Summary of Discussion Points

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


June 12, 2012

1. The Business and Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 3 for its discussion on the draft report on the implementation of the 2005 Council Recommendation on Merger Review. BIAC commends the OECD for undertaking this review as instructed by sections II.2-3 of the Council Recommendation.

2. Over 100 jurisdictions now have in place some form of competition law which regulates mergers, and parties to international transactions of any consequence are today subject to merger control regulation in multiple jurisdictions as a matter of course. The costs associated with compliance with this multiplicity of regimes are excessive, particularly for the large majority of transactions that raise no serious competition issues. A reduction in the costs and burdens associated with the regulatory review of mergers will reduce overall transaction costs associated with mergers, help companies to realize the potential efficiencies associated with such transactions, and enhance consumer welfare.

3. BIAC commends the OECD on its work to date in articulating principles and recommendations for merger review, including its 2005 Recommendation of the Council on Merger Review (“Council Recommendation”).¹ BIAC has provided input on these various reports and recommendations, most notably its joint paper with the International Chamber of Commerce in October 2001.²

4. Since the adoption of the Council Recommendation, there have been numerous significant developments across the globe with respect to competition law, including the


introduction by several major jurisdictions of merger control laws and regulations, and the adoption by several others of significantly revised regimes. There also has been an expansion of the analysis of merger review procedures and practices, particularly through ICN work product, including the adoption of best practice recommendations for merger review.3

5. The Council Recommendation was built upon and derived from past OECD Council Recommendations and Committee Reports, as well as other influential work in this area, notably work initiated by BIAC and the ICN. In February 2001, WP3 asked BIAC to address the issue of “procedural convergence in the review of transnational mergers” and to “produce a model code or framework for the procedural aspects of merger review.” In October 2001, BIAC presented to WP3 its Recommended Framework for Best Practices in International Merger Control Procedures (“BIAC Recommended Framework”).4

6. The ICN’s Mergers Working Group used the BIAC Recommended Framework as a starting point for its own Recommended Practices for Merger Notification and Procedures (“ICN Recommended Practices”).5 The ICN Recommended Practices were developed in recognition of past OECD and BIAC work on merger review and are consistent with OECD principles. Indeed, the competition authorities of all OECD member states participate in the ICN and significantly influence its work product.

7. The 2005 Council Recommendation is a broad statement of principles and practices recognized by OECD and provides a solid framework for merger review procedures for its members and observers. It is important and valuable guidance that helps to streamline the merger process and promote efficient, pro-competitive outcomes.

8. However, there have been significant developments since the Council Recommendation came into force. Many OECD members and observer countries have expanded and/or revised their merger laws. For example, observer members China and India have implemented a new merger review system, the Brazilian merger review system was overhauled when its new legislation went into effect on May 29, and Russia has passed major reforms to its merger review law. Canada, Germany and the United States have all revised their respective merger guidelines, and the European Commission adopted a set of guidelines that explains the Commission’s current practice with regard to jurisdictional issues in merger control. Additionally, since the adoption of the Council Recommendation, the ICN has further expanded its own Recommended Practices.

9. In light of these developments and the further work that has been done in this area, BIAC submits that the Council Recommendation, while highly valuable, is not as comprehensive as it might be. BIAC urges the OECD to review the 2005 Council Recommendation with an eye toward updating and expanding the recommendations as well as evaluating the extent to which OECD members are observing and implementing the existing Recommendations.


4 Supra note 2.

5 Supra note 3.