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Ms. Deborah A. Garza  
Chair, Antitrust Modernization Commission  
Attn: Public Comments  
1001 Pennsylvania Avenue,  
NW Suite 800-South  
Washington, DC 20004-2505

**Re: Comments Regarding Merger Enforcement**

Dear Ms. Garza:

On behalf of the International Bar Association, Antitrust and Trade Law Section, we are pleased to submit the comments of one of our four Working Groups, these comments being related to merger enforcement.

We hope that our views will provide a positive contribution to the Commission's work and we will certainly be pleased to answer any questions members might have.

Yours Sincerely,

A handwritten signature in black ink, appearing to read 'M Reynolds'.

Michael Reynolds  
Chair of the Legal Practice Division of the International Bar Association

Cc:  
Bruno Ciuffetelli, Chair, Antitrust Committee  
John DeQ. Briggs, Co-chair, Working Group  
Riccardo Celli, Co-chair, Working Group  
William J. Kolasky, Co-chair, Working Group  
Thomas McQuail, Co-chair, Working Group



**INTERNATIONAL BAR ASSOCIATION**  
**ANTITRUST COMMITTEE**  
**WORKING GROUP ON US ANTITRUST MODERNIZATION**  
**MERGER ENFORCEMENT**

**1. INTRODUCTION**

1.1 This submission is made to the Antitrust Modernization Commission (“AMC”) on behalf of a Working Group on Merger Enforcement established by the Antitrust Committee of the International Bar Association (“IBA”). The Members of the Working Group are set out in Annex A.

1.2 The Antitrust Committee of the IBA brings together antitrust practitioners and experts among the IBA's 20,000 individual members from across the world, with a unique blend of jurisdictional backgrounds and professional experience.

1.3 The Antitrust Committee has established Working Groups to examine and provide input to the AMC on topics on which comment was invited where it appears that international perspectives would be particularly relevant. This paper provides comments on merger enforcement. It is split into three parts, focusing on the following issues:

**A: Transparency:** We have commented on whether there is sufficient transparency in federal antitrust enforcement policy and what steps we consider the Agencies could take to increase transparency in a manner that would achieve important benefits without placing an undue burden on the Agencies or on businesses.

**B: The Second Request process:** We have set out a number of recommendations as to how, within the existing framework of the US merger review process, the Second Request process could be improved in a way that would enable equal or better decision-making with less burden and expense on the merging parties and the Agencies.

**C: Efficiencies:** Whilst the IBA Working Group agrees with the common consensus that antitrust merger law and policy should promote the realization of efficiencies, it appreciates that striking the right balance between allowing efficiency enhancing mergers and adequately protecting consumers can present

a difficult challenge. The IBA Working Group has commented on this issue below. It has also considered how the issue of efficiencies is addressed in some other key jurisdictions around the world.

- 1.4 The IBA Working Group's comments and recommendations on the above topics draw on its broad ranging experience with merger control regimes around the world, including that of the US. Rather than providing detailed comments on the specific aspects of the US system, the IBA Working Group considers that it can more valuably provide the AMC with general comments on possible improvements to the current system in the US, based on the international perspective that the IBA can bring.
- 1.5 We hope that the AMC finds these suggestions helpful and we remain available to provide further elaboration as required by the AMC. We are grateful for this opportunity to participate in the work of the AMC and we hope to contribute constructively to the process.

October 2005

## A: TRANSPARENCY

*This part of the submission sets out the IBA Working Group's views on the treatment of transparency in the US merger control regime. It has been prepared in response to the AMC's request for comments on whether there is sufficient transparency in federal antitrust enforcement policy.*

*In principle, the IBA Working Group considers that transparency plays an important role in the merger control review process, provided proper systems are in place to protect confidential information and provided cost and delay for both businesses and the reviewing authorities are kept acceptably low. We have set out below a number of recommendations as to how the US regime could be made more transparent. The IBA Working Group considers that these recommendations would achieve important benefits for merger parties and third parties interested in transactions as well as transparency for the market overall, without placing an undue burden on the US Agencies or on businesses.*

### 1. RECOMMENDATIONS

1.1 We set out below a series of recommendations that we consider would improve the substantive and procedural transparency of the US merger control regime. We are mindful of the burden that the pursuit of further transparency could impose on the US Agencies and the parties to transactions, but we consider that the extent to which burdens would be imposed can be managed and that they do not outweigh the potential benefits of a more transparent system.

1.2 Our recommendations are outlined as follows:

(a) **The fact that a transaction has been notified for merger control scrutiny should be made public in every case with a minimum of delay**

Third parties can play a determinative role in the merger control review process. It is therefore crucial to the legitimacy of the process that third parties are given the opportunity to submit their comments on a merger. This implies that third parties must have the ability to find out which transactions the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) are reviewing. Relying on third parties to bring their interest to the relevant Agency's attention or on the Agency to identify and contact relevant third parties to take depositions may not always be sufficient.

We believe that it would be helpful for the FTC and DOJ to publish on their websites an acknowledgment of each transaction they are reviewing. The contents of the statement need only be very brief and could be limited to the names of the parties, an indication of the relevant industry sector and the deadline for submitting comments to the Agency. This approach is already adopted in many other jurisdictions without, it is submitted, undue burden being placed on the authorities or the parties to the transaction.

The justifications for publishing the fact that filings have been received apply equally to publishing the fact that an Agency is examining a transaction of its own volition.

The statement should be published as soon as practicable once the merger has been notified to maximise the ability of third parties to participate in the process.

**(b) Key stages in the Agency's review process should be publicised**

We would encourage the FTC and the DOJ to publicise the key stages of their investigations, rather than to limit the disclosure of such information to the parties (with whom there will naturally be an on-going dialogue).

The opacity of the US merger review process limits the role of third parties in the process, which potentially undermines its credibility. In addition to publicising the fact that they are looking at the transaction (see point (a) above) and publishing details of the outcome of their investigation (see point (c) below), we consider the Agencies should publish the fact that they have issued a Second Request (and provide brief details of the nature of their possible concerns about the transaction).

**(c) The outcome of the Agency's review should be published and made available for future reference**

We would encourage the FTC and DOJ to commit themselves to a policy of publishing summaries of their findings (which would include, as a minimum, a description of the transaction, information on the definition of relevant markets, an explanation of the Agency's concerns about the transaction and its conclusion thereon, including near miss issues and details of remedies considered, adopted and rejected) in respect of a number of defined categories of cases. The following types of cases would appear to merit publication (although we recognize that the precise delineation would need to be appropriately defined).

- horizontal transactions that result in a combined market share or HHI of more than a certain threshold;
- vertical transactions where the parties have a market share of more than a certain threshold;
- transactions that are rejected;
- all transactions where the Agencies have agreed remedies with the parties.

In our view, the FTC and DOJ should publish reasoned decisions (or summaries of their findings) in all cases where a Second Request has been issued. However, we believe that there may be other cases in which the parties avoid a Second Request but where publication would be in the public interest.

Selecting categories of cases should also ensure that cases involving, say, the discussion of efficiencies would also be caught, so that conclusions drawn in such cases can be scrutinized by interested parties. The publication of such decisions would enhance the transparency of the regulatory decision as well as

providing the merging parties and the public with a reasonable understanding of the Agency's approach to new merger proposals.

(d) **The importance of substantive guidelines and other forms of guidance**

Businesses and their advisors value guidance from authorities as to their likely approach to transactions. The authorities in many jurisdictions (including the US) recognise this by publishing guidelines setting out their enforcement policies and by making themselves available to parties wishing to discuss particular transactions. They also more generally take advantage of conferences and journals to set out their policies on particular issues.

Whilst we do not have any specific comments on the content of the US *Horizontal Merger Guidelines*, we wish to make the following general observations:

- the Agencies' reticence in publishing details of their decisions increases the value of the *Horizontal Merger Guidelines* to parties interested in a transaction. The position in the US is in contrast with the position in other jurisdictions where, in addition to generic guidance provided by guidelines, interested parties are able to access detailed accounts of the authorities' decisions in actual cases.
- it is therefore imperative that the *Horizontal Merger Guidelines* accurately reflect the Agencies' current policies. To the extent that those policies change, these should be reflected in updated guidelines; in a regime where the Agencies do not publish details of their decisions, the importance of keeping the guidelines up to date is increased.
- public consultation can play an important role in ensuring that guidelines are as appropriate and effective as possible. We would encourage the US Agencies to engage in public consultation before making revisions to the *Horizontal Merger Guidelines*, including seeking comments on draft revised guidelines before they are finalised.
- the availability of individual confidential guidance on particular transactions is welcomed and valued by businesses and their advisors.

