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SUMMARY OF DISCUSSION OF THE ROUNDTABLE ON REMEDIES IN CROSS-BORDER MERGER CASES

29 October 2013

The draft summary of discussion of the roundtable on Remedies in cross-border merger cases is circulated to delegates FOR APPROVAL UNDER WRITTEN PROCEDURE. Delegates are requested to submit any proposed changes by Friday 3 October 2014.

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SUMMARY OF DISCUSSION

By the Secretariat

1. **Mr. William Baer**, the Chair of Working Party Nr. 3, opened the Roundtable discussion and made a few general remarks regarding the importance of international co-operation and consultation between antitrust enforcers on cross-border mergers remedies. The **Chair** noted that lack of co-operation between the competition authorities might lead to different outcomes in terms of remedies and this could encourage the merging parties to act strategically and try to reach an agreement on a remedy package in one jurisdiction and use that as leverage in negotiations with other authorities. The **Chair** mentioned the impressive improvement in the quality and intensity of co-operation among authorities in the merger area and referred to the use of waivers as the main reason for such development.

2. The **Chair** identified three topics for discussion at the Roundtable: (i) the challenges faced by competition authorities when designing, implementing and monitoring cross-border merger remedies; (ii) a discussion of important cross-border merger cases; and (iii) the revision of a cross-border remedy after it has been approved.

1. Challenges faced by competition authorities when designing, implementing and monitoring cross-border remedies

3. The **Chair** invited Canada to discuss how different timing of investigations in different jurisdictions can potentially affect co-operation between the reviewing agencies.

4. According to the delegation from **Canada** the timing of the investigations has become less of a problem for the Competition Bureau since the statutory amendments which entered into force in 2009, which aligned filing and timing provisions with other authorities. Canada has now a two-stage review process for mergers which is substantially aligned with many other national merger review systems and for this reason today many cross-border transactions are reviewed by Canada at the same time as other authorities. Canada's co-operation experience with other jurisdictions has been overwhelmingly positive, especially if the Bureau is able to engage with other agencies early during the investigative stage. However, there may still be cases of mergers filed in Canada after they are filed in other jurisdictions. The highest risk arising in these cases is when there is a need to identify appropriate remedies in more than one jurisdiction. If there is no co-operation in the investigative stage, it is unlikely that a disagreement can be settled in the remedy stage.

5. The **Chair** thanked Canada for these remarks and turned to the contribution of the European Commission (EC), which also addresses the importance of aligning the timing of different merger investigations. He asked the EC to give an example of a merger case where the timelines of the various merger reviews were not aligned and of the challenges that this raised.

6. The **European Commission** referred to the *Panasonic/Sanyo* merger and discussed the important challenges it presented. The timings of the reviews of the different reviewing authorities were not aligned and that increased the risk that these agencies could take different approaches to the remedies required to address the concerns that each of them had identified in its own jurisdiction. In fact, the case was notified

to the EC when a second request had already been launched in the US and when the Japanese Fair Trade Commission had already discussed in quite some detail a remedy package. However, thanks to effective co-operation, the three agencies involved in this case were able to address their differences and arrive at a globally acceptable and effective remedy package. To address the different timing of the review processes, the EC engaged in co-operation even before the formal notification during the pre-notification phase. This allowed to reach an understanding of the concerns of the other authorities before the notification, which enabled the EC to progress faster in its own investigation and to close the case in phase I. The main lesson from the case is that co-operation should start as early as possible, even before the notification if necessary.

7. The **Chair** asked both Canada and the EC if they take any measure to encourage the merging parties to take a common approach to the merger in the different jurisdictions involved, when they realise that merger notifications are made sequentially by the merging parties for strategic reasons.

