International Chamber of Commerce
The world business organization

Comments on selected issues for study by the US Antitrust Modernization Commission

Prepared by the Commission on Competition for submission to the US Antitrust Modernization Commission

ICC, the International Chamber of Commerce, welcomes the opportunity to submit comments to the Antitrust Modernization Commission (the "AMC") regarding certain antitrust issues that have been identified for potential study. As a world business organisation with members from all sectors in over 130 countries, ICC is able to draw on a rich range of international perspectives from different sectors on these issues. With its long history of interest in the issues below, it is hoped that the following comments may assist the AMC to identify priority areas for further work.

ICC has elected to comment on mergers, acquisitions and joint ventures, international aspects, and single firm conduct, which are issues of particular interest to its global membership.

A. Mergers, Acquisitions, and Joint Ventures

The Memorandum of the Mergers, Acquisitions and Joint Ventures Working Group (the "M&A Working Group"), dated December 21, 2004, recommended six issues for study by the AMC. ICC has a particular interest in two of these issues, as identified below:

1.0 *Should the Hart-Scott-Rodino merger review process be revised to address issues relating to the number and type of transactions requiring pre-merger notification, the length of investigations, the burden imposed by "Second Requests" and civil investigative demands on the merging companies and third parties, and transparency of the enforcement agencies' decisional process?*

1.1 As noted by the M&A Working Group, since the *Hart-Scott-Rodino-Antitrust Improvements Act of 1976* (the "HSR Act"), 15 USC. § 18a, was enacted "the cost, burden, and delay involved in HSR review appear to have increased dramatically for many transactions." [1] Moreover, "[e]ven if these issues have not caused companies to abandon or forego otherwise beneficial transactions, they may have imposed unreasonable uncertainty and costs on companies and delayed the realization of merger benefits."[2]

[1] Memorandum from the Mergers, Acquisitions, and Joint Ventures Working Group to all Commissioners of the Antitrust Modernization Commission, (Dec. 21, 2004) at 9.

[2] *Id*.

International Chamber of Commerce
38, Cours Albert 1er, 75008 Paris, France
Telephone +33 1 49 53 28 28 Fax +33 1 49 53 28 59
Web site www.iccwbo.org E-mail i[redacted]

The Number and type of Transactions Requiring Pre-merger Notification

1.2 ICC notes that some meaningful changes have been made to the notification thresholds in the HSR Act, including the exemptions relating to acquisitions of foreign assets and foreign voting securities, since the International Competition Policy Advisory Committee ("ICPAC") issued its *Final Report to the US Attorney General and Assistant Attorney General for Antitrust* (the "Final Report").[3] ICC is inclined to wait until there has been additional experience with those new thresholds before encouraging further study regarding the number and type of transactions requiring pre-merger notification.

1.3 Nevertheless, ICC agrees with ICPAC that filing fees should be de-linked from funding for the agencies. ICC also encourages the AMC to give further consideration to the optimal manner of accounting for future inflation.

The Length of Investigations

1.4 ICPAC's Final Report also criticized the second-stage review process, particularly its open-ended nature. However, ICPAC's members were not of a shared view on the appropriate mechanism for addressing these concerns.[4] Based on the experience of ICC members, ICC believes that the current U.S. "second request" system has to be reviewed in principle with a goal of limiting the burden on the undertakings concerned and of providing legal certainty in a defined time frame. In this regard, ICC commends to the AMC the approaches of the European Commission and Canada.[5] The EC's Merger Regulation[6] adopts a two-stage process that involves an initial period of 25 working days, used to screen out the vast majority of transactions that do not raise significant competition issues,[7] and a second phase maximum review period that runs approximately 4 months.[8] The second phase can be extended by an additional 15 working days, if the notifying parties offer commitments to address competition issues that have been identified by the European Commission. Thus, the EC provides for an overall maximum review period of 105 working days[9]– about five

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[3] *International Competition Policy Advisory Committee, Final Report to the US Attorney General and Assistant Attorney General for Antitrust*, February 28, 2000.

[4] *Id*. at 131.

[5] The EC has published its *Best Practices on the Conduct of EC Merger Proceedings* guidelines, which provide key procedural guidelines and a timetable for the Commission to follow. This sets markers for both the merging parties and the Commission.

[6] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (the "Merger Regulation").

[7] This period is automatically increased to 35 working days where the European Commission receives a request for referral from a Member State or where the undertakings concerned offer commitments to address any *prima facie* competition issues, within three weeks from initial notification.

[8] Specifically, 90 additional working days.