1.3 These recommendations and the issues that they raise are set out in further detail in sections 4 to 7 below.

2. **THE CASE FOR TRANSPARENCY**

2.1 The importance of transparency as a key element of modern public administration is widely recognised. The merger control review process is no exception; arguments in favour of transparency include the following:

(a) **Enhancing the merger control review process for the merging parties**

For the parties to a potential merger, the ability to foresee how an authority will review their transaction, both procedurally and substantively, affords them the opportunity to assess for themselves (both at the outset and on an ongoing basis

during the course of the proceedings) whether the authority is likely to object to their transaction (partially or in its entirety) and, if it is, on what grounds. This increases predictability and efficiency in transaction planning, which enables the parties to focus on addressing the key issues in the case and to identify the information that the authority will need to assess the impact of the transaction, rather than spending time and effort dealing with other issues that may be of little interest or concern to the authority. Conversely, where there is a significant chance that the transaction could be blocked, it enables parties to consider whether they wish to devote time and resources to planning and subsequently seeking clearance for a transaction which may well not be permitted to proceed.

**(b) Maximising the role of third parties**

In our experience, reviewing authorities generally value the contributions that interested third parties can make to the proceedings. For the authorities, third parties can play an invaluable role in the review process, both as sources of raw data and as antagonists to the merging parties' substantive arguments. For the third parties themselves, the opportunity to participate in the process enables them to protect their own interests by presenting their views on the transaction to the reviewing authority.

Transparency is an important factor in ensuring that third parties play a constructive role in the proceedings. Transparency as to which transactions are being investigated by an authority is often a prerequisite to the authority receiving comments from third parties. Transparency as to which particular issues the authority is looking at (and, conversely, which issues it does not consider it necessary to focus on) encourages third parties to target the information they provide appropriately and thus make their contribution more meaningful.

**(c) Increased accountability of the reviewing authorities**

Transparency improves accountability in relation to potential errors of under- or over-enforcement by the authorities, which may otherwise be more difficult to detect.

An explanation of how a decision has been reached encourages review by the parties and interested third parties, and enables a meaningful performance check on the relevant authority. If the authority is aware that the results of its investigation will be critically reviewed, this not only creates a powerful incentive to make sure it reaches the correct decision (since otherwise it might face the risk of its decision being challenged) but also encourages the authority to carry out its fact-gathering and decision-making process in the most effective and efficient way possible (or otherwise face the risk of public criticism).

In cases where the authority has made a mistake, transparency as to the nature and content of its decision is necessary to give interested parties the opportunity to discover that mistake and, if appropriate, to challenge the decision that has been made. By the same token, increased transparency may

also prevent some less frivolous challenges, because, if parties are aware of the soundness of a decision, they may be deterred from challenging it. Transparency also allows a regulatory authority to better overcome incorrect public criticism of a regulatory decision.

**(d) Enhancing knowledge of and compliance with the law**

Making information about the merger control review process publicly available increases understanding of the authority's policy and may increase voluntary compliance with that policy.

Allowing interested persons an opportunity to review the authority's decisions and practice can also be useful in shaping future enforcement policy since it promotes awareness and debate about the enforcement of merger control policy. Absent transparency, knowledge of the authority's approach in a particular case may effectively be reserved to the parties and their counsel.

Furthermore, an authority can use the announcement of a decision or policy change as a means of actively clarifying its policy, by explaining the boundaries of its approach and indicating which factors might produce a different result.

**(e) Public confidence and credibility**

Transparency can increase public confidence in the relevant authority. For example, if the authority has offered clear and reasoned explanations for its decisions or actions in a particular case, the public is more likely to accept the validity of the approach and view the authority as having increased credibility.

**(f) Reduced risk of leaked information affecting share trading**

Merger control decisions can affect the value of the parties' (and, indeed, other companies') stocks. If there is no timely public disclosure as an investigation moves through critical phases, leaked information becomes of great value, giving recipients a significant advantage in stock market trading. Timely disclosure and transparent process are consistent with an informed market and avoid the potential risk of unfair trade in the target's shares.

**3. IMPLICATIONS IN PRACTICE**

3.1 The following sections summarise what the pursuit of transparency implies in practice and comments on the ways in which transparency might be improved in the US. Our comments and recommendations draw heavily on the approaches adopted, and the experiences learned, in other jurisdictions.

3.2 Broadly, a transparent merger control regime implies transparency as to both the reviewing authority's substantive assessment of transactions and as to the procedural steps it takes in carrying out its investigation and reaching its decision.

**Substantive transparency**

3.3 Put simply, substantive transparency means providing interested persons in a transaction with the means to gauge the reviewing authority's approach to assessing

the impact on competition of a given transaction. In practice, interested persons will extend beyond the parties themselves and are likely to include third parties such as customers, suppliers, competitors, trade unions and consumers.

- 3.4 Substantive transparency can be achieved in a number of ways, such as the publication of decisions and the provision of guidelines setting out the reviewing authority's current policy on the substantive assessment of transactions. In individual cases, a willingness by the authorities to discuss on a confidential basis their preliminary views on potential transactions also increases awareness as to their likely substantive approach and improves the efficiency of the enforcement process.

### **Procedural transparency**

- 3.5 Procedural transparency implies giving the parties and third parties information about the progress and status of the authority's investigation into a particular matter.
- 3.6 The procedural aspects of the US merger control review process can appear somewhat opaque, in particular to third parties not directly involved in the merger, and creates unnecessary uncertainty. As explained above, third parties can play a valuable role in assisting a reviewing authority with its investigation of a merger. In many cases, the reviewing Agency approaches third parties to gather relevant information. However, in other cases, in order to play an active role in the review process, third parties need to know that a transaction is being reviewed and they would benefit from being informed of the main stages in the Agency's review process. In all cases, they should also be afforded the opportunity to scrutinise the review process and, in appropriate circumstances, to challenge that process.
4. **THE FACT THAT A TRANSACTION HAS BEEN NOTIFIED FOR MERGER CONTROL SCRUTINY SHOULD BE MADE PUBLIC**
- 4.1 The US antitrust Agencies receive over 1,000 filings under the HSR rules each year. On receipt of a filing, the relevant Agency has a relatively short waiting period in which to decide whether to issue a Second Request.
- 4.2 In principle, the FTC and DOJ are receptive to third parties who wish to share with them information relating to a notified transaction. Whether or not third parties (in particular customers) consider that a transaction is likely to lead to competitive harm can be a decisive factor in the Agency's decision to issue a Second Request.
- 4.3 The US Agencies may therefore seek to identify and contact persons whom they consider may be affected by the transaction. Provided those most likely to be harmed by a transaction will be readily identifiable, in practice, this approach may prove sufficient in many cases.
- 4.4 However, it is possible that other interested third parties will be overlooked and, if they are, that valuable information and evidence might not come into the Agency's possession. The FTC and DOJ's current practices arguably do not do enough to encourage the receipt of such submissions. In particular, it can be difficult (or even impossible) for third parties to establish whether the Agencies are reviewing a transaction even when it has been notified to them. The FTC and DOJ's current policy is not to disclose that a transaction has been notified except to the extent that they contact third parties for information.

4.5 In our view, publicising the receipt of HSR filings would give all interested third parties the possibility of commenting on the transaction. This would underline the credibility of the US merger control regime and, we suggest, could be achieved at relatively little cost.

4.6 Publicising the existence of a merger that is under review can give rise to a number of practical issues, which we have addressed below. We do not consider that any of these issues are significant enough to overturn the justification for increased transparency in this regard.

**(a) The content of the statement to be published**

Soon after they receive a filing, authorities in many jurisdictions publish a brief statement about the transaction. The content of the statement varies from jurisdiction to jurisdiction but is generally limited to identifying the parties, stating the nature of the transaction (for example, whether it is an acquisition of A by B or a joint venture between A and B), identifying the relevant industry (which might be done by way of a very short description or by reference to a relevant industry code) and setting a date by which third parties must submit their comments<sup>1</sup>.

The European Commission (the “Commission”) adopts a two-stage approach in this regard. Within about 2-3 days of receipt of the filing, the Commission's practice is to publish on its website bare details of the transaction. At this stage, the published information will be limited to the names of the parties, the relevant economic activity code, the date of the filing and the provisional deadline for the Commission's decision on the matter. Usually about one week after the Commission has received the filing, a more detailed (but still relatively brief) statement about the transaction is published in the EU's Official Journal (which is also accessible from the Commission's website). The statement adopts a standard format and the substantive parts of it are provided by the parties themselves. The statement will identify the parties and their main business activities, and will provide a very brief outline of the nature of the intended transaction. It will also invite interested third parties to submit their views on the transaction to the Commission within 10 days of the date of publication.

