Discussion Points

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

Roundtable Discussion on Evidentiary Issues in Merger Review*

October 17, 2006

1. BIAC is pleased to provide Working Party No. 3 with its comments on evidentiary issues in merger review.

I. Introduction

2. BIAC offers views primarily from the perspective of merging parties, although BIAC members have, on occasions, expressed concerns regarding prospective mergers. Access to information and utility of information varies across jurisdictions, and disparities exist even with respect to such closely aligned and established antitrust regimes as the United States and the European Union. This paper conflates discussion of issues raised in items II, III, and IV of the Chairman’s communication.

II. Obtaining Evidence

3. In the U.S., merging parties do not have compulsory pre-litigation access to information from third parties whereas the Federal Trade Commission (“FTC”) and the Antitrust Division of the Department of Justice (“Justice”) have civil investigative demand powers. In the EU, merging parties have access to non-confidential documents in the European Commission’s (“Commission”) file only after the issuing of a “Statement of Objections,” whereas the Commission may obtain “all necessary information” throughout the administrative procedure. Thus, there is a premium on:

- The comprehensive and continuous submission of information from the parties that bears directly on likely issues. This undertaking includes early meetings with responsible agency officials to clarify and develop common ground on important questions. Such interaction should, and increasingly does, involve consultation with the agencies prior to the filing of the HSR prenotification form in the U.S. and the form CO in the Commission.

- Effort by the parties to obtain information, and if possible, support, from third parties, particularly customers, especially where information consists of sound factual

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underpinnings. Where practicable under business and confidentiality limitations, this effort might well take place in advance of formal notification to the agencies.

4. In the U.S., evidence can be obtained through the compulsory process in litigation, but it is a potentially time-consuming exercise, takes place with agency officials in the room who are able to cross-examine witnesses, which often makes for more guarded statements, and the agencies have a substantial head start.

   - In the EU, there is an increased and positive trend to give parties access to non-confidential versions of “key documents,” including information from third parties, in early phases of the administrative procedure.

III. Utility of Information by Source

5. The weight of information accorded by agencies and before courts may differ between the U.S. and the EU. The Court of First Instance (“CFI”) judgment in Sony-BMG raises institutional questions regarding the role of the Commission and limits on its discretion in deciding not to challenge a merger.\(^1\) An appeal on behalf of Sony-BMG was filed on Oct. 3, 2006. This difference does not affect the responsibility of the parties to come forward before the agencies with a comprehensive presentation covering all aspects of the proposed transaction that includes oral, documentary, and, most often, expert economic analysis, as was made by the parties in the cited case.

6. In the EU, evidence from third parties is mainly collected by means of questionnaires in which third parties are requested to provide written answers to pre-defined questions. Often, respondents view responding to these questionnaires as a form-filling exercise, and hence may place little value in trying to understand the exact scope of the questions, or in exploring why specific questions are asked, and others are not. Accordingly, the utility of responses as evidence can be limited, and European agencies should recognize this fact when evaluating transactions.

7. The Commission can interview any natural or legal person who consents to be interviewed for the purpose of gathering evidence, but this manner of collecting evidence is much less relied on in the EU than in the U.S., where agencies often take depositions of interested third parties. Generally, evidence obtained in the course of an oral discussion, with a real opportunity to understand the questions asked and to obtain, if necessary, immediate clarifications to information provided is of better quality than evidence collected in responses to questionnaires.

8. The Commission is increasingly relying on documents prepared in the ordinary course of business to assess transactions. In transatlantic deals, it routinely asks for the production of documents that have been produced to the U.S. agencies. Relying on such documents to assess transactions is generally sound, but document requests should be limited and specific, to ensure that the provided volume of documents remains manageable.

9. In the EU, most agencies are under statutory deadlines to adopt decisions on notified transactions. This factor effectively reduces the time available to collect evidence in addition to that which is provided by the parties in the notification documentation. This limitation

coupled with recent case law by the CFI in Sony-BMG suggesting that the Commission must rely on factually accurate, reliable and consistent evidence to support a clearance decision, raises the policy question on how the Commission should rule on transactions in case of doubt, or in case of incomplete/inconsistent evidence.\(^2\)

A. Parties

10. In the EU’s “front-loaded” procedure, detailed filings containing data and factual presentations by the merging parties should serve, at the threshold, as the most useful source of information for the agencies. The merging parties’ presentations either in the initial filing documents in the EU or otherwise in the U.S., which accurately and thoroughly set forth the pro-competitive and efficiency benefits of a transaction, can obviate the need for the agency to deploy substantial resources in an in depth investigation and possible challenge.

