclusions from those specific experiences.

6. In order to fully develop any given case the co-operating countries could extend their co-operation to the roundtable itself, for example by agreeing that they will each report on the case, and perhaps co-ordinating their discussions of specific aspects of the co-operation. It would be especially interesting to learn about cases in which there were more than two countries involved. At the same time it is important that the discussions not focus exclusively on the more notorious mergers in which there was co-operation. It is well known that the U.S. and the EC are the leading players in this area, but there should be other, equally interesting but less well known examples involving other countries, such as among Nordic or Asia-Pacific countries. Indeed, the discussions should not exclude co-operation between Member and non-Member countries, nor need they be limited to instances of successful co-operation. Information about negative experiences would be highly instructive as well.

7. The contributions need not just be case-specific, however. Any of the above issues are also amenable to general discussions. There is no doubt that some countries have engaged in little or no international co-operation in merger control. It would be useful to explore the reasons why. It is equally clear that the larger countries and jurisdictions have taken the lead in this area, and it could be interesting to explore that issue, as well as the more general one of the role of smaller countries in international merger control. It could also be useful to review the general question of whether international co-operation in this area is as important as it is often assumed to be. How often does it happen, in what kind of cases, and is it likely to in the future?

8. One of the issues noted above is the involvement of the merging parties in the co-operative effort. Given the constraints on sharing confidential information, the voluntary participation of the parties in a joint review may be critical. Delegations could explore this subject in some detail, including how the parties can assist most meaningfully, and identification of the means of securing their co-operation. BIAC could be invited to this or other aspects of the discussions.

**Standardisation of country reports**

9. The business and competition policy communities have an ongoing interest in merger trends – the number, magnitude and characteristics of business mergers – and in the reaction of national competition agencies to these trends. It is widely believed, for example, that a “merger wave”, or “merger boom”, began in the latter part of the 1990s, and that a significant component of this phenomenon has been an increase in transnational mergers. It is difficult to quantify these trends, however. National competition agencies keep and report data relating to merger control in different, sometimes inconsistent ways.

10. The country reports that Member countries submit annually to the CLP could be an important resource in chronicling trends in competition enforcement, including merger control. The reports are
unique – an annual compilation of enforcement activity by the world’s most active competition agencies. They currently provide the basis for an article on recent developments in merger control prepared annually by the Secretariat for the *OECD Journal of Competition Law and Policy*.  

11. There are limitations to the reports for this purpose, however, principally related to inconsistencies in the amount and format of statistical information that they contain. The annual *Journal* articles, for example, sometimes extrapolate from anecdotal material in the reports. The anecdotes – descriptions of significant cases – are important, but it would seem that they could be supplemented by more complete and more consistent statistics from reporting countries. It could be possible improve this aspect of the reports by agreeing on a more structured format for reporting data on merger control activity. An important caveat would apply to any such effort, however: that it not result in any significant additional burdens on Member countries in preparing their reports. As much as possible, the goal should be to standardise the manner in which relevant data are reported, using data that countries are already creating. 

12. The following, provided for discussion, is one possible format for reporting merger control activity. The specifications are printed in italics and are followed by comments. It should be emphasised that the current practice of providing brief descriptions of noteworthy cases or enforcement actions is a highly valuable one and should continue.

*Provide all data on an annualised basis, specifying the relevant 12-month period.*

Comment: Countries submit their reports at two different times, spring and fall. This creates some inconsistency in the time periods to which the data apply, but there does not seem to be an easy way to eliminate it. At the very least, however, it would be helpful if all data were annualised.

1. *State the total number of mergers (“mergers” is meant to include “concentrations” or any other term that refers to transactions that are subject to your country’s merger control law) that were notified to your agency.* If your country does not employ merger notification, or if notification is voluntary, state to the extent possible the total number of mergers that your agency reviewed in any fashion.

Comment: This specification is designed to produce a “universe” of merger activity in a country. It is not complete, of course, as the notification laws of every country exclude some classes of mergers, usually smaller ones, but it would seem to be the best proxy for total merger activity, and almost certainly the most readily available to our delegates.

2. *State the number of mergers that were the subject of inquiry or investigation by your agency; that is, each situation in which your agency gathered information about the transaction in addition to reviewing the notification (if any) and publicly available information.*

Comment: The purpose of this specification is to identify transactions that raised some initial concern about their competitive effects, causing the agency to make additional inquiry.

3. *Specify the number of mergers reported in response to item 2 in which the principal competitive effect of concern was*

   a. horizontal 
   b. vertical 
   c. market extension 
   d. other 

Comment: Some mergers, of course, fit in more than one of the above categories, but it would seem to be most useful and easiest to classify them according to the most significant competitive

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effect of concern. Delegates may wish to discuss whether countries commonly generate such information internally, and if not, how difficult it would be to do so. They may also wish to discuss whether the above categories are the most useful or meaningful.

4. State the number of mergers that were the subject of an enforcement action or threatened enforcement action by your agency, according to the following categories:
   a. merger abandoned by the parties in the face of threatened or announced enforcement action;
   b. merger approved subject to a partial divestiture or remedial order;
   c. merger prohibited entirely by agency or court;
   d. after formal agency hearing or trial in court, merger approved in its entirety.
Comment: Again, delegates could discuss whether countries normally generate data in this fashion, and also whether the above categories are the most useful.