8. The delegate from **Canada** explained that in these circumstances the best solution to discuss the situation with the other agencies and inform the parties of the importance of agency co-operation. The ability of the reviewing agencies to talk to one another is absolutely essential to counterbalance any strategic behaviour of the parties. The representative of the **European Commission** agreed with Canada's position, and explained that this position has been formalised by the European Commission in the EC/US Best Practices on Co-operation in Merger Investigations. This document indicates that the merging parties have an interest in insuring alignment of timings of different reviews. If they do not facilitate agencies' co-operation, there is a risk that agencies could adopt incompatible remedies.

9. The **Chair** turned to the submission from Brazil which discusses the recent changes in merger review after the adoption of the new merger regime in 2012. In particular, he asked Brazil to elaborate on how those changes have affected the ability of the competition authority to co-operate internationally.

10. The delegate from **Brazil** explained that one of the main changes introduced by the 2012 reform was the adoption of a pre-merger review system. This enabled CADE to coordinate more effectively with other agencies. So far, two international mergers have been analysed and decided under the new regime following intensive co-ordination with other jurisdictions. This experience has been very positive in the sense that the companies were very keen to take part in this co-ordination and this resulted in faster decisions and in more effective remedies.

11. According to the Irish submission, the Irish Competition Act does not allow the carving out of purely Irish elements of a larger-cross border merger. The **Chair** asked Ireland which are the challenges from this situation for merger enforcement and for effective international co-operation.

12. The delegate from **Ireland** replied by bringing the example of the *Top Snacks/KP Snacks* merger. In that case, the merging parties generated 95% of their revenues in the UK and only 5% in Ireland. The deal, however, did not pose any problem in the UK, whereas in Ireland the merged entity would be the number one player in the market. The parties decided not to file in the UK (where there is a voluntary notification system) and to implement the transaction there, while the investigation in Ireland was still ongoing. In this case, the deal was not notified to the UK OFT but if it had been, then the Irish competition authority would have tries to obtain waivers from the parties to discuss the matter with OFT. Since the Irish law cannot be enforced outside Ireland, the situation poses an obvious challenge for Ireland Competition Authority.

13. According to the Australian submission, the effectiveness of remedies often depends on the remedies obtained by the lead reviewing agency. The **Chair** asked the Australian delegation to discuss the challenges that the Australian Competition and Consumer Commission (ACCC) faces in cross-border mergers and in particular what are the consequence of having a voluntary notification regime.

14. The delegate from **Australia** explained that the challenge arises from two considerations. First, Australia has a voluntary notification system and second, the centre of a global transaction is often elsewhere (i.e. there are no assets in Australia). Under these circumstances, when the transaction is reviewed by multiple authorities it is very important for the ACCC to engage with the lead regulator(s), which is often the agency of the jurisdiction where the assets are located, as early as possible. Close international co-operation leads to a smaller number of transactions escaping the attention of the ACCC. In the past, there have been occasions where mergers have completely slipped past Australian review, but this does not happen anymore. The main challenge is to deal with situations where the main assets involved by the merger are located overseas and the business in Australia cannot operate as a standalone business. In these cases, a separate divestiture undertaking is not possible and therefore it is very important that the ACCC coordinates with the agency in the jurisdictions where the assets are located so that the lead agency understands the ACCC's concerns and is a position to negotiate a remedy package that addresses the concerns in both jurisdictions.

15. The **Chair** thanked the Australian delegation for its intervention and asked the Mexican delegation to elaborate on the institutional challenge faced by the Mexican competition authority (CFC) in co-ordinating remedies internationally, because of the fact that the Director General for mergers of the CFC who co-ordinates remedies with other agencies is not the final decision maker in Mexico.

16. The delegate from **Mexico** explained that the Plenum of the CFC is the last decision maker in Mexico. Any form of co-ordination and agreement between the Director General for mergers and other agencies does not bind the Plenum. This institutional challenge is very important but normally is more theoretical than practical because the recommendations of the Director General for mergers are regularly taken into account by the Plenum and decisions on remedies are generally consistent with what the staff's recommendations. There are many examples of very good informal co-operation with international counterparts in important cross border mergers, like for example the *Nestle/Pfizer* case discussed in the Mexican written contribution.