The purpose of publicising the fact of the transaction at an early stage in the process is to enable interested third parties to identify themselves as such. Interested parties can then make their views known to the authorities if they consider it appropriate to do so. We consider that a very brief statement along the lines set out above is sufficient to achieve this.

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<sup>1</sup> The UK authorities facilitate the provision of comments by identifying the relevant case handler and providing that person's telephone number and email address. An example of the approach adopted in the UK can be seen on the "invitations to comment" section of the Office of Fair Trading's website, <http://www.oft.gov.uk/Business/Mergers+EA02/Invitations/index.htm>. The Australian Competition & Consumer Commission (“ACCC”) have adopted a similar approach as a result of the recent Guidelines for informal merger reviews dated October 2004 which is based on the International Competition Network's Guiding Principles for Merger Notification and Review. Examples of the ACCC's approach can be found on the Mergers Register on the ACCC's website at [www.accc.gov.au](http://www.accc.gov.au).

The burden of preparing and publishing a brief statement on the transaction should not be significant. The Commission's approach in this regard is to include in its filing form a question asking the parties to prepare a brief description of the transaction that they are happy for the authority to publish<sup>2</sup>. The burden on the Commission is then principally limited to the administrative task of publishing the statement.

In some countries, such as New Zealand, the authority subsequently publishes a non-confidential version of the parties' filing. Whilst we consider that this is helpful in allowing third parties to review and comment on the parties' substantive arguments, the benefits of this approach might well be outweighed by the likely burden of agreeing with the parties a version of the filing that they would be happy to be published. Further, to the extent that a competition authority wishes to market test the parties' arguments with third parties, it may be more appropriate and efficient for it to do this with selected third parties at a later stage in the proceedings.

**(b) The nature of the publication**

Most authorities who publish the existence of filings do so on their websites. Some, such as the Commission and the Austrian authority also issue an announcement in their Official Journals. The Austrian authority also announces notified mergers in a local newspaper; the United Kingdom's Office of Fair Trading ("OFT") makes an announcement on the London Stock Exchange's Regulatory News Service.

In our view, it is sufficient for announcements to be made on the competition authority's website. Whilst such websites might rarely be reviewed by companies themselves, they are regularly reviewed by companies' legal advisors who can alert their clients to the possibility of submitting comments to the authorities. Publication on the authority's website is also likely to be the most cost effective way of making the statement publicly available.

**(c) A complainant's charter?**

In our view, publishing the fact that an Agency is reviewing a transaction and inviting comments from third parties would be unlikely to impose a significant burden on the Agencies in terms of dealing with submissions from third party complainants.

Given the resources (in terms of time, effort and advisors' costs) involved in preparing a reasoned submission about the competitive impact of a transaction, it is likely that most third parties will only make submissions to the Agencies about a transaction if they have a genuine interest in doing so, and have something significant to contribute. Whilst each third party submission would need to be reviewed on its merits, it is relatively unlikely that any reasoned submissions received would be entirely without value to the Agency.

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<sup>2</sup> A similar approach is also adopted by the Austrian and other national competition authorities.

Making available limited information about the Agency's review might prompt a number of unmeritorious comments from third parties. However, our perception is that most merger control authorities accept this as an inevitable consequence of operating a transparent review process. Dismissing wholly spurious submissions should be relatively straightforward and the costs of doing so are unlikely to outweigh the benefits to the Agency of receiving helpful comments from genuinely interested third parties.

**(d) Timing issues**

To meet its purpose of encouraging third party comments, the publication must be made in good time to allow third parties to formulate and submit their comments, and then the Agency to consider those comments within the allotted waiting period or deadline. There is, therefore, merit in some public acknowledgment of a transaction being made as soon as possible after receipt of the filing.

On the assumption that the information published at this stage is minimal and will largely have been provided by the parties themselves, the Agencies should endeavour to make the publication within a relatively short time (a few days) of filing.

**(e) Confidentiality issues**

In some jurisdictions (including the US), parties to transactions are permitted to notify their transactions for merger control clearance before their transaction has been publicly announced.

If the authority to whom the parties notify the transaction adopts a policy of publicising the fact that a transaction has been notified to it, this can give rise to confidentiality concerns. In our experience, the fact that the filing will be publicised can lead parties to delay notifying until after the transaction has been announced. For the parties, this can rule out the possibility of signing and completing a transaction simultaneously, and can generally delay the transaction process.

On balance, we consider that the benefit of publicising the fact that a transaction is being examined outweighs the parties' commercial interests in being able to keep their transactions secret. Parties rarely consider that the merger control review process will be wholly confidential, either because the reviewing authority may need to contact third parties for their views on the transaction or else simply because they do not trust the authority not to leak information. Highly confidential transactions are therefore unlikely to be notified before they have been announced in any event.

Where appropriate, we consider that the US Agencies should be able to accept filings (or pre-filing approaches) on a confidential basis, but on condition that the relevant waiting period or deadline either will not start to run until the parties consent to the Agency making the transaction public or will be extended to give third parties sufficient time to submit their comments on the transaction.

In general, we also believe that, in most cases, the merging parties should have some opportunity to comment on the contents of any publication of information relating to their merger to ensure no inappropriate confidential information is inadvertently disclosed by the authority.

- 4.7 As well as reviewing transactions that are notified to them under the HSR rules, the US Agencies also review corporate activity in the US generally. Where appropriate, they will investigate and possibly challenge transactions that do not meet the HSR filing thresholds.
- 4.8 The justifications for publishing the fact that filings have been received apply equally to publishing the fact that an Agency is examining a transaction of its own volition. Indeed, this is the approach adopted in the UK where filings are submitted on a voluntary basis and where the relevant authority is charged with monitoring corporate activity with a view to potentially challenging transactions that the parties have decided not to notify. Although the UK authority has discretion as to when to publish the fact that it is looking at a merger, in practice it will do so whenever it has contacted the parties about a transaction which has not been notified.

## 5. **KEY STAGES IN THE AGENCY'S REVIEW PROCESS SHOULD BE PUBLICISED**

- 5.1 We consider that there is merit in the reviewing Agency publicising certain key aspects of its investigation of a transaction. Being aware of the current status and progress of an investigation enables interested persons to focus their comments on the issues that are being examined by the Agency at that time. It also permits scrutiny of the Agency's procedures.
- 5.2 Whilst the parties to a transaction are likely to have a reasonable insight into the status of the relevant Agency's investigation, the FTC and DOJ are relatively reticent in respect of providing information to the outside world about the status of their investigations. Indeed, no public announcement is made about a merger until, in some cases, the Agency announces the conclusion of its investigation.
- 5.3 To observers in many jurisdictions, the lack of information available about the merger control review process in the US can be surprising. Most other major jurisdictions publicise at least some of the main steps in their reviews. By way of example, we briefly summarise below the approaches adopted by authorities in some other major jurisdictions in this regard:

### (a) EC Merger Regulation (“**ECMR**”)

In addition to publicising the receipt of a filing, the Commission will make the following stages of its investigation known to third parties:

- If the Commission launches a "Phase II" investigation<sup>3</sup> into a merger it will issue a press release announcing this fact and outlining its main

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<sup>3</sup> The Commission adopts a two stage review process. Its initial Phase I period lasts for 25 working days (subject to limited possibilities of extensions), by the end of which the Commission must decide either to clear the transaction or, if it continues to have concerns about it, to launch an in-depth Phase II investigation lasting a further 90 working days (subject to extensions). The Commission clears over 90% of cases at the end of the Phase I period.

concerns about the transaction. The fact that the Commission has opened Phase II proceedings indicates that it has potentially significant concerns about the transaction. In our experience, knowing this can prompt more reticent (but nevertheless potentially very valuable) third parties to come forward and assist the Commission with its investigation going forward.

- The Commission also provides the merging parties with a statement of its objections to the transaction and will hold oral hearings. Whilst these are not publicised generally, interested third parties are entitled to receive a non-confidential version of the statement of objections (i.e. with all confidential business information removed).
- In appropriate cases, the Commission will encourage the parties to attend “triangular” meetings with the Commission and third parties. The Commission might suggest such a meeting where, for example, two or more opposing views have been put forward on key market data or on the substantive impact of the transaction. Triangular meetings are voluntary. They are a recent innovation and, in practice, they are relatively uncommon.
- Interested third parties may also be invited to participate at a formal oral hearing regarding a transaction (if the parties request one – which is not always the case). Third parties may be given the opportunity to comment on remedies proposed by the parties as part of the Commission's market testing process.
- The Commission also publishes its final decision on the transaction (see section 6 below).