5. State, to the extent possible, the number of mergers reported in response to items 1 and 4, that had any of the following attributes:
   a. at least one of the merging parties was headquartered in a foreign country;
   b. Your agency notified the competition agency of another country of an investigation or other action, pursuant to the 1995 Council Recommendation;
   c. the merger, to your knowledge, was notified to another country;
   d. your agency engaged in any form of co-operation or information sharing with the competition agency of another country.
Comment: This specification obviously is designed to identify transnational mergers, both in the aggregate and those that were the subject of an enforcement action. Again, delegates could discuss issues of burden and general availability of data relating to this item.

13. There are, of course, additional possible specifications that would elucidate useful information about merger activity and enforcement trends. They would include data on size of mergers, measured by assets or turnover of the parties, and on economic sectors in which mergers take place. Such data may be more difficult to generate, however. Delegates could also discuss other types of data relating to mergers that are available and could be included in the reports. Information on the number of “second requests”, or “phase two investigations” – investigations that proceed to an advanced stage of information gathering and analysis – could be useful, though it is possible that not many countries generate such data.

14. It should be emphasised that adoption of this or any other reporting format would not make it mandatory for countries to adhere to it, and that if individual countries do not generate data relating to a particular specification they could simply omit a response, or in the alternative, provide such data as is responsive and readily available. Conversely, the adoption of any such format should not discourage countries from reporting additional information outside the format that is available and relevant.

**Harmonising national merger review procedures**

15 The Working Party indicated a reluctance to consider, with a view to the mid- or long-term, harmonising national merger review procedures, in terms that would reduce differences in review time frames and facilitate international co-operation where it is indicated. However, it invited the Secretariat to suggest specific ways in which the Working Party might be able to work in this area without taking on issues that cannot be resolved without legislative changes that seem unlikely. The Secretariat has not had any significant insights in this respect, but the following paragraphs, reprinted from the June note, may serve to remind delegates of several possible topics for consideration by the Working party.
All Member and observer countries employ some form of merger notification scheme, and in most, notification of a defined class of mergers is mandatory. Each country’s notification rules are different, however. In all countries in which notification is mandatory, the mergers that must be notified are defined at least in part by minimum size thresholds. These thresholds differ from country to country, however, and these differences can affect the notification of transnational mergers. Specifically, the rules of some countries define a minimum “nexus” to the country’s economy, usually in terms of turnover in the country or value of assets located in the country, that must exist in order to subject a transaction to the country’s notification requirements. In a minority of countries, however, the rules do not specifically define such a nexus; turnover thresholds, for example, are defined in terms of worldwide turnover of the merging firms, thus theoretically requiring the notification of mergers in which the merging firms do no business in the notified country.

Issues of timing can arise regarding mergers that are subject to notification or review by more than one country. Notification rules differ across countries as to when a merger must be notified. In some, particularly in those countries employing premerger notification, there is no mandatory date on or before which notification must be made; the parties are merely forbidden to consummate the transaction (a concept that itself is subject to different and complex rules) until after notification and review. They are free to decide when to notify and begin the review process. In other countries, particularly those employing *ex post* merger control, a mandatory notification date is imposed by the rules. The event that triggers the notification obligation, however, varies from country to country. In some, notification can (or must) be made at the time an agreement in principle is reached, and in others, only after a definitive agreement has been reached. Finally, the time periods allotted to competition agencies for review and decision vary across countries. The time periods may be rigid and predictable, or they may be relatively open ended, depending upon decisions by the competition agency to request additional information from the merging parties. These differing procedures inevitably result in different end dates for country reviews of any given transnational merger.

This variation in merger review time frames obviously complicates the process for the merging parties, but it could also pose problems for competition agencies. It could be more difficult for two or more agencies to co-operate in a merger investigation if they are at different stages in their review. An early decision on a merger by one agency could substantially affect, if not preempt, the decision of another, particularly if the remedy imposed by one country has transnational effects itself. Also, while staggered review periods may disadvantage the merging parties in some cases, they may offer strategic advantages in others. To the extent that the parties can control the timing of review in different countries, they may seek to complete the review first in a country whose competition agency is believed to be more favourable to the transaction, hoping that result will influence the decision in another country, where there could be more opposition.

- Are current notification thresholds sufficient to screen out mergers of foreign entities that have little or no “nexus” to the notified country? What is the experience of countries that employ worldwide turnover thresholds without reference to a minimum amount occurring in the notified country?
- Do merger notifications provide sufficient information to permit agencies to identify transnational mergers at an early stage? How much information about the merging parties’ operations abroad should be required in initial notifications?
- What effect have differing time periods for review of transnational merger had on the process from the competition agencies’ perspective? Have delegations encountered strategic behaviour by the merging parties in an attempt to orchestrate or control the sequence of review across countries?
- When is it desirable for countries to co-ordinate the timing of their review of transnational mergers? What are the obstacles to doing so?