



## **ERT position paper on best practices in international merger control - Executive Summary**

The European Round Table of Industrialists (ERT) brings together representatives of around 50 major multinational companies of European parentage from a wide range of industrial and technological sectors. ERT member companies generate combined revenues exceeding €2,250 billion and invest around €50 billion annually in research and development activities. ERT advocates policies at both national and international levels, with the goal of improving competitiveness, growth and employment.

ERT appreciates the efforts of competition authorities worldwide in promoting the principles of fair competition. However, continuous effort has to be made to ensure that competition authorities avoid imposing unnecessary burdens on business in pursuit of those aims.

To that end, ERT conducted a consultation exercise among its member companies in October/November 2016 in order to gather feedback on their experiences of merger control internationally. This feedback has been distilled into a number of recommendations for “best practice” in the conduct of merger control proceedings, which are set out below. While these are already reflected in some competition authorities’ existing merger control regimes, more consistent and widespread adoption of these best practices would improve the efficiency of merger control proceedings around the world for businesses, and the reviewing authorities alike.

### **Recommended best practices in international merger control**

#### *Jurisdiction*

Filing thresholds should be set at a level such that a notification is only required when a transaction has sufficient local nexus. In particular, thresholds should be set high enough to catch only those transactions that may plausibly have an impact within the jurisdiction concerned. Jurisdictional rules should also require that both the purchaser and the target, or in the case of a joint-venture (“JV”), the JV itself, are either physically present or generate a considerable turnover in the jurisdiction concerned.

#### *Transparency, procedural fairness and non-discrimination*

It is crucial that the merger control process is, and is seen to be, procedurally fair. Businesses should be given sufficient opportunities to respond effectively to any concerns that competition authorities may have. This means:

- i. Allowing parties to have more and timely contact with the case team and other decision-makers;
- ii. Giving sufficient weight to the parties’ evidence and submissions; and

- iii. Promptly notifying parties once a decision has been made and publishing the reasoned decision.

There should be transparency in the merger control process, which includes providing the notifying parties with appropriate and timely access to file and to any legal or economic evidence upon which a decision is based. There should also be clarity on the timing of proceedings, and competition authorities should communicate to the notifying parties why and how they have taken decisions concerning the substance or process of the review.

Merger control rules should be designed and applied so as to ensure that they do not result in discrimination against businesses on the basis of their nationality or in pursuit of industrial policy goals such as the protection of interests of specific domestic companies. Such factors ought to be irrelevant to the assessment of a transaction's impact on competition and should not be taken into account.

#### *Procedural efficiency*

Pre-notification discussions can be a useful part of the merger control process. However, pre-notification should only be conducted where needed, should be focused, should (as far as possible) take account of the commercial time constraints, and should not unduly prolong the overall timetable. This is particularly important in the context of "no issues" cases.

Where needed, pre-notification should also be seen as an opportunity to eliminate from the scope of the competition authority's substantive review those issues that are unlikely to give rise to substantive competition concerns.

Requests for information ("RFIs") should not be used by competition authorities as a means solely of extending the review period. Competition authorities should also adopt reasonable approaches to using "stop-the-clock" powers; information should be provided to the notifying parties about why and when stop-the-clock powers might be used, and specific justification provided in each such instance.

Information requirements and document submissions that are irrelevant to the competitive assessment (e.g. copies of company incorporation documents, accounts, details of all sales figures for subsidiaries located in the country) should be eliminated. Similarly, authorities should avoid unduly burdensome procedural formalities (e.g. translation of non-critical documents, and notarisation / apostillisation requirements).

#### *Information requests*

ERT considers that the following good practices would reduce the cost and burden for businesses in responding to requests for information ("RFIs") from competition authorities:

- (i) Strictly focusing only on areas of substantive concern and essential information;
- (ii) Avoiding duplication / reopening areas already deemed out of scope;
- (iii) Limiting the number and scope of RFIs;
- (iv) Consolidating queries rather than sending multiple requests;
- (v) Ensuring questions are clear, specific and tailored to the respondent;
- (vi) Ensuring any requests for internal documents are targeted to avoid "catch all" requests for thousands of documents;
- (vii) Limiting data requests to information that is strictly necessary; and
- (viii) Allowing flexibility in the presentation/formatting of data, particularly in respect of large data requests.

### *Coordination*

Competition authorities should seek to build upon existing efforts to increase coordination on individual transactions (e.g. by aligning review timetables and ensuring remedies packages are tailored and appropriate to each jurisdiction concerned). Similarly, authorities should consider aligning aspects of their procedural rules (where appropriate), such as adopting jurisdictional criteria based on local turnover thresholds and streamlining the information required in the initial notification.

### *Next steps*

The ERT welcomes the opportunity to discuss further with competition authorities how they might take forward the recommendations set out in this paper. Please contact [b.larielle@ert.eu](mailto:b.larielle@ert.eu) for further information.

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