The Commission will publicise the deadline by which it is required to make its decision. It will also communicate with third parties during the course of its investigation and may be willing to provide them with further information about the status of its investigation and the nature of its concerns (without disclosing confidential information).

**(b) United Kingdom**

In the UK, the review of mergers is split between two authorities. The OFT conducts the first stage process at the end of which, if the OFT has concerns about a transaction, it will refer the transaction to the Competition Commission for an in-depth investigation. Public announcements (usually in the form of press releases, which will also appear on the authority's website) are made at the start of the OFT's review of the transaction (i.e. to announce that it is looking at a transaction) and in respect of the following:

- when the OFT decides whether to clear the transaction or to refer it to the Competition Commission;
- a statement of the issues that the Competition Commission will investigate and decide on;

- a summary of the Competition Commission's preliminary findings in the case;
- details of the remedies that the Competition Commission is considering to overcome any concerns that it might have about the transaction;
- the final decision on the transaction.

The Competition Commission also publishes procedural information, such as its proposed timetable for the various stages of its investigation. This will give an indication of when third parties are likely to be contacted for comments, when hearings will be held and when the final decision is due to be made.

The authorities will also have direct contact with interested third parties during the course of their investigation.

**(c) New Zealand**

In addition to making an initial press statement on receiving an application, the New Zealand Commerce Commission (“NZCC”) will publicise the deadline for its investigation. It will generally also make a press statement at each significant point in the process, such as if it has decided to hold an industry conference to consider the application.

The NZCC is authorised to consult "with any person who, [in its opinion], is able to assist it in making a determination". The NZCC will generally provide to third parties only that information necessary to facilitate this process, and may well be limited in its ability to provide information if it has granted a Confidentiality Order in respect of the application.

**(d) Australia**

In Australia, for contentious matters, the Australian Competition and Consumer Commission (“ACCC”) publishes a Statement of Issues outlining the basis on which the ACCC has come to a preliminary decision. The ACCC also publishes:

- details of remedies or undertakings that have been proffered for comment;
- a public competition assessment in relation to major mergers or where the merger parties request it.

For mergers considered by the ACCC, the ACCC also publishes procedural timelines, an indication of issues it is considering in market inquiries and a timeframe in which the final decision is to be made.

The ACCC will also have direct contact with interested third parties during the course of its investigation.

We would encourage the FTC and the DOJ to publicise the key stages of their investigations, rather than to limit the disclosure of such information to the parties. In addition to publicising the fact that they are looking at the transaction (see section 4

above) and details of the outcome of their investigation (see section 6 below), we consider the Agencies should publish the fact that they have issued a Second Request (and provide brief details of the nature of their possible concerns about the transaction). Knowing that a Second Request has been issued might prompt third parties (who might not have been involved in the transaction before that stage) to submit useful comments to the Agency. If the Agency identifies the broad nature of its concerns, this will allow third parties to focus their submissions on the topics that are likely to be of interest and value to the Agency.

## 6. **THE OUTCOME OF THE AGENCY'S REVIEW SHOULD BE PUBLISHED**

- 6.1 Most merger control regimes -- but not the US system -- require the reviewing authority to publish a statement of the conclusions it has reached on a merger that it has been reviewing.
- 6.2 In our view, the practice of publishing decisions is an important element of a transparent regime because it enables the parties and third parties to scrutinise the approach the authority has taken, both with a view to satisfying themselves that the decision was correct and, in practice often more importantly, with a view to assessing the authority's likely approach in future cases. This practice is of benefit to the authority, merging parties, and third parties as it reduces uncertainty and increases the predictability of the enforcement process by, among other things, increasing self-enforcement in addition to promoting an efficient merger review regime generally.
- 6.3 We would therefore be in favour of the US Agencies adopting a more open approach to publishing details of the outcome of their examinations of mergers. We are however mindful of the costs, delay and confidentiality issues that can arise in this context. Our best practice recommendations in this regard are as follows:

### (a) **A statement regarding the Agency's decision should be published in respect of all transactions examined**

Irrespective of the substantive content of the decision or the outcome of the investigation, it can be helpful for interested third parties to know that the Agency has examined a transaction.

In the US, most of the transactions reviewed by the Agencies are notified to them under the HSR rules. In our experience, the practice in most jurisdictions with a mandatory filing regime is for the reviewing authority publicly to announce that it has cleared the transaction. We consider that it would be helpful for the US Agencies to adopt a similar approach. The FTC's website currently identifies transactions that have been granted early termination. As a minimum, this practice could be expanded to include all transactions examined by the Agencies (although, as explained below, in respect of many transactions, we consider that detailed accounts of the Agencies' findings would be appropriate).

The US Agencies also review some transactions of their own initiative including, for example, transactions that do not meet the HSR jurisdictional thresholds. The extent of the Agencies' investigation into these sorts of

transactions varies from case to case. Whilst in some cases the FTC and DOJ might carry out a full investigation of the transaction, perhaps leading to a Second Request, in others they are able very quickly to conclude that a transaction will not give rise to any substantive competition concerns. The question therefore arises as to whether (and, if so, when) the Agencies should make public the fact that they are looking at transactions. In principle, we consider that the Agencies should publish a statement of their decision in all cases where they have contacted the parties for information about the transaction so that the fact they have examined a transaction becomes a matter of public record.

**(b) A fully reasoned decision does not need to be published in all cases**

Whilst we consider that it would be helpful for a statement regarding the Agency's decision to be published in respect of all transactions examined, we do not consider that it would be an appropriate use of public resources for a fully reasoned decision to be published in all cases.

Most merger control law regimes (including that in the US) are capable of triggering mandatory filings of transactions that clearly do not give rise to antitrust concerns. There is little merit in the reviewing authorities publishing fully reasoned decisions on such transactions.

Some authorities, such as the Commission under the ECMR, are required to adopt a decision in all cases. The content of the decision usually depends on the nature and complexity of the transaction under review. The Commission's decisions, for example, can range from 4 paragraphs in length (and, in substance, consisting of little more than the names of the parties, a very short description of the transaction and a confirmatory statement that it gives rise to no antitrust concerns) in cases that qualify for simplified treatment<sup>4</sup> to over 100 pages in more complex cases. Except in simplified procedure cases, decisions are fully reasoned and typically describe the parties and the transaction, comment on the relevant economic market and summarise the expected competitive impact of the transaction. The decision often leaves issues "open", for example in relation to market definition, in cases where, on any basis, competition issues will not arise. The Commission publishes all Phase II decisions in the Official Journal and, in practice, makes all Phase I and Phase II decisions available in non-confidential form on its website.

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<sup>4</sup> The burden of preparing and publishing a full decision in every case can be significant. To reduce this burden, the Commission has identified a category of transactions that can benefit from a simplified procedure which, inter alia, results in the Commission publishing a short-form decision. As a general rule, transactions benefit from this procedure if (i) the parties are setting up a joint venture that has turnover and assets in the EEA below certain thresholds or (ii) there are no horizontal or vertical links between the parties' activities or, (iii) to the extent that there are links, the parties' combined market share is less than 15% where there are horizontal links and is less than 25% where there are vertical links between them. The Commission retains the ability to require the parties to submit a full filing where it considers that the transaction could give rise to concerns. However, if it does this, it is also required to publish a full decision on the matter.

We would encourage the FTC and DOJ to adopt a more expansive approach to publishing their conclusions on transactions that they have reviewed. Whilst we consider that there is merit in the Agencies at least publicly acknowledging the outcome of their review in all cases, a balance needs to be struck between increased transparency and avoiding excessive burdens on the Agencies and the parties.

A practical and relatively low key approach would be for the FTC and DOJ to publish guidelines setting out the circumstances in which they will publish the outcome of their reviews of transactions. This approach has been adopted by the Canadian Competition Bureau which, in April 2005, issued a policy statement for the publication of technical backgrounders in merger cases. The stated purpose of the policy is to increase transparency. In determining whether to publish a technical backgrounder, the Canadian Competition Bureau will consider whether:

- the release of more comprehensive information will provide useful insight or education to the public and business community, thereby encouraging greater compliance with the law;
- the issues are sufficiently important or complex;
- there is a need to clarify a point of law or policy (for example, where the Bureau has taken a new approach);
- the matter in question has received substantial publicity in the press; or
- the practice in question has a significant impact on consumers.