11. In the EU, the Commission has the ability to verify the parties’ arguments by requesting comments and information by any third party, and in the U.S., the agencies have the ability to easily verify the parties’ arguments and theories by reviewing the parties’ own documents and through depositions. The U.S. agencies receive documents through voluntary submissions or through the second request process, which often includes documents covering a two to four year time period. The U.S. agencies also depose party personnel, and BIAC is aware of at least one case in which the agencies took over thirty party depositions. The time constraints imposed in the Commission by the merger regulation limits the extent to which party evidence submitted in response to a statement of objections can be subject to further third-party investigation. The regulatory impediment should not prevent the agency from relying on such information provided by the parties. In addition, whether the evidence submitted by the parties must be held to a standard of being of “particular” force is questionable.

12. Information meriting significant weight includes:

- Natural experiments in the marketplace;
- \textit{Ex ante} documents indicating pricing practices in the industry;
- Evidence reflecting the effect past mergers had on prices;
- \textit{Ex ante} documents regarding competition and customer behaviour; and
- Industry market share trends (volatile fluctuations in shares vs. steady shares).

13. The agencies should assess the incentives of the particular individuals providing information. For example, employees of the target company may be concerned about losing their jobs if the proposed transaction is commenced. The parties should work with the agencies in their identification of deposition witnesses to insure that a proper, and accurate, cross-section of employee opinions is presented and understood.

14. The agencies should not necessarily take aspirational party documents at face value, \textit{e.g.}, aspirational marketing documents, internal review documents drafted by specific individuals to obtain internal approvals of a proposed transaction, and, more importantly, investment

\(^2\) Parties in the cited case believe that the evidence was neither incomplete nor inconsistent.
banker reports. These documents often reflect what the author wishes were true as opposed to the reality of the marketplace.:

B. Customers

15. Agencies should continue to provide substantial reliance on customers’ views when they have sound grounding in industry facts and are drawn from actual experience. The agencies should, however, make every effort, through review of customer documents or otherwise, to verify that the views expressed by customers are reliable.3 Obviously, third party support is more credible if presented in individualized statements, not as one of many similarly worded declarations or letter endorsements. Credibility is important because agencies will follow-up and test supporting statements.

16. U.S. courts are appropriately sceptical of customer views where they are not representative, based on unsupported or misplaced concerns or on bias. For example, in Oracle, the court found that what customers “testified to was, largely, their preferences. Customer preferences towards one product over another do not negate interchangeability . . . the issue is not what solutions the customer would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle. . . . [U]nsubstantiated customer apprehensions do not substitute for hard evidence.”4 In SunGard, the United States Department of Justice presented statements from approximately fifty customers even though the defendants had more than 7,500 customers combined.5 The court found that “[t]he sampling of customer statements before the Court is minuscule when compared with the entire universe of defendants’ shared hotsite customers.”6 In Arch Coal, the court found that while it “does not doubt the sincerity of the anxiety expressed by SPRB [Southern Powder River Basin] customers, the substance of the concern articulated by the customers is little more than a truism of economics: a decrease in the number of suppliers may lead to a decrease in the level of competition in the market. Customers do not, of course, have the expertise to state what will happen in the SPRB market, and none have attempted to do so.”7 The court, therefore, concluded that customer testimony was not persuasive on the issue of whether the proposed transaction was likely to result in coordination among SPRB producers.8 In a recent paper, Ken Heyer, Economics Director, Antitrust Division, U.S. Department of Justice, noted that “soliciting the views of customers is not a complete substitute for detailed competitive analysis of factual evidence.”9

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3 As Ken Heyer recently noted, “[w]here the views of customers are . . . supported by objective evidence—including, perhaps, internal documents prepared by the customer in the ordinary course of business—the testimony will be more reliable, and may be found to apply more generally to the market as a whole.” Ken Heyer, Predicting the Competitive Effects of Mergers by Listening to Customers, Economic Analysis Group Discussion Paper (Sept. 2006) at 18.


6 Id.


8 Id.

9 Heyer, supra note 3, at 23.
17. In Europe, agencies should give more weight to views from customers than to views from competitors (see below). The absence of strong customer concerns should prompt authorities to presume that a transaction will likely not raise competitive problems.\(^{10}\)

**C. Competitors**

18. Former U.S. Assistant Attorney General Baxter commented that competitor opposition to a merger demonstrates that the merger’s pro-competitive potential has merit. Some agency staff members have endorsed the converse; if competitors support a merger, it must be anticompetitive. In both instances, cavalier conclusions are risky and the basis for a competitor’s opposition or support of a merger needs be examined. For example, where a firm is both a competitor and a supplier or customer, its information should be weighed from both perspectives.

19. If a complaining competitor is also an unwanted suitor, information provided by this party should be properly weighed.

