Presented by the BIAC Competition Committee to the OECD Competition Committee Working Party No. 3.


September 17, 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 on its Draft Report on Experiences of Member Countries under the 2005 OECD Recommendation on Merger Review (“Draft Report”).

2. The OECD’s work to date in articulating principles and recommendations for merger review, including its 2005 Recommendation of the Council on Merger Review (“Council Recommendation”), has lead to some useful changes to, and re-evaluation of, the merger review schemes of a number of OECD members. Moreover, the OECD’s work has influenced non-members and other policy-making bodies in the development and evaluation of merger review practices.1 BIAC has a vested interest in the OECD’s work in this area and has provided input on these various OECD reports and recommendations, most notably through BIAC’s joint paper with the International Chamber of Commerce in October 2001.2

3. 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”).3


3 Id.
4. 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”). 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.

5. 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.

6. The Draft Report provides a comprehensive evaluation of the impact and implementation of the Recommendation, and BIAC believes that the Secretariat’s evaluation is largely accurate and perceptive. Below, we note several areas in which we believe that the Draft Report and the underlying Recommendations may require re-evaluation. These comments should not be taken as a wholesale criticism of OECD’s work or progress in this area. To the contrary, BIAC believes that this is one of the Committee’s most important initiatives and our comments reflect the significance with which we believe the Recommendations and Draft Report should be regarded.

7. The area in which the Recommendations perhaps have had the greatest impact is with regard to merger notification and review procedures. Numerous jurisdictions, both OECD members and non-members, have amended their laws and regulations in light of the principles embodied in the Recommendations. For example, the Draft Report rightly notes that several jurisdictions strengthened their local nexus requirement to avoid capturing mergers that are unlikely to have any distortive effects in their jurisdiction. Changes such as these have helped not only to streamline agency process to allow for more efficient and effective enforcement, but in many cases have also reduced burdens and costs for notifying parties. This is the type of win-win scenario envisioned by the Recommendations.

8. BIAC observes, however, that agencies sometimes overestimate the extent to which their existing procedures, or in some cases the changes that they have implemented, comport with the spirit of the Recommendations. For example, the Draft Report states that the majority of OECD member countries have adopted notification forms which allow the authority “to obtain the necessary information in an efficient, consistent and manageable way.” BIAC would suggest that this is a subjective, and in our view inaccurate, evaluation of the current state of the information requirements of notification forms. The business community does not share the view that information requirements are efficient, consistent and manageable.

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6 Id., ¶ 27.
9. One of the inherent premises of the Recommendations is that the efficiency and effectiveness of the merger notification and evaluation process must be judged through an objective lens, that is, it must be efficient and effective not only for the agencies, but also for the affected parties (i.e., the merging parties and affected third parties). The changes that have been implemented have largely achieved that process—as the win-win scenario above suggests.

10. It follow, BIAC suggests, that the evaluation of the status of compliance of OECD members with the Recommendations requires the participation of the affected parties, without which an objective assessment of compliance is difficult. While some of the low-hanging fruit has already been plucked (e.g., local nexus), other areas of significant impact remain -- in some jurisdictions -- in need of ample attention. In BIAC’s view, these include not only information requirements, but also pre-notification meetings (and the extent to which they are “voluntary” and comport with or distort timing and review periods), procedural fairness, notification fees and transparency.

11. These areas are particularly exposed to subjectivity during the self-evaluation or peer evaluation process. Agencies are often able to interpret their own laws, regulations and procedures as complying with the letter of the Recommendation even when, in practice, they diverge materially from the spirit.

12. BIAC recognizes that this abstract critique is an insufficient basis on which to identify and address the specific shortcomings of any jurisdiction’s adherence to the Recommendations. Indeed, BIAC emphasizes that it is inappropriate to paint all members with the same broad brush, even with regard to the generally problematic areas we have identified above. Many—if not most—OECD members have made significant improvements to their merger review practices, often through the application of significant effort, persuasion and, in some cases, political risk. BIAC unequivocally praises these efforts.

13. Just as it is important to praise these advances, it also is important to identify areas requiring improvement. This requires an independent analysis of each jurisdiction, measured objectively against the Recommendations so that existing gaps can be revealed and the authority can consider whether to make adjustments.

14. To accomplish this, BIAC proposes that a fundamental element of the Country Reviews conducted by the Competition Committee should be a thorough evaluation of the subject jurisdiction’s compliance with the Recommendations, fully informed by the input of the affected parties, in order that an objective commentary can be provided by the reviewing authority to the subject country. BIAC would be pleased to provide input in this regard.

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7 Peer evaluation is an important facet and may result in an objective outcome, but because sister-agencies often share identical incentives, peer review is undoubtedly exposed to a higher risk of subjectivity than review by users.

8 Currently, BIAC is not invited to participate in Country Review sessions. BIAC would be pleased to do so, however, BIAC’s input with regard to compliance with the Recommendations would not necessitate its direct participation in the Country Review sessions.
15. BIAC acknowledges and respects each member’s autonomy and authority to elect not to comport with the recommended practices. We believe, however, that these decisions should be made in light of an objective evaluation of whether the jurisdiction is, in actuality, comporting with the principle, rather than a subjective assessment which might overlook non-compliance.

16. The OECD’s investment in merger review, especially the Recommendation, has paid significant and concrete dividends to OECD members, their merger authorities, merging parties and consumers. It is an area where the OECD’s successes can be readily observed. There are further dividends to be reaped by continued investment in merger review. The Recommendations already lay the groundwork for further progress. BIAC notes that since the implementation of the Recommendation in 2005 there have been further advancements in the development of merger review policy and procedure, particularly by the ICN. BIAC does not exclude that it may be appropriate to revisit the Recommendations to evaluate whether they require enhancement or modification. But BIAC believes that there is more immediate benefit to be gained by a more systematic and objective evaluation of compliance with the Recommendations. BIAC is prepared to assist, constructively, in this initiative.