Summary of Discussion Points

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

Council Recommendation on Merger Review

September 3, 2004

BIAC recognizes the significant progress achieved by the OECD in articulating principles and recommendations for national review of mergers and acquisitions.\(^1\) 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. BIAC is gratified that the draft merger recommendation incorporates many of the principles and practices stated in BIAC’s previous submissions on this topic.\(^2\)

We also note that the OECD’s draft recommendation is built upon and derived from past OECD Council Recommendations and Committee Reports, as well as other influential work in this area, notably that of the ICPAC and the ICN. Indeed, the OECD’s draft recommendation is a broad statement of principles and practices recognized by the OECD and recently articulated by the ICN’s Merger Working Group.

In that respect, BIAC would ask the Council to consider whether it would be appropriate to adopt, as a Council Recommendation, the entirety of the Recommended Practices for Merger

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\(^1\) See, \textit{e.g.}, OECD Council Recommendation for Co-operation Between Member Countries On Anticompetitive Practices Affecting International Trade, C(95)130/Final.

\(^2\) See, \textit{e.g.}, BIAC, \textit{Recommended Framework for Best Practices in International Merger Control Procedures}, October 4, 2001, urging certainty, transparency, due process, protection of confidential information, jurisdictional nexus, and elimination of unnecessary transactions costs through reasonable information requirements, quick clearance of competitive transactions, non-duplicative national review, international cooperation and flexible timing and filing deadlines; OECD Global Forum on Competition, \textit{Contribution from BIAC}, October 19, 2001, CCNM/GF/COMP/WD(2001)25, identifying 10 fundamental considerations to be taken into account in the establishment and operation of competition authorities: Independence of the enforcement authority, certainty for the business community, transparency, non-discrimination, due process, compliance-oriented approach, articulated case selection criteria, appropriate informational gathering tools, protection of confidential information, and sensitivity to dynamic markets.
Notification Procedures prepared by the Notification and Procedures Subgroup of the ICN Merger Working Group. The ICN Recommended Practices were developed in recognition of past OECD work on the subject 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. Moreover, the ICN recommendations would benefit significantly from having the express imprimatur of the OECD, leading to consistent merger recommendations that are most likely to be effectively implemented across OECD member states, and joined by the myriad competition authorities that participate in the ICN.

BIAC recognizes that the Council may conclude that the ICN Recommended Practices are not appropriate for adoption as a Council Recommendation. In that event, BIAC offers the following comments on the draft Council Recommendation. The Council Recommendation, as drafted, provides a solid framework for merger review procedures with which BIAC is in essential accord. BIAC believes a few substantive modifications are desirable and is pleased for the opportunity to suggest additions to the text of the draft recommendation, for consideration.

A. Notification and Review Procedures

BIAC is in essential accord with the OECD’s broad recommendations under this heading. However, we see a benefit to expanding some of the principles and practices for avoiding costs and burdens to merging parties stated at Section I.A.1.b.

In particular, we suggest amending Section I.A.1.b.(ii) to include a recommendation for the use of *de minimis* thresholds below which notification will not be necessary.

We believe Section I.A.1.b.(iii) should provide additional guidance on the scope of “reasonable information requirements” including the adoption of initial notification requests tailored to elicit the basic information needed for initial determination of potential competitive concerns and flexible protocols for determining the need for and scope of subsequent information requests.

Finally, we endorse the recommendation at Section I.A.1.b.(v) for flexibility in notification requirements, but suggest the recommendation go further in recommending that in jurisdictions for which notification requirements do not exist, provisions be made for transparent and unambiguous guidance on actions of the merging parties that will trigger formal review of a transaction.

BIAC is in accord with the recommendation at Section I.A.2. that member countries ensure transparency and clarity in the procedural rules, policies, practices, notification requirements, and procedures involved in their respective merger review regimes. However we suggest

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3 BIAC’s comments correspond to our accompanying mark-up of the OECD draft dated July 7, 2004.
tempering the recommendation for post-enforcement disclosure by including a qualifier on the use of confidential information.

At Section 1.A.4. we suggest additional language with respect to the confidential treatment of third party information and transparency in making available the procedures by which third parties may be heard.

We have suggested amendments to Section 1.A.6. to broaden the scope of the recommendation for confidential treatment of business secrets and confidential information.

B. Coordination and Cooperation

BIAC endorses the broad principles and recommended practices stated at Section I.B. However, we see a need for specific language addressing the use of confidential information gained through inter-agency cooperation. In particular, we suggest an emphasis on safeguards governing information disclosed to or obtained from a foreign enforcement agency.

C. Resources and Powers of Competition Authorities

Consistent with the recommendation in Section I.C.1., that competition authorities have sufficient powers to conduct efficient and effective merger review, we urge additional language under this heading recommending that member countries seek to avoid multiplicity of review within a single jurisdiction.