[9] The 90 working days period can also be extended at the request of the notifying parties (within 15 days of the opening of the second phase) or the Commission (with the notifying parties' agreement), provided that the total extension of the phase 2 period does not exceed 20 working days.

months. ICC notes that the Canadian Competition Bureau embraces a similar five-month maximum review period, albeit in the form of an informal "service standard."[10]

1.5 The European and Canadian approaches are broadly consistent with the Recommended Framework for Best Practices in International Merger Control issued by ICC and the Business and Industry Advisory Committee to the OECD ("BIAC") in October 2001 (the "ICC-BIAC Recommended Best Practices"), which recommended a two-phase merger review process characterized by an initial maximum phase I review period of 30 days and a maximum phase II review of an additional 4 months for those transactions that raise potential competition issues that merit additional investigation beyond the phase I maximum review period.[11] ICC-BIAC Recommended Best Practices further suggested: "If maximum review periods are not imposed, the enforcement agency should enter into an agreement with the parties setting out a detailed investigative schedule culminating in a date certain for the ultimate enforcement decision.[12] A four-month period should be targeted as the maximum review period in such undertakings, which should only be modified by agreement between the parties and the head of the enforcement agency."[13]

1.6 ICC notes that since ICC-BIAC Recommended Best Practices were issued, the International Competition Network has been created and has developed Recommended Practices for Merger Notification Procedures ("ICN Recommended Practices"). Among other things, the ICN Recommended Best Practices state that "merger reviews should be completed within a reasonable period of time."[14] In commenting upon this principle as it relates to transactions that are subjected to a second phase review, the ICN Recommended Practices state that reviews should be completed or capable of completion within six months or less following the submission of the initial notification(s)."[15] However, the commentary then proceeds to suggest that this deadline should not be cast in stone, but should be flexible, to allow for a "limited extension," with the consent of the merging parties, in complex cases and/or to allow for the negotiation of mutually acceptable conditions for clearance."[16] ICC notes that while this recommendation advocates an overall maximum review period that is somewhat longer than that set forth in ICC-BIAC Recommended Best Practices, it would, if adopted in the U.S., nevertheless represent a significant improvement over the *status quo*.

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[10] See Competition Bureau, Fee and Standards Handbook, http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1719&lg=e.

[11] See http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf, at §2.1.5.2.

[12] It should be noted that this applies in only exceptional cases. It is critical that time extensions not become standard operating procedures in merger reviews.

[13] *Id*.

[14] International Competition Network, *Recommended Practices for Merger Notification Procedures*. See http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf, at §4A.

[15] Id. at Comment 2 to Principle IV(C).

[16] *Id*. at Comment 6 to Principle IV(C).

1.7 An important issue related to the length of the review process is the time that can be lost while the two federal antitrust agencies wrestle with the issue of which of them will review a particular transaction. ICC's members have observed that this has become an increasing problem, and that from time to time discussions between the agencies have absorbed so much time in the initial period that they have not had sufficient remaining time to investigate during that period, with the result that they have felt compelled either to issue a second request or to suggest that the notifying parties withdraw and re-file their notifications. ICC encourages the AMC to study the extent to which non-binding guidelines for case-sharing between the two agencies may assist to address this problem.

The Burden Imposed By Second Requests and Civil Investigative Demands

1.8 Many business groups and practitioners that appeared before ICPAC described the second-request process as "unduly burdensome." [17] After considering the matter, the Final Report recommended that in designing second requests, the antitrust agencies "narrowly tailor their requests for additional information to the issues prompting the need for further review."[18]

1.9 ICC strongly encourages the AMC to study this matter, as many ICC members have reported that overly broad second requests are being issued. In this regard, ICC agrees with the observation in ICPAC's final report that the level of willingness to engage in productive negotiations to limit the scope of a second request appears to vary among staff members and counsels for merging parties, and modification requests are sometimes not resolved in a timely fashion. ICC also wishes to draw to the AMC's attention the following ICC-BIAC Recommended Best Practices that are relevant to the second request process:[19]

(1) A Phase II investigation should be initiated only when an agency, having conducted a diligent review of information submitted by the parties and collected, as necessary, from third parties concludes that the proposed transaction raises potential competitive issues within the jurisdiction concerned that merit further investigation.

(2) At the commencement of a second stage review, the reviewing agency should articulate to the merging parties the specific competitive concerns that are driving the investigation. This statement may be made orally or in writing and should contain a short but clear statement of the competitive concerns that cause the agency to undertake further investigation. The disclosure should not preclude the reviewing agency from pursuing any additional avenues of investigation or theories of competitive harm if new information comes to light.

(3) Enforcement authorities should attempt to coordinate their Phase II reviews to the extent possible. At a minimum, this should include coordinating with respect to the timing and content of information requests, as well as the

[17] International Competition Policy Advisory Committee, *supra* note 3, at 137.

[18] *Id*. at 140.

[19] ICC-BIAC Recommended Best Practices, *supra* note 10, at §2.1.5.1(3)-(7).

format in which the information is requested (e.g., fiscal vs. calendar year; net sales vs. gross sales; dollar sales vs. unit sales; gross prices vs. net prices). Coordination also would be desirable with respect to the timing of interviews and plant tours.

(4) Enforcement authorities should give consideration to accepting information that has already been provided in another jurisdiction, where that information is substantially responsive to what is required. (This is a practice that is becoming increasingly common in Canada, where the competition bureau has saved merging parties substantial time and effort by accepting interrogatories and documents previously submitted to the US DOJ or FTC).

(5) Seriatim requests for information should be avoided unless justified by the discovery of new facts or necessary for purposes of clarifying prior submissions.

