Summary of Discussion Points

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

Discussion on de minimus Rules in Merger Control

28 June 2011

The Business and Industry Advisory Committee (“BIAC”) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 3 on a matter of significant importance to business.

These comments are meant to serve as a point of reference for the short discussion to be held on de minimis rules in mergers cases that will accompany the WP3 roundtable on “Remedies in Merger Cases”.

Purpose of merger control

BIAC supports in principle government efforts to investigate those mergers in their jurisdictions which may have effects on competition, and the power given to regulatory authorities to prevent anticompetitive mergers. BIAC is of the view, however, that these powers are accompanied by an important responsibility. Governments wishing to foster an environment conducive to economic growth should prevent only those mergers likely to have a significant adverse effect on competition in their jurisdiction and should not discourage (whether by imposing excessive costs or creating delay, uncertainty or legal risk) the vast majority of mergers that have positive or, at worst, neutral effects on growth and competitiveness.
Exclusions for two *de minimis* situations proposed

One source of uncertainty which may have the effect of discouraging potentially beneficial mergers is that national authorities in certain jurisdictions have the discretion to review, and potentially prohibit, small mergers or mergers in small markets. This may be because the jurisdiction has no mandatory notification thresholds, because the authority has the discretion to review mergers which fall below such thresholds, or because mergers in small markets are not specifically excluded from review. BIAC submits that exclusions from merger control for *de minimis* mergers and for mergers in markets which are *de minimis* in size would be beneficial for growth and competitiveness, to the benefit of merger control authorities and businesses alike. In particular these exclusions will:

i) provide legal certainty;

ii) avoid undue costs to the parties;¹

iii) free up resources for authorities to address their priorities, avoiding the need to review applications for approval in *de minimis* cases;

iv) permit faster restructuring of small and medium sized businesses, a factor of particular importance following an economic downturn; and

v) encourage start-up businesses by ensuring that the buy-out exit route, which is a particular incentive to new business formation in the IT, engineering, pharmaceutical and biotech areas, will remain readily available so long as the start-up remains *de minimis* in size.

**Exclusion of *de minimis* mergers**

To avoid unnecessary scrutiny of small mergers and potential negative impact on growth and innovation, BIAC supports the idea of creating a clear exclusion in all jurisdictions under which small mergers would not be subject to merger control notification or review. BIAC submits that the national *de minimis* exclusions so implemented should also extend to all multi-jurisdictional mergers which affect only a small target business within the jurisdiction in

¹ The study carried out by Deloitte in November 2007 for the UK Office of Fair Trading suggests that legal risk and costs can be significant deterrents to beneficial transactions. Asked to indicate on a scale of 1-4 (where 1 is never and 4 is frequently) how often mergers which are not anticompetitive are deterred by the risk and cost of merger control, the average of responses was 1.92, demonstrating a significant regulatory chilling effect.
question. In keeping with agreed international best practice, notification should not be required unless the transaction is likely to have a significant, direct and immediate economic effect within the jurisdiction concerned. Where notification of a multi-jurisdictional case is not appropriate, it is all the more appropriate that intervention should not be permitted either. BIAC is aware of instances in which trivial mergers have been investigated at a cost entirely disproportionate to the turnover of the target business. However, BIAC is not aware of any scientific evidence determining the precise level for the most appropriate de minimis threshold to establish an appropriate transaction size for various jurisdictions. BIAC would support government efforts, in consultation with the business community, to use objectively quantifiable criteria to identify an appropriate threshold for the target’s turnover, below which small mergers are unlikely to have a significant adverse economic effect in light of the characteristics of the local economy.

Since the objective is to identify small mergers, meaning transactions where the increase in economic concentration is small, a threshold based on the size of the target’s turnover should suffice, without the need for any limit on the size of the acquiring entity or group. The target turnover threshold could, if necessary, be subject to anti-avoidance rules, for example to ensure that larger transactions are not artificially subdivided.

**Exclusion of de minimis markets**

A number of jurisdictions recognise that transactions in very small markets, sometimes referred to as “bagatelle markets” are never likely to have a sufficiently significant economic effect to merit review or intervention.

BIAC would support the general adoption of such an exclusion to cover mergers, which may exceed the de minimis mergers threshold discussed above but which nevertheless, in light of the small market involved, are most unlikely to have any significant adverse economic effects.

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3 For example in the UK, in 2008 the *Chiral Technologies* case involving target UK turnover of £80,000 and in 2005 *Chemring and Comet* involving UK turnover of £84,000 were subject to detailed investigation before both eventually being cleared. The UK is now considering a de minimis exclusion for small mergers with target turnover below £5million.

4 Including Germany
Conclusions

BIAC is pleased that this issue, which refers to matters of *de minimis* impact but nevertheless is of real practical significance, is under consideration. A more risk based approach to such minor transactions would be a helpful step in the direction of ensuring that merger control remains proportionate to the requirements of maintaining effective competition and no more.