Summary of Discussion Points of the
Business and Industry Advisory Committee (BIAC) to the OECD presented to
the
OECD Competition Committee Working Party No. 3 on
International Co-operation and Enforcement
“Mergers in Markets with Systemic Effects”

18 October 2011

Introduction

1. The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee WP3 session on mergers in markets with systemic effects.

2. The OFT paper acknowledges that certain markets with high concentrations and high barriers to entry could suffer negative effects from the failure of large suppliers. In these markets the failure of a single firm can potentially lead to further business failures (‘systemic effects’). Examples cited are markets with large auditing, insurance/re-insurance, banking, payment systems and cash handling services where there might be a potential tension between ensuring stability and preventing further concentration on the market. BIAC notes that the OFT welcomes a short exchange of views with a particular focus on the audit and accounting markets.

3. BIAC would like to offer some general comments on the points raised by the paper, rather than focusing on the audit and accounting markets. We believe the paper raises some important issues of wider application, which we address in the following note.

Policy reasons for allowing mergers that might increase concentration

4. In markets where 'systemic effects' are possible, there is a potential tension between ensuring stability and preventing further concentration on the market. While this is true, it should not be forgotten that competition is only one of several objectives that Governments seek to promote when regulating mergers. It is not entirely
inconceivable that a merger which might be blocked/modified on competition grounds might in reality be permitted because other considerations are more important. As a matter of principle, there should be no objections in allowing mergers that might lead to greater concentration for wider important policy reasons.

5. The UK merger regime already provides for this in Section 58 of the Enterprise Act. This provision lists criteria such as national security, media plurality or the stability of the UK financial system that could be taken into account. In these cases it is possible for the UK Government to intervene and weigh competition law concerns against those criteria. The Act allows the Secretary of State to add additional policy objectives as the need arises. This provision has not always been without controversy but in our view the principle is sound.

6. There should also be no objection in blocking a merger which is not problematic from a competition perspective on the basis of wider policy reasons. The Dubai Ports World's failed purchase of franchises at several American port facilities is one example.

Higher concentration not always a competition problem

7. In any case, it should be pointed out that mergers resulting in greater concentration do not always lead to ‘anti-competitive’ mergers / mergers likely to result in a Significant Lessening of Competition (‘SLC’). In our view, if a merger leads to a high level of concentration, this does not automatically mean that there is a competition problem. Debate around this issue should recognise that merger control has evolved. Decision-takers consider many factors other than concentration levels such as barriers to entry, propensity to switch, closeness of competition, supply and demand-side substitutability, buyer power, efficiencies and customer benefits etc. As this list shows, the effect of a merger on ‘concentration’ is far from being the only consideration.

Global networks

8. The paper also asks for views on ‘local’ mergers that might have international impacts. It is not clear why these issues cannot be tackled/explored using traditional techniques of market definition and analysis: if a (geographic) market has global characteristics, the effect of the merger on the global market can be explored in the usual way (i.e. considering not only global levels of concentration, but also barriers to entry, customer propensity to switch, etc.).

How to deal with systemic effects

9. There are many measures that can be put in place to alleviate the risk of an increase in concentration (if one firm collapses) that do not necessarily involve a merger. For example in the UK banking sector ‘living wills’ are being put in place, to avoid the need to rescue banks, to avoid the systemic risk arising out of the collapse of a bank and to manage an orderly resolution. Living wills are recovery and resolution plans:
in times of stress a recovery plan would be put in place but if such recovery is not possible, then an orderly resolution of the bank can take place.

10. While the effectiveness of living wills as a policy solution may be specific to the banking sector, similar contingency planning may well be appropriate in other sectors, including audit, in order to provide 'life support' in the event of failure. Given the global characteristics of the largest audit firms, such regimes should be developed at a global level where possible.

Need for clarity

11. Business would welcome greater clarity and/or a clear statement of policy around the circumstances in which concerns about a lessening of competition will be ‘trumped’ by wider policy considerations. These circumstances will be very rare and business would not object to clarification/guidance that made it very clear that it will only very exceptionally happen.

12. What is disruptive is the situation where businesses are led to think that non-competition considerations might be allowed to override competition points in their particular case. These circumstances should be rare and exceptional and business would support an exercise having the objective of clarifying principles which should apply to the determination of when such circumstances are likely to arise. In the view of BIAC there would be a useful role for OECD to perform in achieving consensus on an objective set of principles which clearly distinguish cases involving systemic effects from, for example the aspirations of a national or regional industrial or economic strategy.