17. The **Chair** then turned to the US delegation and asked what would happen when the merging parties decide to grant waivers with different scopes for different jurisdictions or refuse to grant a waiver preventing discussions with certain jurisdictions.

18. The delegation of the **United States** emphasised that when these situations come up they lead to differentiated co-operation with different international partners. This can pose significant challenges, at least in theory. In practice however communication among enforcers and with parties can help overcoming these challenges. The *Western Digital/ Hitachi* merger case is a very good example of this. In this case, the US FTC cooperated with ten other agencies and the extent of the co-operation with each agency differed depending on the likely competitive effects in each jurisdictions. The parties granted waivers for co-operation with each agency which had launched an extended review of the case. That meant, however, that there were a handful of other jurisdictions with which the US FTC did not have waivers. Despite this, the agencies were able to co-operate quite effectively trough calls to determine the different review timetables and the general approaches to the investigation in each jurisdiction. These discussions were based on publicly available or agency confidential information so they did not require the exchange of confidential information. The US delegation also reminded that the US Department of Justice (DoJ) and Federal Trade Commission (FTC) have recently issued a model confidentiality waiver along with an explicatory document to be used in mergers cases and in civil non-merger matters. The revised form reflects the US agencies' recent learnings and it will make it easier for merging parties and third parties, as well as for the agencies, to negotiate waivers.

19. The **Chair** opened the floor to comments and the delegate from **Germany** pointed at the *CPTN/Novel* case as a case raising issues related to the different timing of the investigations in different jurisdiction (the Bundeskartellamt and the US DoJ). The merger was notified shortly before Christmas, which already raised significant time constraints for the agencies. The authorities, however, were able to cooperate thanks to waivers but concluded their investigations with different sets of remedies; these remedies were not implemented at first as the transaction was withdrawn and pragmatically re-notified by the parties after the initial concerns were addressed in a restructured transaction.

20. The **Chair** asked BIAC and other outside business community representatives how widespread is strategic behaviour of notifying parties in deciding to stagger notifications and what could be the legitimate explanations for delaying notification in one or more jurisdictions.

21. **BIAC** noted that co-ordination of 10 or more notifications at once is a complicated task. The real challenge for the notifying parties is to figure out the jurisdiction(s) in which the process takes the longest. While strategic behaviour cannot be excluded, in the large majority of cases the simple complexity of handling multiple filings leads to the staggering of notifications. The number of jurisdictions with merger notification regimes has risen dramatically in the last ten years and this has increased the risk of conflicting remedies. The *Western Digital/Hitachi* case, for example, involved five jurisdictions all of which imposed a different set of remedies, which the businesses considered difficult to reconcile, if not conflicting. The business community has noted the tendency in some jurisdictions to issues "personalised" remedies. While this is understandable and justifiable in some cases, this should be balanced by a convergent approach to the remedy package, governed by positive comity principles. This means that the jurisdictions involved should be relying on the jurisdiction which is most able to execute the remedy, especially when the assets involved are located in one jurisdiction.

22. The **Chair** inquired if there were any reactions to BIAC's contribution.

23. The representative of the **European Commission** stressed that when the authorities reviewing a merger have different notification systems (as in the case of EU and US), notification in both jurisdictions at the same time is not necessary. In such a situation it is better to notify first in the back loaded system and later in the front loaded system since the latter requires providing much more information. On the other hand, the best way to avoid any criticisms about gaming the system is to have a good dialogue from the beginning with the agencies involved. In response to BIAC particular comment about positive comity and the recognition that there need not always to be a remedy in every jurisdiction where there is an issue, the delegate from **Canada** pointed out that the experience of the Bureau shows that it does not take an action when the Bureau is fully satisfied with the remedies entered into in another jurisdiction.

2. Discussion of actual cross-border merger remedy cases

24. The **Chair** opened the second part of the discussion concerning the challenges that competition authorities face in seeking for coordinated outcomes in actual cross-border merger cases and gave the floor to Australia.

