Summary of Discussion Points

Presented by the Business and Industry Advisory Committee (BIAC) to the OECD
Competition Committee Working Party No. 3 (WP3) Roundtable

February 15, 2011

“Creeping Acquisitions”

1. BIAC welcomes the opportunity to provide its views to the Competition Committee WP3 Roundtable on Creeping Acquisitions. Although not a subject of major concern, it is worthy of the Working Party’s interest because of the growing importance of cross-border transactions which requires that agencies have an approach as harmonized as possible, and one that does not raise unnecessary regulatory hurdles.

2. BIAC recognizes that there is a need to prevent situations where firms acquire either parts of a company or complementary businesses through a number of transactions which, taken separately, would not meet the criteria for merger control, and which are likely to result in an anticompetitive situation. This is usually referred to as “interrelated transactions”, “staggered” or “creeping acquisitions”.

3. The amount of harm caused by such situations should not be overrated. In jurisdictions where specific provisions exist to address this issue, there does not seem to be a major amount of case law revealing extensive and problematic application of these provisions.

4. However it is clear that transaction engineering aimed at circumventing applicable merger control provisions should be prevented, while avoiding the pitfalls that are among BIAC’s usual concerns: unnecessary filing and approval requirements, inconsistent requirements, legal uncertainty and the awkward and often very costly situations where completed transactions have to be undone ex-post.

5. There are three ways which are commonly used to address the issue of creeping acquisitions: the purely sectorial approach, the so-called “aggregation model” and the “powerful firm” model.

6. Some agencies have considered that certain sectors, and in particular the retail sector, are more prone than others to concentration through creeping acquisitions.
This may result in specific regulation, for instance requiring the notification of transactions that the generally applicable thresholds would not normally trigger\(^1\). Such a solution is certainly preferable to any change to broadly applicable legislation for the sole purpose of addressing the concerns of a specific sector. However, it is only desirable where the risk of competitive harm in the sector is verified, and provided that the additional control requirements are not in themselves disproportionate to the harm to be fought.

7. Under the aggregation model, a firm (irrespective of its industrial sector) is prohibited from making an acquisition if, when combined with other acquisitions made by the same firm from the same parties and in the same or a related relevant market over a specified period of time, would create an anticompetitive situation. Probably the most comprehensive example is to be found in the European Merger Regulation. First, it provides that where “two or more transactions […] which take place within a two-year period between the same persons or undertakings shall be treated as one and the same concentration arising on the date of the last transaction”\(^2\). This is applied in three sets of circumstances: when a first transaction not meeting the threshold is followed by a second one requiring notification, then the first one must be notified as well; when a first notifiable transaction is followed by a second transaction below the threshold, then the latter transaction is notifiable; and when two or more parts of a company are simultaneously acquired by the same purchaser from the same vendor, the transactions are treated as constituting a single transaction (including by aggregating the relevant turnovers) to determine Community dimension. This results in onerous additional filing requirements, but effectively prevents the structuring of transactions aimed at avoiding the application of the Merger Regulation. However, it is arguable that the rule goes beyond what is strictly necessary in covering acquisitions from the same seller in entirely different industrial sectors.

8. These specific provisions are complemented by the Commission’s broad interpretation of the Regulation’s Article 3(1) defining concentrations (the question of whether a transaction is a concentration logically precedes that of whether it meets the thresholds triggering the Commission’s competence). This construction, although only based on a recital of the Regulation\(^3\), has been consistently applied by the Commission, and supported and clarified by a judgment the Court of First Instance

\(^1\) Following the above-mentioned investigation in the UK, acquisition by any large grocery retailer of any store with groceries sales are above 1,000 square meters must be notified to the Office of Fair Trading by the acquiring party.

\(^2\) Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, Article 5(2) paragraph 2. According to the Commission’s Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), “the purpose of this provision is to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation” (para. 49). This practice is often referred to as a “salami” transaction.

\(^3\) Recital 20: “It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.”
which stated that “a concentration within the meaning of Article 3(1) of Regulation No 4064/89 may be deemed to arise even in the case of a number of formally distinct legal transactions, provided that those transactions are interdependent in such a way that none of them would be carried out without the others and that the result consists in conferring on one or more undertakings direct or indirect economic control over the activities of one or more other undertakings”.

9. The Commission’s “safety net” is further complemented by the second prong of the Regulation’s Recital 20 concerning transactions “taking the form of a series of transactions in securities taking place within a reasonably short period of time”. Again, the need to protect against such type of “salami” transactions, which are not uncommon especially with respect to listed companies, is understandable. However, one cannot but feel uncomfortable with a rule which sits in a recital rather than an operative provision, makes a reference to a “reasonably short period of time” and is not supported by a substantial background of case law. Incidentally, in many jurisdictions, corporate law and stock exchange regulations, for other purposes, provide rules of disclosure which also aim at creeping acquisitions.