1.10 Elsewhere in ICC-BIAC Best Practices, the following best practice is suggested to facilitate an efficient and expeditious second phase review process:[20]

> A frank exchange of ideas is critical to the expeditious resolution of issues. Both the reviewing agency and the parties should be encouraged to discuss the competitive issues and potential solutions at the earliest possible stage and to continue this dialogue throughout the review process. The reviewing agency should advise the parties specifically of concerns with a transaction as soon as practicable and, in all events, no later than the commencement of a second-stage investigation. These discussions should occur without prejudice to the ultimate resolution of the matter. The discussions should be used to resolve potential issues during the Phase I period and/or tailor the information required of the parties during the Phase II proceeding.

1.11 Regarding the coordination of reviews between enforcement authorities in different jurisdictions, ICC recognizes that the practice of obtaining waivers from merging parties of their rights under confidentiality laws offers the potential to significantly expedite merger reviews. Unfortunately, based on the experience of ICC members, it has not always been clear that this benefit has been realized by merging parties. Accordingly, to encourage voluntary waivers of confidentiality, cooperation pursuant to a waiver should affirmatively seek to reduce the length of time that otherwise would be required to complete a merger review and to reduce the burden that otherwise would be imposed upon the party providing the waiver**.**

1.12 ICC also encourages the AMC to study the extent to which due process safeguards can be built into the second request framework to minimize the burdens that are imposed on merging parties and third parties who are requested to provide information to the reviewing agency. This is something that was addressed by ICPAC, which recommended that the agencies make the appeals procedure more attractive to merging parties, in part by

[20] *Id*. at §2.1.5.2(4).

encouraging merging parties to use the appeals process as well as by involving supervisory officials in the modification negotiation process.[21] In this general connection, ICC draws the AMC's attention to the following additional ICC-BIAC Recommended Best Practice:[22]

> While the decision to initiate Phase II procedures should rest in the sound discretion of the enforcement agency, mechanisms should be in place to ensure that the parties concerned have timely and effective rights of appeal before a court or other independent arbiter regarding the interpretation of laws, regulations and procedures; decisions relating to substantial compliance with filing requirements; the scope of information requests issued by the enforcement agency or of any oral examinations that may be sought; and final decisions of the agency with respect to a merger.

1.13 Finally, ICC would like to draw the AMC's attention to the issue of foreign productions and translation requirements. The ICPAC Final Report observed: "At an average cost of $40 a page word for word (one box is roughly 2,000 pages, thus $80,000 a box) or $10 a page for a summary ($20,000 a box), translation requirements can impose a significant cost on parties with multinational operations." [23] With this in mind, the Final Report recommended that agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations only of documents relevant to the inquiry; and that parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice.[24] ICC encourages the AMC to fully explore how progress in reducing the burden on parties in this regard can be achieved. In this regard, ICC draws the AMC's attention to the following ICC-BIAC Recommended Best Practice:[25]

> Local jurisdictions are entitled to expect that notification forms be submitted in the local language. Jurisdictions should not require extensive translation of supporting documents such as transactional documents, annual reports, etc. For purposes of initial review, the enforcement agencies should be prepared to accept summaries, excerpts and other means of reducing translation burden, without prejudice to their ability to require full translations if it is determined that the transaction merits investigation.

Transparency of the Enforcement Agencies' Decisional Process

1.14 The M&A Working Group's Memorandum observes that "commentators have urged the [AMC] to consider ways in which the agencies could increase the transparency of the enforcement process, particularly with respect to non-litigated consent orders and

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[21] International Competition Policy Advisory Committee, *supra* note 3, at 140-141.

[22] BIAC, *supra* note 10, at § 2.2.3.2.

[23] International Competition Policy Advisory Committee, *supra* note 3, at 141.

[24] *Id*. at 142.

[25] ICC-BIAC Recommended Best Practices, *supra* note 10, at § 2.1.4.8.

transactions that are not challenged."[26] ICC would be supportive of such study by the AMC, as it believes that there is room for improvement in this area. In this regard, the AMC may wish to take note of the following ICC/BIAC Recommended Best Practice: "Consideration should be given to using speeches, press releases, information bulletins and/or other tools to disseminate information regarding precedential interpretations of statutes, regulations, policies or practices, or regarding the basis for the agency's conclusions with respect to high profile or important cases."[27]

2.0 *What role, if any, should private parties and state attorneys general play in merger enforcement? Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers?*

2.1 ICC considers it a best practice to avoid concurrent jurisdiction among multiple domestic agencies. As noted in ICPAC's Final Report, "shared power may generate inconsistent policy approaches within a single jurisdiction [and] can make efforts at global harmonization and cooperation more difficult. In addition, it imposes additional uncertainty as to timing and outcome and further increases transaction costs."[28] As a result, ICPAC concluded that "a more rational or sensible approach would be to give exclusive federal jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to the DOJ and FTC."[29] However, the ICPAC Final Report stopped short of recommending that state attorneys general be precluded from having a role in merger review.