25. The delegate from **Australia** described the two key issues for designing an effective remedy: the assets and the purchaser. Evidently, the most effective remedy may not be identical in each jurisdiction as there may be additional and specific concerns in one jurisdiction or a purchaser in one jurisdiction may already have a significant presence in another preventing it to be a suitable purchaser for a global divestiture. In the *Pfizer/Wyeth* case, for example, there were specific concerns in Australia that did not arise in the US. In this case, a two part remedy was necessary, including a global remedy and an

Australian-specific remedy. That was, however, an example where the parties resisted offering a suitable remedy in the first place and the discussion on what would be the most effective remedy for all the jurisdictions had to go through multiple iterations. The delay however could have been avoided by acknowledging the issue earlier.

26. The **Chair** asked the Canadian delegation to expand on the challenges the Bureau faced in the *Novartis/Alcon* review, which is a case of a global merger affecting markets which are national.

27. According to the delegate from **Canada** the *Novartis/Alcon* was a case where the US had already ordered divestitures but there were additional concerns in Canada which were not necessarily addressed by such remedy package. The merging parties, the Competition Bureau and the US FTC engaged in substantial discussions to reach a distinct remedy package in a coordinated fashion. The solution involved identifying a single purchaser for all of the assets to be divested in both jurisdictions and also a common monitoring program by the divestiture trustee. This proved to be very efficient and effective because it reduced duplication and allowed the agencies to have the same information and the same perspective on the enforcement of the remedy.

28. The **Chair** moved to the Japanese delegation and asked to reflect on the challenges that monitoring behavioural remedies may pose and what measures the Japan Fair Trade Commission (JFTC) has taken to insure compliance with the behavioural undertakings.

29. To respond to the questions, the delegate from **Japan** gave a brief description of the *ASML/Cymer* merger case and the nature of remedies adopted in such case. In order to insure that the parties implemented the behavioural remedies involved with this case, they were required to report the status of compliance for five years from the closing of the merger. Also, the parties agreed to set up an independent monitoring scheme subject to approval of the JFTC.

30. The **Chair** then asked the Korean delegation how to secure implementation of a remedy when the merging parties are located in another jurisdiction and to insure that the remedy package is fully complied with.

31. The delegate from **Korea** referred to the *Rio Tinto/BHP Billiton* merger. In order to address the concerns of price increase and coordination due to high concentration post-merger and the level of dependence of Korea on the iron ore products of the merging parties, the Korean Fair Trade Commission (KFTC) considered two options: imposing behavioural remedies and banning the transaction. In the end, the KFTC decided not to prohibit the transaction which would have led to the possibility of the parties exiting the Korean market with an impact on consumer welfare, but concluded that international co-operation was the best means to secure compliance.

32. The **Chair** thanked the Korean delegation and turned to Mexico to offer its perspective on the use of waivers as a means to address some of the challenges posed by cross-border merger enforcement.

33. The delegation from **Mexico** indicated that the *Nestle/Pfizer* merger in 2012 led to a very high concentration in the infant formula market and was opposed by the Mexican authority (CFC). The CFC opposed the merger on the basis that the transaction was substantially lessening competition in the Mexican market. The CFC Plenum required the divestment to a third party of all assets necessary to maintain Pfizer infant formula division's presence in the Mexican market as an independent competitor. The CFC considered that this remedy, which *de facto* prevented the merger of Nestle and Pfizer in Mexico, would insure competition in the market. Since the transaction was notified in other jurisdictions (Chile and Colombia), waivers granted by the parties allowed the agencies to discuss effectively the remedy package with a full information set. As a result similar remedies were imposed in the other jurisdictions as well.

34. The **Chair** turned to the Ukrainian delegation to discuss why the Ukrainian Antimonopoly Committee preferred behavioural obligations in the Tampa/Kontern case when the parties had offered structural commitments.