10. The U.S. have a similar rule, set forth in the Hart Scott Rodino Act, which stipulates the aggregation, for the purposes of premerger notification, of separate acquisitions of voting securities, assets or other “non-corporate interests” with in a period of 180 days. From the point of view of legal certainty, this has the advantage of giving a precise set of financial thresholds, and makes reference to a significantly shorter period than the European Merger Regulation. In the UK, the OFT’s power to refer to the Competition Commission a completed merger specifies that the OFT may treat successive events which occurred within a period of two years as having occurred simultaneously on the date on which the latest of them occurred.

11. An alternative to the “aggregation model”, based on a substantial market power test, is sometimes called the “powerful firm” model. This consists in controlling any acquisition, irrespective of its size or the market share of the target, by a firm having reached a certain level of market power. This method has obvious faults: the difficulty of defining a relevant threshold applicable to all industries, the different approaches to substantial market power (substantial lessening of competition, dominant position, etc.) according to jurisdictions, the creation of a disproportionate burden for de minimis transactions, etc. BIAC would suggest that the aggregation model is to be

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4 Court of First Instance’s (CFI) judgment of 23 February 2006 in Case T-282/02 Cementbouw v Commission (para. 109), decision upheld by the European Court of Justice Judgment of 18 December 2007 in Case C-202/06P Cementbouw v Commission

5 For example, Section 13(d) of the U.S. Exchange Act of 1934, article L.233-7 of the French Commercial Code

6 Code of Federal Regulations, §801.13

7 Enterprise Act 2002, subsections 22(1) (b), 27(5) and 27(6). See for instance the OFT’s decision on the completed acquisition by Sports Direct International plc of a number of stores from JJB Sports plc, 1 May 2009, ME/3986/08
preferred over this approach, which does not accord with the ICN best practice rules for merger control.

12. In fact, many jurisdictions have provisions giving antitrust authorities an *ex post* control of creeping acquisitions which do result in a substantial lessening of competition, or an abuse of dominant position. For instance in the U.S., even if the premerger notification conditions of the the Hart Scott Rodino Act are not met, the agencies are able to intervene against creeping acquisitions, using the more general provisions of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In France, article L-430-9 of the Commercial Code allows the Competition Authority to issue injunctions (including rescission orders) in respect of concentrations resulting in the abuse of a dominant position or the creation of a “state of economic dependence”: this applies “even if these acts have been subject to the procedure specified in [the Code]”. This prerogative is used in the case of successive acquisitions which taken separately did not breach competition law but in aggregate resulted in an anticompetitive situation.

13. The problem with these provisions like with all *ex-post* remedies, is that they give poor legal certainty to firms devising a commercial strategy, since a transaction which in the first instance could be considered as *de minimis* since it did not meet the notification threshold, or even was formally approved, can be “clawed back” and have to be undone. Additionally, there is uncertainty as to whether the agencies can review and possibly dismantle only the last in a series of transactions, or also previous transactions which were not notifiable. One recognizes that the authorities must have a possibility of challenging situations of substantial lessening of competition or abuse of dominant position resulting from concentrations, and that there is no reason why creeping acquisitions should escape this rule. This, however, should not open the door to unnecessary subsequent reviews of transactions which have already been duly reviewed and approved.

14. In conclusion, BIAC does not object to the specific treatment of creeping acquisitions in merger control regulations to the extent that it provides clear legal certainty and is aimed at countering avoidance strategies. However, this must be designed so that the conditions of compulsory notification are clear, which speaks in favor of the “aggregation method”, limited to transactions between the same parties and in the same or closely related markets, rather than the alternative methods sketched above. The thresholds must be appropriate so as not to inflict an excessive burden in respect of transactions which are really *de minimis*, and the period considered should be reasonably short.

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8 Respectively prohibiting acquisitions of stock or assets where “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly” and “unfair methods of competition”. See for instance the decision of the FTC in the matter of Talx Corporation, 6 August 2008 (C-4228), tackling a series of acquisitions by the same purchaser over a period of more than three years and approving a number of behavioral commitments by the acquirer.

9 See for instance two decisions taken under the former French regulations, but which would be similarly dealt with under the current régime : decision 02-D-44 of the Conseil de la Concurrence (11 July 2002) ordering the dismantling of a number of joint ventures in the field of water distribution, *Arrêté* of the Ministry of Economy (25 May 2005) ordering the divestiture of several beer storage facilities.