2.2 ICC endorses ICPAC's position as it relates to avoiding multiple review at the federal level, and would go further by encouraging the AMC to actively explore the desirability of eliminating duplication as between federal and state antitrust authorities. To this end, the AMC may wish to note the following ICC/BIAC Recommended Best Practices:[30]

(1) Multiplicity of reviewing agencies within a single jurisdiction should be avoided. Each jurisdiction should identify the agency or agencies responsible for merger review and clearly delineate responsibilities.

(2) A single federal authority responsible for merger review is the preferred approach. This approach is likely to maximize transparency and consistency in the application of competition policy.

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[26] Mergers, Acquisitions, and Joint Ventures Working Group, *supra* note 1, at 8-9.

[27] See, e.g. ICC-BIAC Recommended Best Practices, *supra* note 10, at § 2.2.1.5. See, e.g., ICC-BIAC Recommended Best Practices, *supra* note 10, at § 2.2.1.5. One commendable example is the DG Competition's practice of collecting and making such information available in a single website.

[28] International Competition Policy Advisory Committee, *supra* note 3, at 143.

[29] *Id*.

[30] ICC-BIAC Recommended Best Practices, *supra* note 10, at § 2.1.5.3.

(3) Compartmental governments within a country should be prohibited or discouraged from engaging in the review of notified transactions. Mergers of sufficient size to trigger notification thresholds should be presumed to warrant the attention of federal agencies without need for subsidiary enforcement.

(4) Where the proposed transaction involves areas traditionally subject to sectoral regulation, the sectoral regulators may have a legitimate role in the merger review process. The findings of the federal competition agency as to the competitive effects of the proposed transaction, however, should be binding on the sectoral regulator.

B. International

3.0 One of the international issues in respect of which the AMC has sought comments is whether the *Foreign Trade Antitrust Improvement Act* ("FTAIA") should be amended to clarify the circumstances in which the *Sherman Act* and the *FTC Act* apply to extraterritorial anticompetitive conduct. ICC recommends that the FTAIA should be so amended.

3.1 In its decision in *F. Hoffmann-LaRoche Ltd. v. Empagran SA*,[31] the Supreme Court held that the FTAIA excludes from the scope of the U.S. antitrust laws claims based on transactions outside the United States, where the alleged foreign injury is "independent" of any domestic effects of the alleged antitrust violation. In reaching this conclusion, the Court confirmed that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[32] Among the reasons cited by the Court for this position in the antitrust area is the fact that "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies," which, it observed, often reflect "a balance of competing considerations" in the language of foreign antitrust laws.[33]

[31] 542 U.S. 155 (2004).

[32] *Id*. at 2366.

[33] *Id*. at 2368.

3.2 The Court, however, left open the possibility that the U.S. antitrust laws may reach non-U.S. commerce under the FTAIA where domestic effects are not entirely independent from the foreign injury. In the absence of clarification from Congress, it will be left to the lower courts to determine what kind of relationship, if any, is sufficient to enable non-U.S. purchasers to recover treble damages under the US antitrust laws. Given the allure of treble damages, it is reasonable to expect that the level of activity of the lower courts in this area will be significant.

3.3 On the one hand, it is conceivable that a court might find that high prices in the U.S. will suffice to give rise to a claim under the FTAIA, even if the plaintiff did not actually pay those high prices, on the theory that lower, competitively determined, U.S. prices would have made it difficult to sustain the price fixing agreement if it had been limited to foreign territory. In an era where the bounds of geographic markets are increasingly extending beyond U.S. borders, this "but for" approach could give rise to an exception that swallows the rule. While such an approach recently was rejected by the United States Court of Appeals for the District of Columbia (the "DC Circuit Court"), on remand from the Supreme Court, in *Empagran*,[34] there can be no assurance that such an approach would not be embraced by another appellate court or by a district court.[35]

3.4 On the other hand, a more restrictive approach, along the lines of the "direct causal relationship" approach that recently was embraced by the DC Circuit Court in *Empagran*,[36] could help to limit the reach of U.S. antitrust laws to a more manageable range of situations. This is something that ICC's members believe would be worthy of further study by the AMC. ICC also encourages the AMC to address the question whether Section 1 of the *Sherman Act* and Section 4 of the *Clayton Act* even authorize claims by non-U.S. purchases for treble damages. This is something that the *Empagran* decision did not address.[37]

3.5 To the extent that lower court action alone can be expected to result in decisions that are not entirely consistent, there is substantial scope for significant uncertainty to emerge. This uncertainty could be perpetuated for many years, thereby compounding the chilling effect that U.S. antitrust laws may have on foreign business transactions occurring wholly outside the U.S. Perhaps more significantly, this uncertainty may impede global antitrust enforcement efforts, as suggested by several foreign governments, the United States Department of Justice (Antitrust Division) and the Federal Trade Commission, in briefs filed with the Supreme Court in *Empagran*.

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[34] *Empagran S.A. v. F. Hoffman-LaRoche Ltd.*, No. 01-7115, 2005 US App. LEXIS 12743 (D.C. Cir. June 28, 2005), *available at* http://pacer.cadc.uscourts.gov/docs/common/opinions/200506/01-7115c.pdf.