20. Regardless of point of view, competitors are, or should be, knowledgeable about industry structure, relevant market areas and demand elasticity, and thus, can provide a very useful source of information for the agencies. The court in *Arch Coal* placed weight on competitors’ views regarding market transparency and factors relating to facility of coordination.\(^{11}\)

21. The intentions, commitment, capabilities, and other information of a firm that is acquiring assets through a potentially curative divestiture are, of course, of substantial interest. In *Arch Coal*, the court found the testimony and supporting documentation of Kiewit (a producer in the SPRB that planned to purchase a divested mine) useful in determining that the SPRB would continue to be competitive post acquisition.\(^{12}\)

**D. Economic Experts**

22. In presenting the case for a merger, it is particularly useful when a respected economist’s opinion is based on concrete facts. U.S. courts tend to ignore views even of solidly credentialed economists where not grounded in market facts. For example, in *Oracle*, the court found that the “evidence Elzinga marshalled was circumstantial and highly qualitative, . . . [and ultimately] unreliable in establishing a distinct and articulable product market.”\(^{13}\) European Courts tend to view economist submissions as testimonial.

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\(^{10}\) Heyer argues that lack of strong customer concern may be related to other factors, such as whether customers have the information available to determine that a transaction will harm them, whether the cost of contacting the agencies and assisting them is outweighed by the potential harm of the transaction, whether customers are intermediate customers as opposed to final consumers (the effects on each being different), and are not necessarily an indication of the merger’s actual effects on consumer welfare. See Heyer, supra note 3. BIAC submits that an absence of customer concern with a merger, by itself, should give rise at least to an inference that customers view the transaction as efficient and pro-competitive.

\(^{11}\) See, *Arch Coal* at 140, 142-43.

\(^{12}\) *Id.* at 148.

\(^{13}\) *Oracle* at 1158-59.
23. Particular caution is recommended when using simulations, which are sensitive to slight manipulation of assumptions. They can, nevertheless, corroborate predictions based on sound factual analysis.

24. Agencies and courts should recognize that the value of economic expertise depends to a great extent on the availability of the necessary underlying factual information. In certain cases, e.g., bidding analysis, the underlying data often, for all practical purposes, contains gaps.

**E. Market Share Information**

25. In the U.S., the agencies are increasingly less reliant on market shares as an indicator of the potentially anticompetitive effects of a merger. An FTC report indicates that, historically, the FTC is unlikely to challenge a transaction where the market shares are well above the Merger Guidelines unless there also is the presence of credible customer complaints or hot documents, or the investigation indicates that entry is difficult.14

26. In the EU, market share thresholds signalling a potential anticompetitive effect are lower than in the U.S.15 BIAC encourages European agencies to increasingly look beyond market shares in determining whether transactions may raise competitive concerns.

**IV. Recommendations**

27. In addition to comments throughout this paper, BIAC submits the following broad recommendations.

28. Agencies and parties should cooperate to facilitate early crystallization and deliberation on issues.

   - Parties should present information and arguments at an early stage. This is already a requirement for the parties in the EU procedure.

   - Agencies should undertake to confer with parties on issues at a senior level. Steps need to be taken to mitigate pressure created by short time span between Statement of Objections and decision.

29. Agencies in the U.S. should be viewed as essentially prosecutorial and wide latitude should be accorded to decisions not to challenge an acquisition. In such cases, the evidentiary standard

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14 U.S. Federal Trade Commission, *Horizontal Merger Investigation Data, Fiscal Years 1996-2003* (Feb. 2, 2004, rev. Aug. 31, 2004), available at [http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf](http://www.ftc.gov/os/2004/08/040831horizmergersdata96-03.pdf), at tables 5.1, 5.2, 7.1, 7.2, 9.1, and 9.2. See also, Deborah Platt Majoras, *U.S. Antitrust Practice - How Does It Affect European Business?*, Address Before the Studienvereinigung Kartellrecht (Apr. 7, 2005), available at [http://www.ftc.gov/speeches/majoras/050411brussels.pdf](http://www.ftc.gov/speeches/majoras/050411brussels.pdf) at 10 (“One of the factors that we are examining is customer testimony. . . . My view is that we should continue to give significant weight to the views of customers in our merger investigations, and continue to present customer testimony at trial. Customers are valuable sources of information about many mergers’ competitive effects because they have the most to lose from an anticompetitive deal, and usually have little incentive to provide misleading information.”).

15 The *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 3, §17, note that the “Commission has . . . considered mergers resulting in firms holding market shares . . . below 40% to lead to the creation or strengthening of a dominant position.”
should not be the same as in the judicial review of an agency decision to challenge. The weight accorded an agency decision to challenge a merger should not depend, as it may in the U.S., on which agency initiates the action. The understanding that parties have to provide substantial, probative evidence to the agency is the same in either case. In the EU, authorities usually investigate and decide whether a transaction can be implemented, subject to appeal by the parties. Under this system, internal checks and balances combined with effective and timely judicial review of administrative decisions are of key importance.