Whilst the Canadian Competition Bureau's approach is to be welcomed, we would encourage the FTC and DOJ to identify particular categories of transaction in respect of which they would ordinarily propose to publish statements of their conclusions; although the Agencies might retain discretion as to when they would publish their conclusions, there could be a presumption that they would publish details of their decision in respect of these types of transaction. In our view, these should in principle include:

- horizontal transactions that result in a combined market share or HHI of more than a certain threshold;
- vertical transactions where the parties have a market share of more than a certain threshold;
- all decisions to oppose a merger;
- all transactions where the Agencies have agreed remedies with the parties.

In our view, the FTC and DOJ should publish reasoned decisions (or summaries of their findings) in all cases where a Second Request has been issued. However, we believe that there may be other cases in which the parties avoid a Second Request but where publication would be in the public interest.

In cases where the Agencies' findings are published, the information made public should include a description of the transaction, information on the definition of the relevant markets, an explanation of the Agency's concerns about the transaction and its conclusion thereon (including any near miss issues where the Agency was ultimately satisfied that the transaction did not give rise to concerns). Details of remedies should also be made public. An explanation of why potential remedies were selected and why others were rejected would also be helpful, particularly to businesses involved in other transactions who would value the practical guidance this would give them in identifying possible remedies in their own transactions.

(c) **The nature of the publication**

Most authorities publish details of their decisions on their website. In our view, this can be an effective and efficient approach.

On a practical level, it is important that authorities' decisions can be readily accessed both shortly after the investigation has been concluded and thereafter. Whilst each case is specific to its facts, previous cases can provide invaluable guidance to persons involved in future transactions. To be effective, the raw information contained on a website needs to be supported by an efficient and effective search engine that can be used to identify previous transactions involving certain parties and industries. For each enforcement category, the sites should provide multiple indexes of decisions, including listings broken down by date of decision, names of the parties, and subjects addressed in each decision. In the US, subject indexes should be coordinated between the different enforcement Agencies so that each Agency's website can contain useful cross-references to each other's site.

(d) **Addressing confidentiality issues**

Transparency does not imply a disregard of the confidentiality of information provided by the parties or third parties during the course of the investigation.

Many authorities endeavour to produce non-confidential versions of their decisions suitable for publication. The Commission can serve as an example of how confidentiality issues can be dealt with. To assist it in the process of producing non-confidential versions of decisions, the Commission will ask the parties and third parties to identify confidential information at the time they provide it to the Commission. It will also provide the parties with a copy of its decision and ask them to identify any information contained therein that they consider confidential. Whilst this inevitably creates a burden for the Commission and the parties, and may delay the publication of the decision (typically by about 2 to 3 weeks from the date of the decision but, in complex cases, possibly for much longer), this is generally accepted as a necessary cost of maintaining a transparent system. In the meantime, the Commission's approach is to issue on the day of its decision a press release announcing its decision. In order to ensure that the public versions of its decisions are meaningful, the Commission takes a strict view on confidentiality and, for example, where market shares are excised, they are replaced by relatively narrow ranges (eg a statement that a party's market share is "10-20%").

## 7. THE IMPORTANCE OF SUBSTANTIVE GUIDELINES AND OTHER FORMS OF GUIDANCE

7.1 Whilst we are not proposing to comment in detail on the specific content of the *Horizontal Merger Guidelines*, we consider that we can contribute usefully to this debate by sharing our views on the role that guidelines should be expected to perform in the enforcement process and how they might be employed most productively.

7.2 Based on our broad international experience, we offer the following comments in respect of the practical deployment of guidelines:

### (a) **Published guidelines form an important part of a transparent merger control regime**

Most developed merger control regimes have now published guidelines summarising the relevant authority's approach to assessing the substantive impact of transactions. Some jurisdictions have introduced guidelines relatively recently. For example, the Commission's guidelines on the assessment of horizontal mergers under the ECMR were published in 2004, while the UK authorities first published guidance in 2003.

Whilst the inherent limitations of guidelines are clear, they are generally welcomed by businesses and their advisors as an insight into the authority's approach to assessing transactions. When the Commission published its Green Paper on proposed changes to the ECMR regime in December 2001, most respondents called for the promulgation of enforcement guidelines comprehensively articulating the Commission's enforcement policy in relation to merger control generally and the application of the substantive test specifically.

In the US, the value of the *Horizontal Merger Guidelines* to businesses and their advisors is made more significant by the current lack of transparency as to the approach adopted by the Agencies in actual transactions. In regimes where the authority publishes details of its decisions on transactions, businesses and their advisors can draw guidance from both the guidelines (which tend to adopt generic and relatively high level guidance on the authority's policies) and the authority's actual decisions (which provide an indication of the authority's approach in practice; importantly, decisions also evidence the authority's current policies, which may have developed since the time the guidelines were published). In the US, in the absence of published accounts of many of the Agencies' decisions, the guidelines become of greater significance. It follows that the *Horizontal Merger Guidelines* must be kept under regular review to ensure that they continue accurately to reflect the current policies of the Agencies.

### (b) **Guidelines should seek to address all the main issues**

On the basis that guidelines are generally welcomed by interested parties, they should address the main areas that are likely to be relevant to the assessment (such as market definition, non-coordinated effects, coordinated effects, buyer power, portfolio effects/bundling, efficiencies, vertical effects).

We note that, whilst the *Horizontal Merger Guidelines* are generally comprehensive and complete, they do not address vertical or conglomerate issues. The Commission's guidelines also omit vertical and conglomerate issues. Under the ECMR, this has been a more significant issue than in the US, with the Commission raising concerns in cases such as *GE/Honeywell* on both vertical and conglomerate grounds. The Commission has indicated that it will issue guidance on its approach to the assessment of vertical and conglomerate mergers in due course. This is only likely to happen once the Court of First Instance in Luxembourg has handed down its judgment on the parties' appeal against the Commission's decision on *GE/Honeywell*. Merger cases decided more recently suggest a softening of the Commission's attitude towards at least conglomerate issues. In the US, the Agencies under the current administration have been largely inactive in challenging vertical and conglomerate mergers which, in practice, suggests that there may be no urgent need to address these issues at this stage.

(c) **Guidelines must be of practical use to interested parties**

It would be unrealistic to expect guidelines to provide answers to each and every question that might arise in the review of a transaction. By its very nature, merger control assessment requires the relevant authority to look at the specific facts of each case since these will be crucial to the outcome and maintain the flexibility to come to different outcomes.

Accessible generic guidelines are therefore unlikely to provide definitive answers to any but the most straightforward of cases. However, guidelines can usefully give interested persons the information they need to put themselves in the authority's shoes and gain some understanding of the authority's mindset in assessing a particular transaction. The authority's approach should be consistent from case to case and thus guidelines can provide valuable guidance in this respect.

In practical terms, we consider that guidelines should endeavour to outline the parameters by which potentially difficult transactions will be identified. In this respect, we consider that, while the *Horizontal Merger Guidelines* are useful in elaborating the analytical methodology employed in evaluating transactions, the numeric thresholds are for the most part unrealistic. For example, the HHI thresholds suggest that 6 to 5 or 5 to 4 transactions run a serious risk of being challenged. The guidelines also suggest that mergers of non-leading firms risk being challenged. In practice, these sorts of transaction have not generally given the Agencies cause for concern in previous cases.

(d) **Public consultation on the content of guidelines plays an important role in shaping the enforcement process**

When the *Horizontal Merger Guidelines* were last revised in 1997, we understand that the relevant FTC and DOJ taskforce did not invite public comment. We would encourage the FTC and DOJ to seek public consultation on the proposed text prior to adopting revised guidelines.

Prior to adopting its guidelines in 2004, the Commission engaged in a period of public consultation. This was conducted principally by the Commission publishing draft guidelines for comment. The draft guidelines attracted comments and suggested amendments from a wide range of interested parties (including businesses, law firms, economists and academics). It is submitted that, absent this consultation process, the value of the Commission's guidelines (for example, in terms of appropriateness of content, accuracy and ambiguity) might have been impaired.

(e) **Guidelines do not need to be legally binding, provided they offer parties sufficient certainty that the Agency will adopt the approach set out in the guidance**

In our experience, guidelines in most jurisdictions are normally considered to be non-binding on the relevant authority<sup>5</sup>. Provided that parties can have confidence that the authority will in practice follow the approach set out in its guidelines, we do not consider that this detracts from their value. Moreover, the non-binding nature reflects the need from time to time for antitrust policy to evolve; transparency has an important role to play in ensuring that this evolution is in the public domain.

