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Organisation de Coopération et de Développement Economiques
Organisation for Economic Co-operation and Development

28-Jan-2003

English text only

DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAFFE/COMP/WP3/WD(2003)3
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Working Party No. 3 on International Co-operation

PROCEDURAL FAIRNESS FOR MERGING PARTIES IN MERGER INVESTIGATIONS

-- Republic of Lithuania --

This document is submitted by the Delegation of the Republic of Lithuania to the Working Party No. 3 of the Competition Committee FOR DISCUSSION at its next meeting on 12 February 2003.

JT00138344

English text only

PROCEDURAL FAIRNESS FOR MERGING PARTIES IN MERGER INVESTIGATIONS

Contribution from Lithuania to Working Party No. 3

1. Procedural fairness in the investigation stage

1. A decision whether a merger notification or compliance with a request for information is sufficient to permit applicable waiting periods to begin to run should be based on a publicly known impartial standard. In Lithuania, competent officials working in the Administration of the Competition Council (usually the Head of the Concentration Division and a case-handler) make a decision that a merger notification is complete when the information received from the merging parties complies with the officially approved and publicly known requirements for the typical notification form. Such procedure ensures legal certainty by providing impartial standard to all business undertakings. However, business undertakings can initiate pre-notification contacts before notifying the Competition Council and ask for the reduction in the scope of information that has to be submitted. Such procedure is envisaged in the Resolution No. 45 of April 27, 2000 of the Competition Council ("The procedure for the submission and examination of merger notifications and the calculation of aggregate turnover").

2. Merging parties should have a right to request that a decision concerning completeness of a merger notification had been examined in court if it could have influenced an initial enforceable decision concerning a notified merger. A request for a judicial review before the final decision of a competition authority would not seem to be in the best interest of the merging parties although it is possible to imagine a situation where a case-handler for whatever reason would not agree that a merger notification is complete even if it were so. Such request would only extend the length of the investigation and therefore would make it more difficult to keep the deal alive for the merging parties.

3. It is true that supplemental requests for information are likely to impose significant burden not only on the merging parties but also on the competition agency itself. Judging from our experience there does not seem to be a need for an independent review or more formal procedures because our competition authority is always willing to engage in negotiations with the parties to reduce their burden.

4. The decision whether to initiate an in-depth (second phase) investigation should be left entirely to the discretion of the competition authority. Such investigation is supposed to be initiated when a preliminary investigation does not yield a clear answer concerning the likelihood of post-merger anticompetitive effects. However, sometimes concerns about possible anti-competitive effects could be easily dispelled in a meeting with the merging parties. Such meeting could save precious time both for the merging parties and the competition authority. Therefore a competition authority should adopt a standard practice of inviting the merging parties to an informal meeting before proceeding with an in-depth investigation.

2. Procedural fairness at the decision-making stage in the agency

5. The initial enforceable decision about whether a merger should be blocked does have an utmost importance to the merging parties. The merging parties should have a right to respond to the concerns of the competition authority and such a right is provided in Lithuania. When the Concentration Division prepares a statement to the Competition Council with the proposal to block a merger or to require divestitures, the Competition Council is not allowed to make a decision immediately. The merging parties

receive a statement with the objections that were raised and are notified about the date when the final decision is supposed to be made. They have a right to access the Competition Council's file subject to the legitimate protection of business secrets.

6. In Lithuania the proceedings in which the parties participate do not have a rigid structure. On the one hand, the merging parties know the concerns that were raised by the intended merger before arriving at the proceedings and therefore there is no need for the Concentration Division to necessarily present evidence orally. On the other hand, the merging parties are provided with a possibility to present additional requests and/or arguments before the final proceedings. Usually, during the final meeting merging partiers are offered an opportunity to present their arguments orally and are asked clarifying questions by the members of the Competition Council.

7. When the initial enforceable decision is made at the competition authority the need arises for a structural separation between the structural parts that conduct investigation and/or prepare recommendation and the body that is responsible for the decision. In Lithuania this is implemented by the two-tier structure of the competition authority. The Competition Council consists of a chairman and four members that are appointed by the President of the Republic upon nomination by the Prime Minister. All investigations of the competition cases including mergers are carried out by the Administration of the Competition Council.

3. Rights of appeal

8. A right to appeal against an adverse decision by a competition authority should not be taken away from the merging parties under any circumstances. Even if it were so that such right is not an effective procedural safeguard it should be left to the merging parties to decide whether to use it.

9. Appeals resolution should be fast enough so that the merging parties could save a deal when the final decision is in their favor. On the other hand, a fair appeal process may require lengthy proceedings. Therefore it seems to be very difficult or even impossible to propose any maximum time for resolving appeals.