35. The delegate from **Ukraine** clarified that the *Tampa/Kontern* merger did not lead to monopolization or to a substantial restriction of competition in Ukraine. However, since the market affected was very dynamic and market shares seemed prone to fluctuations, the Antimonopoly Committee preferred to consider behavioural instead of structural commitments.

36. The **Chair** then invited Brazil to discuss examples of successful co-operation mentioned in its submission and the reasons such success.

37. According to the delegate from **Brazil** prior to the 2012 legislative reform co-operation with other agencies was complex because the timing of the different notifications and national procedures were not always aligned. Under the former regime there was only one case where Brazil co-operated with other agencies and the remedies imposed were indeed aligned with those of the other enforcers. This case, however, took almost two years to reach a final decision in Brazil. Based on the Brazilian more recent experience, the reasons for successful co-operation are the similarity of the competition concerns and the pro-active involvement of the parties in procedural and substantial aspects as of the start of the investigation. Co-operation proved particularly important to reach consistent remedies in cases where the assets subject to divestment were located outside Brazil.

38. The **Chair** asked the Russian delegation to explain how seasonality influenced the remedy chosen for the dairy products case reviewed by FAS.

39. The delegate from **Russia** explained that the price volatility in the dairy products market is generally due to the seasonality of supply and demand of raw material and that this important factor had to be taken into account in the decision. The analysis of FAS showed a high concentration rate and the possibility of future dominance, indicating that while seasonality was important to consider it was not the key factor for the final decision. The merger was approved and remedies included some form of price control and non-discriminatory access of suppliers to crude milk. In addition to competition factors, FAS also considered social economic aspects of the merger as the merger promoted a positive influence on both farmers' profits and price stability.

3. The modification of remedies after their approval

40. The **Chair** moved to the third and final part of the discussion and asked to the US delegation to comment on the specific situation where an remedy needs to be modified after it has been adopted.

41. The delegation of the **United States** emphasized that when modifying remedies in a cross-border context, the US agencies are very careful to ensure that the modifications would not have a negative impact on the remedies approved by sister agencies. International co-operation in these cases is paramount to a successful remedy revision discussion with the parties and with the other agencies. For example, in the case of the *Western Digital/Hitachi* merger, when intervening events called for a modification, the US FTC engaged in a close co-operation with the European Commission in order to ensure that all the aspects of the revised merger remedy were consistent with the existing arrangements. This allowed the effective implementation of the revised remedy in all jurisdictions involved.

42. The **Chair** then asked Korea to discuss the related case where a remedy is modified in another jurisdiction and this decision may have an impact in Korea. This may be the case in particular of remedies which have a long implementation period and require on-going coordination.

43. The delegate from **Korea** responded that there have not been cases where the differences in terms of the remedies imposed by other jurisdictions were significant. Usually, the KFTC is confronted with minor differences arising from different competitive environments. Also, procedural differences can cause differences in remedies and in their enforcement. This is the reason why, even if co-operation is very productive there can be cases where remedies will differ. In cross-border mergers, co-operation among competition authorities becomes very important but when remedies must be implemented over a long period of time it might be useful to consider ways to require the consent of other jurisdictions which have been involved in the design of the original remedy, which would make co-operation smoother when one agency reaches the conclusion that the original remedy should be modified.

44. To conclude the roundtable discussion, the **Chair** invited BIAC to react to the interventions of the other delegations and to offer its remarks on the discussion from a business perspective.

45. According to the delegate from **BIAC** in consumer products one can expect to see differing remedies in different jurisdictions due to different factual contexts. But even if remedies imposed by different agencies are different in the end, co-ordination on the process and procedures is quite welcome by the business community. However, in more global or regional cases, there is a need to coordinate on the substance of the remedy. What has changed since *GE-Honeywell* transaction, which is unanimously viewed as a low point for enforcement co-operation, is not the "how" to cooperate or the principles behind effective co-operation but rather the number of agencies that are active on the competition front in terms of imposing remedies, and the dynamics and complexity that this generates.

46. The **Chair** thanked all participants from the very interesting discussion and for the thoughtful remarks and adjourned the meeting.