7.3 The provision of guidance on specific scenarios is valued by parties to potential transactions. We support the need for there to be some basis for parties to discuss a potential transaction with a reviewing authority on a confidential basis, as an integral part of any merger control review process. We have no specific comments on the US Agencies' approach to this issue.

8. **CONCLUSION**

8.1 The IBA Working Group considers that the above recommendations would improve the substantive and procedural transparency of the US merger control regime. We are mindful of the burden that the pursuit of further transparency could impose on the US

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<sup>5</sup> For example, the Commission's guidelines set out general, non-binding, guidance on the way in which the Commission will assess concentrations where the undertakings concerned are actual or potential competitors on the same market. They are intended to reflect the Commission's understanding of the law (as contained in the relevant legislation and the judgments of the European courts, which are binding on the Commission) as well as its intended practical application thereof. The guidelines are not formally legally binding on the Commission, although there may be scope to challenge the Commission (for example, on the grounds of breach of legitimate expectation) if it departed from its guidelines in a particular case. In practice, it is unlikely that the Commission would intentionally depart from its stated policy in the guidelines.

Agencies and the parties to transactions, but we consider that the extent to which burdens would be imposed can be managed and that they do not outweigh the potential benefits of a system which is more transparent.

## **B: THE SECOND REQUEST PROCESS**

*This part of the submission sets out the IBA Working Group's views on the Second Request process of the US merger control regime. It has been prepared in response to the AMC's request for comments on whether the process can be improved in a way that enables equal or better decision-making with less burden and expense on the merging parties and the Agencies.*

*While these comments and recommendations draw on the IBA's understanding of the processes employed in other jurisdictions, they also recognize that the US merger control regime is unique. In particular, the US system requires the antitrust Agencies to litigate mergers in non-specialized courts to block transactions; most other administrative or quasi-administrative bodies have the power to block transactions. The US also has a tradition of extensive pre-trial discovery in litigation that is less common in other jurisdictions.*

*The US system imposes substantial burdens on the agencies and merging parties and these burdens can be ameliorated, to some extent, while at the same time recognizing the unique aspects of the US merger control system. The IBA Working Group therefore accepts that the demands of highly sophisticated economic analysis and the litigious US approach contribute to the burdensome and document intensive nature of the Second Request process. We also accept that these features will remain in place for the foreseeable future. However, these features and the history of the HSR amendments have shaped the Second Request process into a form currently ripe for modernization.*

### **1. RECOMMENDATIONS**

1.1 Consistent with the overall objectives of the Antitrust Modernisation Request we recommend the following reforms to the Second Request process:

(a) **Probable cause**

The Agencies should be subject to a probable cause standard before requesting information directed at exploring any issue.

(b) **Numerical cap**

There should be a numerical cap on the number of people whose files must be searched and produced as part of the Second Request process. Searching the files of low level employees is likely to deliver very few insights to the transaction.

(c) **E-mails**

A more appropriate balance between the benefits and burdens of E-mail discovery can be accomplished by targeting searches to limit the search and production of E-mails.

(d) **Backup tapes**

The requirement to produce backup tapes should be eliminated.

(e) **“Meet and confer” and “early disclosure” requirement**

A meeting in advance of the issuance of the Second Request to narrow areas in issue would assist the parties to clarify the nature of the request, reduce the burden and shorten the process.

(f) **Shorten HSR period**

If the Second Request were limited to the task of making an informed decision *whether* to litigate, and not to exhaustively uncovering all information that might be relevant to any litigation, the burden and cost could be reduced significantly.

(g) **Econometrics**

The Agencies should first have a clear understanding of what econometric analysis they intend to run, and should limit requests to the data required to perform that analysis.

(h) **Time limits**

One way to address this issue is for the Agencies and the parties to enter into “contracts” (or “timing agreements”) setting out when certain decisions will be made, triggered upon the staggered production of documents related to certain issues.

1.2 The IBA Working Group considers that these recommendations would achieve tangible benefits by reducing the burden on the Agencies and on businesses. These recommendations are now considered against the background of the US merger control regime.

2. **BACKGROUND**

2.1 Before setting out in detail the IBA Working Group’s recommendations for reform of the Second Request process, it is first useful to review those features of the US merger control regime which affect the framework of the IBA Working Group’s modernization proposals. These features include:

(a) The US Second Request process is unique. Other merger control regimes do not ordinarily require the production of the volume of information, documents and data required in a Second Request. As a result, the Second Request process is costly and time consuming. The US approach may be contrasted with the substantially lower costs of merger review in other jurisdictions.

(b) There will remain a continued heavy reliance on sophisticated microeconomic analysis of a merger’s impact on pricing or other competitive variables.

(c) In evaluating possible reforms of the Second Request process it is useful to review its history. The Hart Scott Rodino (HSR) amendments to the Clayton Act, which created the Second Request process, were enacted in 1976. The implementing regulations were enacted in 1978, and the first Second Requests were issued that same year. The treatment of mergers at the time of the HSR amendments was very different from current practice. In 1976, merger law was largely a “rules” based regime driven by market shares and concentration

ratios. While a broader consideration of market factors was invited by the Supreme Court's *General Dynamics* decision, the scope of such factors was uncertain and generally deemed to be limited. The framers of the Second Request process saw this process as a means to obtain the relatively limited information which, at the time, was required to assess mergers. It was envisioned that the Second Request process could be completed in a matter of weeks.

- (d) Since the HSR amendments, US merger review has come a long way and now involves detailed and sophisticated microeconomic analysis of a merger's likely impact on prices and markets. The current merger guidelines require a detailed analysis of a merger's likely impact on a firm's market power.<sup>6</sup> In addition, the 1997 amendments to the Merger Guidelines require that against all of these factors, the Agencies (and by implication, the courts) should also consider whether particular kinds of cost savings would counterbalance any enhancement to market power resulting in lower prices to consumers. The current merger regime thus identifies mergers that may enhance market power at very low increments.
- (e) The emphasis on unilateral effects has further increased the level of detail required to evaluate the potential effects of a merger. The collection of the volume of information required to measure precisely whether the proportion of customers who value particular features of the merging parties' products deemed to be more similar than comparable features of competitors' products such as to permit a market-wide price increase post merger was not within contemplation when the HSR amendments were drafted.
- (f) Superimposing efficiency considerations on the unilateral effects analysis requires the collection of further information to allow a very sophisticated analysis of how *particular* cost reductions are likely to affect prices to individual customers and whether similar efficiencies can be achieved through less anticompetitive means.
- (g) The development and use of sophisticated economic tools to evaluate mergers has further increased the volume of data required to be produced under a Second Request. The increasing sophistication of the analysis has coincided with a proliferation of sources of information. Previously unavailable narrative information detailing competition on a deal-by-deal basis has become available with the proliferation of electronic sources of information (for example E-mail). Computerized accounting and inventory systems allow the retrieval of voluminous price and output data. The sheer availability of masses of data has substantially added to the task of complying with the Second Request.
- (h) In the US, the antitrust Agencies must litigate to block mergers in courts of general jurisdiction. As a result, while a very small percentage of transactions

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<sup>6</sup> This analysis involves taking into account subtle differences between the products of the merging parties and those of other competitors, barriers to entry, the nature of negotiations between buyers and sellers, the ability and likelihood of other firms to reposition to replace lost competition, and a myriad of other market-specific factors.

are actually litigated, it would appear that the Agencies feel that they must exhaustively collect information that might potentially be required in case of litigation. The Agencies' investigating staffs believe that without such information, they will not be in a position to convince a court of general jurisdiction that they have met their burden of proof that by the government's own standards requires exacting proof of a transaction's likely microeconomic effects.

- (i) The adversarial system, under which mergers operate, creates a powerful incentive to secure every last piece of information that may prove useful in litigation during the Second Request process, when the parties' incentives are to substantially comply with the request so as to start the clock on the final waiting period. These incentives change once the litigation begins.
- (j) The IBA Working Group considers that, in most cases, the Agencies can reach an informed decision on a transaction based on substantially fewer documents and less data than the Second Request typically generates. The Agencies tend to collect more information than may be strictly necessary, at substantial cost, for a number of reasons:
  - (i) the Agencies may not trust merging parties not to take advantage of any gaps in the request to "hide" incriminating documents and information;
  - (ii) the Agencies are concerned that the merging parties will use information not previously provided to defend the transaction;
  - (iii) the Agencies believe that they cannot effectively test the parties' assertions if they have not collected substantial amounts of information from which allegedly exculpatory information has been drawn; and
  - (iv) the Agencies are concerned that they will need the additional information collected if they are forced to litigate the case, either to rebut specific defences or to rebut the suggestion that the evidence presented is unrepresentative of the market as a whole.