[35] Indeed, *see Kruman v. Christie's*, 284 F.3d 384 (2d Cir. 2002).

[36] *Empagran*, 2005 US App. LEXIS 12743 at *9 ("The statutory language – "gives rise to" – indicates a direct causal relationship, that is, proximate causation, and is not satisfied by the mere but-for 'nexus' the appellants advanced in their brief.").

[37] *See* D. Gelfand, T. Dunne and P. Bock, *Looking for Treble*, Global Competition Review (August/September 2004), 10, at 11.

3.6 In the view of ICC's members, Congress is in the best position to consider the delicate and competing policy implication of the different interpretations of the Supreme Court's decision, in assessing the extent to which, and circumstances in which, U.S. courts should open their doors to foreign purchasers.

C. Single-Firm Conduct[38]

4.0 In its memorandum to the AMC, the Single-Firm Conduct Working Group identified controversy among scholars on fundamental issues in monopolization law. Specifically, the Working Group identified a number of questions, including the following which we address in this comment:

(1) Should the standard for single-firm conduct move closer to the standard for abuse of a dominant position utilized in Europe?

(2) Should existing US prohibitions on single-firm conduct be relaxed?

(3) Did *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* go too far in allowing dominant firms to extend power into adjacent markets through refusals to deal?

(4) Should tying doctrine be revised or clarified—for example, so that it is defined legislatively as a Rule of Reason offence?

(5) What is the correct treatment of bundling and discount programs?

Summary

4.2 With respect to the first question, this comment concludes that in general, U.S. jurisprudence should not seek to emulate perceived differences in European jurisprudence. Next, this comment addresses question two, and suggests that the proper analysis should focus on the general principle that monopolization enforcement exists to foster competition, not competitors. In answering question three, this comment concludes that *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP* did not go too far. While answering question four, this comment suggests that rule of reason analysis should be applied more uniformly in tying cases. Finally, in responding to the fifth question, this comment suggests that enforcement agencies should seek to avoid enforcement against bundling and discount practices with ambiguous or equivocal effects.

4.3 At the outset, it should be acknowledged that the objectives of any rational business enterprise are to expand its position in the marketplace to the greatest extent possible and to maximize the return on investment of its stakeholders. These objectives drive companies to out-perform their peers through superior innovation, efficiency and industry. Companies that are the most successful at achieving one or more of these metrics are the most likely to become dominant firms. Often, the firms achieving these objectives employ aggressive

[38] Much of this portion of the submission is based on *OECD Competition Committee Roundtable on Competition on the Merits,* prepared by the Business and Industry Advisory Committee to the OECD, June 1, 2005.

competitive practices, combining their skill in innovation and production with savvy and creativity in marketing, distribution, and customer relationships that help to maximize the value of their goods to consumers. Success thus achieved is the result of a healthy competitive process.

4.4 In protecting competition through the regulation of dominant or monopolistic firms, judges and enforcement agencies must engage in the difficult task of distinguishing between firms that have achieved or maintained a dominant position through the deployment of desirable means, and those that have done so through means that retard, rather than advance, the competitive process. The challenge is particularly great when firms employ means that appear not only to reward their own efforts but also to hinder the efforts of their competitors. This challenge is illustrated in the questions put to the AMC.

5.0 *Should the U.S. Standard Move Closer Towards the European Standard?*

5.1 A primary consideration in preserving competition on the merits is ensuring that the enforcement process itself does not undermine benefits to consumers. Thus, in order for a practice by a dominant firm, or would-be dominant firm, to qualify for enforcement action, it should cause harm to the competitive process itself. For this reason, no meaningful competition standard can be satisfied by proof of harm to or elimination of a competitor, or even on the exit of all competitors from a market. It is generally accepted that in a free-market economy competition enforcement agencies should not intentionally act to manipulate a market that is functioning competitively by seeking to promote an industry champion or to hinder a disfavoured company. If this principle is accepted, then agencies and courts should not seek to disrupt a competitive process which in some cases legitimately may lead to single firm dominance or exclusivity. Enforcement premised on maintaining competitors, therefore, can no more be justified than enforcement designed to manipulate a market. "Results-oriented" enforcement should be rejected.

5.2 Differences among standards of conduct in different competition jurisdictions can impose direct and indirect costs upon multinational companies -- the direct costs of multifaceted compliance programs and the indirect costs of efficiencies lost if marketing, distributing, and manufacturing must be fragmented to meet separate requirements. These costs have been well noted in the context of mergers and acquisitions, discussed elsewhere in this comment, but the consequences of varying standards are also important in the context of single firm behaviour, which does not have the benefit of defined periods of review and clearance. Every day, companies must respond to dynamic conditions of supply and demand in the marketplace. To the extent that these responses are constrained by inapposite rules or uncertainty about their application, competition will suffer.