2.2 In considering recommendations to improve the merger review process in the US, this paper starts with the assumption that there are practical limits to the reforms which can be proposed. In particular:

- (a) There is unlikely to be consensus in the US that an administrative system where the Agency can, on its own, order a deal blocked, would be preferable to the current adversarial litigation system.<sup>7</sup>
- (b) There is also unlikely to be consensus in the US that merger review should revert to a more rigid rules-based system and move away from sophisticated

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<sup>7</sup> Other regimes which employ administrative processes, such as the European Commission, have been criticized for enabling the reviewing authority to block transactions without independent scrutiny as part of the process.

microeconomic analysis.<sup>8</sup> These two assumptions constrain the extent to which the current HSR Second Request process can be fundamentally reformed.

2.3 Nonetheless, a number of beneficial reforms are possible even accepting these features as limitations of the US merger control regime. These reforms can go a long way to making the Second Request process a more efficient and modern process.

### 3. MODERNIZATION RECOMMENDATIONS

3.1 The following recommendations are designed to significantly reduce the burden on merging parties while acknowledging and addressing the legitimate concerns of the Agencies described above.

(a) **Probable cause**

The Agencies should impose a probable cause standard before requesting information directed at exploring any issue. If there is not enough information developed in the initial waiting period to give rise to probable cause to believe that the issue is likely to be a serious concern, information on the subject should not be requested. Information should not be requested on an issue without good reason to believe that the issue is likely to raise serious anticompetitive concerns. The premise for including the request is that the incremental burden of producing the information given that a Second Request will issue in any event is low. Such a standard would counter any temptation to request information when there was no real competition concern. Along similar lines, the Second Request should not contain requests for information on competitive issues that have little direct connection to the merger transaction but that involve other antitrust issues involving the merging parties. (We note that similar criticisms have been levelled against the antitrust enforcement agencies in other jurisdictions as well.)

(b) **Numerical cap**

There should be a numerical cap on the number of people whose files must be searched and produced as part of the Second Request.

The high cost of Second Request compliance stems from the necessity to collect and review the files of everyone in the organization that may have been involved in the merger. The incremental benefit of collecting redundant documents from people at the lower levels within the organization is small. A sufficiently accurate picture of the relevant activity, on which judgments can be based, can be achieved from a more targeted review of the organisation's documents. Agreeing at the outset which files are the most representative and informative could substantially reduce the scope of the production while having little impact on the quality of information available to the Agencies. Numerical caps could be tied to the size of the organizations involved in the merger or to the number of relevant product overlaps.

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<sup>8</sup> The international trend is increasingly to apply more sophisticated analysis and to collect significant quantities of additional information to do so.

To facilitate the Agencies' ability to judge whose files should be searched, the Agencies should consider requiring production of pre-existing organization charts as part of the initial HSR filing.

The Agencies should take comfort from the experience of civil litigants after the change in the Federal Rules of Civil Procedure that put caps on the number and duration of depositions. There is a broad consensus among civil litigators that the quality of discovery has not been compromised by these changes, and that the cost and burden of civil litigation has been significantly reduced.

One area where collecting documents from multiple sources could have some significant value to the Agencies is with respect to pricing to individual customers in mergers where the theory of competitive harm is unilateral effects and where the ability to price discriminate is important. Where the number of customers is large, a sample of customer data should be sufficient to test the Agencies' unilateral effects or price discrimination theories. If the parties choose to argue that the sampling is not representative of the market as a whole, then it is incumbent upon them to undertake the burden of providing the materials necessary to test that assertion. But even in that situation, it is not necessary to produce every relevant document. Such information can be elicited in interrogatories which require the parties to state their position and to provide documents or data sufficient to allow the Agencies to test the assertion.

(c) **E-mails**

The proliferation of electronic communications is another source of the increased cost of Second Request compliance. On the one hand, E-mails have clearly improved the quality of information available to the Agencies. E-mail communications can be more candid and uncensored than more formal documents, and can therefore provide valuable insight. On the other hand, random comments in E-mails can also be unrepresentative of truly significant competitive forces. If a sampling of E-mails does not pick up such documents, it is unlikely that the real competitive impact of a transaction has been obscured. A more appropriate balance between the benefits and burdens of E-mail discovery can be accomplished by limiting the search and production of E-mails.

One approach is for the merging parties to describe the search terms employed, which provides the Agencies an opportunity to evaluate the appropriateness of the search methodology and challenge the parties' response if the search terms are deemed inadequate.

Another option is for the Agencies and the merging parties to agree on appropriate search terms to narrow the field of what must be produced.

The individuals whose E-mails must be searched should be limited to those employees particularly likely to have valuable information, for example the pricing manager or sales manager. The production of only a sampling of the documents screened by the search terms should be sufficient to accurately predict the effects of a transaction.

(d) **Backup tapes**

The standard Second Request requires the production of all responsive documents located on archived or backup tapes. We recommend that the requirement to produce back up tapes be eliminated in virtually all cases. Complying with this requirement significantly increases the cost of the Second Request process. For this reason, in many cases, merging parties pursue negotiations with the FTC and DOJ to limit or eliminate the requirement that backup tapes be searched for responsive documents. This negotiation creates a situation of uncertainty which takes time to resolve. Moreover, parties must “bargain” in order to obtain this relief, and may forgo requesting other legitimate relief as a trade-off. As noted above, the incremental value of each additional E-mail is likely to be small. The incremental value of deleted E-mails found only on the backup tapes is likely to be even smaller.

(e) **“Meet and confer” and “early disclosure” requirement**

The Federal Rules of Civil Procedure and the local rules in various districts require that litigants meet early in the litigation process and disclose relevant information. Similarly, before the parties have submitted a formal merger filing in the European Commission, pre-notification contacts are now considered almost mandatory, even in very straightforward cases. A similar meeting in advance of the issuance of the Second Request would reduce unnecessary burden and shorten the Second Request process.

We propose that no later than five days in advance of the expiry of the first waiting period, if a Second Request is likely to issue, the parties and the investigating staff be required to meet to exchange information and focus the Second Request.

Imposing this rule would require that the Agencies resolve clearance disputes much earlier in the process so as to allow their staffs sufficient time to investigate to make the meeting productive.

Consistent with the “probable cause” standard described above, the investigating staff would be required to disclose the markets they are investigating, and the issues that are the focus of their concern. The meeting will also provide an opportunity to discuss the organization charts produced by the parties. The parties would be required to attend the meeting with officers knowledgeable about the responsibilities of the positions on the chart. This will be the Agency’s opportunity to determine how to allocate the numerical cap described above on the number of people to be searched.

For this process to work, the parties have to be forthcoming with accurate information. A failure to do so would undermine the process and that can be dealt with in the same way, namely a “bounce” and restart of the clock for a demonstrable failure to substantially comply.

(f) **Shorten HSR period, lengthen pre-trial discovery period**

The recommendations above are aimed at mitigating the problem of requesting information that is not necessary to assess the merger. If the Second Request were limited to the task of making an informed decision *whether* to litigate, and not to uncovering every piece of evidence that might be relevant to such a litigation, the burden and cost could be reduced significantly.

The Agencies' desire to collect all the evidence that may be required in litigation for the case in chief, for the rebuttal of arguments that they know the parties will make and for those that they do not anticipate but nonetheless want to be prepared for, lengthens and increases the cost of the Second Request process. This proposal would require the Agencies to develop the information necessary to rebut the defendant's case, rounding out evidence to bolster their burden of proof, and proving that the information relied upon is representative of the market generally during the pre-trial discovery period under the supervision of the trial judge rather than through the Second Request process.

(g) **Econometrics**

While we are sympathetic to the argument that it is difficult to define the relevant econometric analysis in the first thirty days after a transaction has been notified, it is not unreasonable to require the Agencies to have a specific reason in mind for requesting the data before imposing the burden of production on the parties.

The Agencies should have an understanding of what econometric analysis they intend to run, and should limit requests to the data required to perform that analysis. Gaining an understanding of what data is available and how the parties keep data should be a central agenda in the pre-Second Request meet and confer process proposed above.

(h) **Time limits**

Lengthy decision making by the Agencies has resulted in a perception that negotiations are largely fruitless.