5.3 Decisions in cases involving single-firm conduct have led commentators to question what standards can be ascribed to the jurisdictions involved. For example, John Vickers, Chairman of the Office of Fair Trading in the United Kingdom, observed that although differences in merger regulation have diminished recently, the same could not be said with respect to abuses of dominance.[39] He noted, for example, the *Tetra Pak II* holding of the

[39] John Vickers, Chairman, Office of Fair Trading, Speech to the 31st Conference of the European Association for Research in Industrial Economics: Abuse of Market Power, (Sept. 3, 2004), available at http://www.oft.gov.uk/NR/rdonlyres/948B9FAF-B83C-49F5-B0FA-B25214DE6199/0/spe0304.pdf.

European Court of Justice that a company charged with predatory pricing may face liability even if it did not have a realistic chance of recouping its losses with supracompetitive prices after its rivals departed.[40] This stands in contrast to the *Brooke Group* holding of the US Supreme Court where plaintiffs must prove probability of recoupment.[41] The recoupment standard in U.S. law requires courts to focus more directly on the ultimate issue of concern to consumers -- the prospect of supracompetitive pricing after the price cuts have ended. Departure from this approach will not redound to the benefit of the competition that the Sherman Act is intended to protect. Chairman Vickers called for competition law to draw more directly from economic principles.

5.4 Rather than inquire whether one jurisdiction seeks to emulate the standards of another, ICC suggests that competition authorities in all jurisdictions approach single-firm behaviour with the objective to preserve the process of competition rather than the survival of competitors. This approach is consistent with the thinking of officials from the EC, as evidenced at a recent meeting of competition authorities at the Organization for Economic Cooperation and Development. In a comment submitted by the Delegation of the European Commission to the OECD's Competition Committee for the June 1-2, 2005 meeting, it was suggested that the main considerations regarding the Commission's approach to the application of Article 82 EC include the principle that

> "[p]rotection of the competitive process is not protection of *competitors*. When analyzing the effects of behavior by dominant companies competition authorities should not disturb competition by protecting competitors that are inefficient and are likely, in the short or medium term, to disappear from the market on the basis of the competitive process if no intervention will take place…."[42]

This passage could just as accurately describe the approach to single-firm conduct widely accepted in the U.S. ICC is optimistic that such thinking will continue to influence enforcement in Europe.

5.5 The ICC Commission on Competition suggests that competition authorities continue their efforts at anchoring single-firm standards in sound economic principles in all jurisdictions. Both U.S and European enforcement activities -- by virtue of providing additional case studies, and by virtue of the AMC's ongoing inquiry and the European Commission's current policy review on Article 82 EC -- will undoubtedly contribute to the understanding of those principles and the implications of their application.

6.0 *Should Prohibitions on Single-Firm Conduct Be Relaxed?*

6.1 The appropriate model for enforcement should focus on preserving the competitive process by distinguishing between those practices that allow the market to play-out according to the true economic performance of the competitors and those which instead prevent firms in a market from meeting with their true economic fate. It should be recognized that this is a

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[40] E.g. Case C-333/94P *Tetra Pak International SA v Commission* [1996] ECR I-5951, para 41. See also Case T-203/10 Manufacture Française des Pneumatiques Michelin v Commission, (30 September 2003)

[41] Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 US 209 (1993).

[42] Comment submitted by the Delegation of the European Commission to the OECD's Competition Committee meeting, (June 1-2, 2005)

very fact-intensive consideration. There are few, if any, unilateral practices that can be condemned as anticompetitive without consideration of their actual effect on competition. Unlike some horizontal restraints, which long experience and empirical study have shown can lead to competitive harm in virtually all cases – reducing the risk of false positives to a de minimis level – unilateral practices can not so neatly be pigeon-holed. Exclusive distributorships, for instance, most often benefit competition but can, in some circumstances, unduly foreclose competition. Even practices that would be facially suspect – for example the manipulation of government regulatory structures as identified in the note by the United States to the OECD, may be justified in some circumstances and do not admit the application of *per se* rules.

6.2 In short, there are certain basic economic principles that should uniformly be applied by regulatory agencies in the consideration of such practices. These economic principles need to be understood and the process should be adopted of publishing the economic principles that are being applied by the authorities concerned as a way of providing valuable predictability for investment decisions and to provide and enhance greater understanding by market participants, members of the ICN, and other interested parties.[43]

6.3 Scholars continue to debate the appropriate standard for determining whether unilateral conduct is exclusionary. This debate has generated at least four distinct approaches for determining exclusionary conduct: the "but-for" test; the "sacrifice test;" the "less efficient rival" test; the "disproportionality" test; and the "balancing" test.[44] The "but-for" test inquires whether the monopolist would have undertaken the conduct but for its anticompetitive effects. The sacrifice test is similar to predatory pricing: under this test, a monopolist engages in a short-term sacrifice of profits. The less efficient rival test, articulated by Judge Posner, establishes a two-part standard: the plaintiff must prove the defendant has monopoly power and then prove that the challenged practice is likely in the circumstances to exclude from the defendant's market a more efficient competitor.[45] The disproportionality test asks whether harms of the challenged conduct are disproportionate to the resulting benefits and the balancing test suggests that a mere preponderance of harm versus the benefit would be enough to establish a violation.

6.4 Each of the above approaches attempts to place the rivalry among firms in the larger context of competition in a market. Single-firm cases are necessarily cases about the dynamics and the prospects of an entire market. Like other competition cases where the activity being challenged could well benefit consumers, condemnation of the activity could harm them. Avoiding mistaken judgments either way requires a full understanding of the over all

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[43] Consideration of best practices in Section 2 enforcement should cover procedure as well as substance. As noted in Section I, *supra*, authorities have made significant strides in procedural convergence in merger review. Protracted uncertainty about the legality of single-firm behaviour can deprive companies and consumers of the benefits of robust competition.

[44] These four approaches are analyzed in Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3 (2004) and some of the tests are also mentioned in the Memorandum from the Single Firm Conduct Working Group to all Commissioners of the Antitrust Modernization Commission (Dec. 21, 2004) at 8, *available at* www.amc.gov/pdf/meetings/Single-FirmConduct.pdf.

[45] RICHARD A. POSNER, ANTITRUST LAW 194-95 (2d ed. 2001).

economic impact of the activity. Such cases should be fact-intensive inquiries that consider sophisticated economic evidence.

6.5 The standards governing single-firm conduct need to be sufficiently flexible to adapt to advances in our understanding of economics. Prohibitions that are simple and inflexible can result in both over-deterrence of beneficial behaviour and under-deterrence of anticompetitive conduct. Most single firm cases will involve vigorous competition, which should of course be encouraged by the antitrust laws, no matter who wins or loses -- as long as the victory did not depend on the impairment of competition itself. Specifically, closer adherence to the general principle that monopolization enforcement exists to foster competition, not competitors, combined with greater efforts to publicize the economic rationale behind enforcement decisions, would result in more uniform decision-making.[46]

7.0 *Did Verizon v. Trinko Go Too Far in Allowing Monopolists to Refuse to Deal?*

7.1 The recent decision in *Verizon Communications v. Law Offices of Curtis Trinko, LLP*,[47] deals explicitly with the challenge facing courts in their endeavors to avoid deterring beneficial conduct or imposing remedies that they are ill-equipped to administer. For these reasons the Court declined to use Section 2 to impose upon the defendant a duty to deal with a competitor, even if the refusal allowed the defendant to reap the benefits of its position in the market.[48]

7.2 The Court covered familiar ground in its decision, including the observations that the purpose of Section 2 is to prohibit monopolization, not to eliminate monopolies; that the Sherman Act generally does not restrict the right of a party to decline to deal with other parties if it so desires; that imposing a duty to deal risks turning a court into a regulatory authority; that requiring rivals to deal can breed collusion; and that allowing companies to charge monopoly prices, even for a short duration, "induces risk taking that produces innovation and economic growth."[49]

7.3 There is no obvious aspect of the decision that broke new ground on the issue of a monopolist's duty to deal under Section 2. The Court declined to recognize or repudiate the

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[46] Although recent monopolization cases have provoked debate over whether their applications of the standard deterred too much or too little, the debate has focused on the application of standards, rather than the standards themselves. *See, e.g.*, *Gavil*, *supra* note 37, at 29 (the cases reviewed include: *United States v. AMR Corp*., 335 F.3d 1109 (10th Cir. 2003); *LePage's Inc. v. 3M Co*., 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S.Ct. 2932 (2004); *Pepsico, Inc. v. Coca-Cola Co*., 315 F.3d 101 (2d Cir. 2002); *Conwood Co. v. US Tobacco Co*., 290 F.3d 768 (6th Cir. 2002); *United States v. Microsoft Corp*., 253 F.3d 34 (D.C. Cir. 2001); *Virgin Atlantic Airways Ltd. v. British Airways PLC*, 257 F.3d 256 (2d Cir. 2001); and *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039 (8th Cir. 2000)).

[47] 540 US 398 (2004).

[48] The court noted in its analysis that, in contrast to the Sherman Act, another federal statute at issue in the case, the Telecommunications Act of 1996, did impose on the defendant certain requirements to deal with rivals

[49] 540 US 398, 407 (2004).

"essential facilities" doctrine, thus maintaining its abstention on that theory. At the same time, it declined to overturn earlier cases creating limited exceptions to the right to refuse to deal. Thus the Court distinguished and explained *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[50] by noting that Verizon's alleged refusal to provide interconnection services to rivals could not be characterized as a change from prior, profitable practices. The behaviour in *Aspen* was found without justification but for its effect on competition, while the practice in *Trinko* was defended on the grounds that it avoided costs.

7.4 In essence, the Court reiterated reasons why Section 2 should be applied cautiously to refusals to deal, and resisted the temptation to recognize new theories of liability or to declare the practice immune from attack. ICC members can understand why the Court (and the U.S. competition authorities, which filed briefs in the case) did not regard the situation before it as one of the rare exceptions to the right of parties to choose their customers. Accordingly, we would not characterize the decision as going too far.

8.0 *Should the Tying Doctrine Be Revised or Clarified?*

8.1 The threshold question in a tying case is similar to that in any monopolization case. Both focus first on the market power of the defendant. This determination requires a full consideration of the conditions of entry and the current constraints felt by market participants by the threat of new entry. Indeed, the assessment of market power incorporates many of the same elements as the assessment of competition itself.

8.2 Tying cases are currently considered under either a rule of reason or *per se* analysis. However, the *per se* analysis in a tying is different from *per se* treatment for most other conduct. *Per se* offenses such as price fixing require no assessment of market power – the prerequisite for *per se* treatment of tying cases. Moreover, courts have gone beyond even this simple departure from *per se* treatment and have begun to consider business justifications for tying arrangements even where market power has been found. For example, in *United States v. Microsoft Corp.*, the D.C. Circuit declined to apply the *per se* rule, reasoning that tying arrangements involving computer software may have procompetitive efficiencies.[51]

8.3 The Supreme Court has cited tying cases for the proposition that there is "often no bright line separating *per se* from Rule of Reason analysis."[52] The fundamental inquiry when analyzing a tying arrangement should be whether competition is threatened by the practice in question. ICC members believe that this assessment is best accomplished by analyzing tying arrangements under the rule of reason.

9.0 *What is the Correct Treatment of Bundling and Discount Programs?*

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[50] 472 US 585 (1985).

[51] 253 F.3d 34 (D.C. Cir.) (en banc), *cert. denied*, 122 S.Ct. 350 (2001); *see, e.g.*, ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (5th ed. 2002).

[52] *NCAA v. Board of Regents*, 468 US 85, 104 n.26 (1984).

9.1 As noted in the Report of the Section of Antitrust Law of the American Bar Association to the AMC, the cumulative effect of antitrust remedies should not result in over-deterrence, which could distort competitive forces.[53] One of the risks of monopolization enforcement is the deterrence of legitimate competitive conduct. Certain practices may have anticompetitive consequences in narrow circumstances, and enforcement may discourage the same practices in other situations where they may provide benefits to a market and to consumers.

9.2 It can be difficult to distinguish between anticompetitive acts and vigorous competition. This is particularly true when the alleged anticompetitive act is the offering of lower prices to customers – practices such as aggressive discounting, attractive rebates, and various loyalty programs. The law should continue to demand that companies challenging such practices demonstrate anticompetitive consequences, because these types of cases may discourage practices that provide significant net benefits.

9.3 Recent decisions in the U.S. and EC may have that effect. Compare, for example, the *Lepage* case,[54] with *Michelin II* and *British Airways*,[55] the first of which imposed liability for bundling goods at above-cost prices that a competitor with a limited offering could not match, while the other two condemned loyalty-inducing discounts without finding that they had harmed competition. It is difficult to discern from the opinions whether the distress of the competitors was a result of aggressive competition or a byproduct of anticompetitive practices. Firms that lead their product categories could regard these cases as warnings against multi-product discounts that win customers from smaller competitors. If so, customers may see less competition, fewer discounts and a higher transaction costs in many industries where the leading firms have large shares.

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[53] Report of the Section of Antitrust Law of the American Bar Association to the Antitrust Modernization Commission, Sept. 30, 2004, *available at* www.amc.gov/comments/abaantitrustsec.pdf.

[54] 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S.Ct. 2932 (2004).

[55] Case T-203/10 Manufacture Française des Pneumatiques Michelin v Comission, (30 September 2003) sufficient to show that conduct tends to restrict competition or, in other words, that the conduct is capable of having that effect"); and Case T-219/99 British Airways plc v Commission, (17 December 2003) (on appeal, C-95/04).

9.4 It is critical that the regulation of these practices focus on their effects on the welfare of customers in the market. The ability of rivals to match a dominant firm's discounts is at best ambiguous evidence on the desirability of the practice. Inadequate attention to demonstrable competitive effects could create law that preserves inefficient competitors while sacrificing competition. Remedial relief is not warranted when smaller competitors have difficulty competing against a dominant player that is more efficient. Efficiencies should always be relevant in unilateral conduct cases -- whether proferred in defense of the practice or implicated in the proposed remedy. Challengers of aggressive discounting should bear a heavy burden to show that intervention in the marketplace would produce remedies that benefit consumers without imposing costs that consumers will bear.

10.0 *Conclusion*

10.1 Consideration of the effects of a practice should focus on the maintenance or enrichment of market power, not structural dominance. When enforcement agencies or tribunals protect competition through the regulation of single-firm conduct, they must engage in the task of distinguishing between firms that achieve or maintain a dominant position through legitimate means and those that have done so through means that hinder the competitive process. Dominant firms often employ behavior that combines valuable innovation with aggressive marketing.

10.2 The focus of the analysis of any allegedly anticompetitive practice should be on the question of the effect of the challenged practice on competition itself. The plight of an individual competitor may be very appealing but not very revealing on the ultimate issue. As a leading treatise notes, the "antitrust appraisal of conduct depends upon understanding its possible anticompetitive consequences and its possible benefits for effective competition."[56] When antitrust enforcement adheres to economic analysis, antitrust law is most likely to protect markets from the anticompetitive acts of individual firms.

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[56] 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651a (2d ed. 2002).