There is a view that a declaration of substantial compliance so as to trigger the final waiting period can be detrimental to further dialog with the merging parties. The explanation given is that the investigating staff cannot divert their efforts during the last thirty days from preparing for litigation. As a result, parties are often reluctant to certify substantial compliance even if they have provided the Agency with all the information reasonably required to form a conclusion. The result is a potentially protracted and potentially uncertain period where the transaction is held in limbo. This situation is not conducive for either the Agency or the parties. The parties should not be put in a position where exercising their statutory rights to trigger the waiting period implicitly or explicitly prejudices the review of their deal on the merits.

One way to address this issue is for the Agencies and the parties to enter into "contracts" setting out when certain decisions will be made, triggered upon the staggered production of documents related to certain issues. Ideally, these "contracts" will be negotiated as part of the pre-Second Request meeting and

conferring process. This process should allow the Agencies to designate what materials they would find productive to review early, and to identify and prioritize the issues that are likely to prove dispositive. But even if all of this cannot be worked out in advance, there is no reason why a policy favouring such agreements after issuance cannot be implemented by the Agencies. The policy would provide that the parties can initiate a process that will result in the Agencies designating which materials they would like to receive earlier in the process. In exchange for providing those materials, the Agency would commit to resolving the issues to which the documents relate within a set time period. Such an approach would encourage compliance and ensure continued dialog between the parties and the Agency.

#### 4. **CONCLUSIONS**

The US Second Request process is unique. It is also a costly, burdensome and document intensive process. While due regard for the unique historical and procedural framework of US merger review is essential to proposing practical and realistic reforms, international comparisons suggest that, reforms are possible without sacrificing the quality of the merger review process.

## C: MERGER EFFICIENCIES

*This part of the submission has been prepared in response to the AMC's request for comments on the role of efficiencies in merger analysis.*

*As we are sure the AMC will already benefit from detailed comments from US commentators that will address the specifics of US law and practice, the IBA Working Group's comments are focussed on a more general policy and practice perspective that draws upon the IBA Working Group's broad experience from a variety of jurisdictions, including the US. These comments and recommendations draw to a significant extent on the IBA Working Group's understanding of the positions in other jurisdictions.*

*In general, it will be no surprise that the IBA Working Group agrees with the common consensus that antitrust merger law and policy should promote the realization of efficiencies. However, the key question in these circumstances is the extent to which efficiencies can be influential, in practical terms, in the analysis of a merger case. Striking the right balance between allowing efficiency enhancing mergers and adequately protecting consumers is the key challenge in this exercise.*

*The IBA Working Group provides its comments cognizant of the difficulty in arriving at the appropriate balance, and its comments and recommendations are provided to contribute and advance the AMC's deliberations on the way forward for US merger analysis without providing a specific recommendation. In this regard, in response to some of the AMC's questions on how efficiencies should be specifically addressed, it is informative to provide a sampling of how some key jurisdictions around the world address these issues.*

### 1. **ROLE OF EFFICIENCIES IN MERGER REVIEW**

- 1.1 The focus of the AMC's enquiry into merger efficiencies analysis appears to be on exploring the practical meaning of efficiencies and assessing what their proper role in merger analysis should be. Key issues include the appropriate role of efficiencies as either one of many factors in the determination of competitive effects or as a defence to an otherwise anticompetitive merger, and the appropriate economic standard to review efficiencies. If, ultimately, the only relevant question is whether the merger will lead to some significant lessening of competition ("SLC"), it may be less of a priority for any antitrust regime to develop an elaborate merger efficiencies analytical framework. This essentially means that any relevant efficiencies (which would likely be variable cost efficiencies) must be passed through to consumers in order to be considered, which essentially means that they are being realized in a competitive market to begin with in order for one to be able to prove the market conditions exist for the pass-on to occur. As Robert Pitofsky put it, this is a "killer qualification."<sup>9</sup>
- 1.2 From another perspective, others would argue that only efficiencies which result in pass-through should be relevant because the primary goal of competition laws is to protect consumers even where the larger economy would benefit from efficiencies to producers.

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<sup>9</sup> Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, (1992), 81 Geo.L.J. at 207.

- 1.3 In another sense, the lack of a merger efficiencies defence could be interpreted as a jurisdiction saying, on an absolute and *ex ante* basis, that no situation could ever exist where it would be in our interest to allow a merger that creates substantial and cognizable efficiencies in the broader economy if it may harm a certain group of consumers.
- 1.4 Also, it is interesting to consider the following proposition: that employing efficiencies as only a factor in SLC analysis as opposed to a defence necessarily implies that one has adopted some type of price standard, modified or otherwise.
- 1.5 The treatment of efficiencies in various jurisdictions is driven by the goals of merger law and policy, which may include diverse goals such as achieving pure economic efficiency, protecting consumers, creating national champions, promoting international competitiveness, and preventing mergers to monopoly. Recent trends in various jurisdictions show increasing attention and importance of the role of efficiencies in merger review, although there is no consensus on a proper standard by which efficiencies should be assessed.
- 1.6 For example, in Canada, the issue of the appropriate standard was played out in the *Superior Propane Case*<sup>10</sup> where essentially the question boiled down to how the *Competition Act* would arbitrate between the interests of the greater economy, by permitting efficiencies that would benefit it as a whole, and those of a smaller subgroup of propane consumers. In other words, should the Canadian economy have been precluded from benefiting from a merger's efficiencies because of a predicted wealth transfer from propane consumers to propane distributors and their shareholders? In this sense, from one perspective, the merging parties were only partial and, to some extent, incidental beneficiaries of a societal wealth maximizing merger efficiencies policy.
- 1.7 Accordingly, as pointed out above, it is critical to appreciate that the role of efficiencies in merger analysis hits the foundation of fundamental objective(s) of competition law. Also, notwithstanding this fact, it is important to put the issue of merger efficiencies in the proper perspective, namely that they would only be determinative in a very small number of merger cases. Still, the manner in which merger efficiencies are assessed highlights whether an antitrust law has a bias towards promoting competitive markets through the broader perspective of facilitating efficiencies or the narrower focus of protecting consumers from predicted short to medium term price increases. Over time, it could be argued that the most efficient economies will necessarily provide their consumers with the best quality products at the best value because this is more likely where a greater proportion of a society's resources are being used efficiently across interrelated product markets.
- 1.8 The tension between the greater interests of society and those of a specific group of individual consumers is also what makes efficiencies analysis such a difficult and engaging issue for crafters of government competition policy. It is a tension that

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<sup>10</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.); *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 11 C.P.R. (4th) 289 (F.C.A.); *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417 (Comp. Trib.); *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2003), 23 C.P.R. (4th) 316 (F.C.A.).

exists in many other areas of government policy and, in those contexts, if it is any consolation, the choices seem just as difficult.

## 2. EFFICIENCIES IN US MERGER REVIEW

- 2.1 The assessment of efficiencies is arguably the single most difficult task facing authorities in a merger review where efficiencies may be relevant. The difficulty of efficiencies analysis has led to an incremental and conservative approach to its use in merger analysis. In order to avoid convoluted and confusing efficiencies analyses, which would undermine predictability of how mergers would be considered in a merger review, US approaches to efficiencies have tended to be black-and-white.
- 2.2 Following the 1950 Celler-Kefauver Act, which opened the door to the consideration of efficiencies, the early court cases set an extremely hostile tone toward efficiencies. In *Brown Shoe*,<sup>11</sup> the US Supreme Court rejected efficiencies as a justification for an anticompetitive transaction, with policy implications favouring decentralization of economic power. In *FTC v. Procter & Gamble Co.*,<sup>12</sup> the court held that efficiencies could be anticompetitive; in this case, finding that a merger with Clorox would result in marketing efficiencies which could entrench market power. The concept of efficiencies as anticompetitive was the antithesis of the intent to consider efficiencies as offsetting anticompetitive effects of a merger, and this decision stands as the high watermark of judicial hostility against efficiencies. Judicial hostility has only slowly abated, and appears to remain the norm. Similarly, initial treatment of efficiencies in the 1968 *Merger Enforcement Guidelines* and successive revisions of those Guidelines have resulted in a very narrow scope for the application of efficiencies considerations under the price standard.<sup>13</sup>
- 2.3 The 1997 Amendments to the *Horizontal Merger Guidelines* elaborated on the appropriate treatment of efficiencies in merger analysis. Those amendments entrench the approach that the proper role of efficiencies is as a factor in the competitive effects analysis, rather than as an independent value that is a counterweight to that analysis. Accordingly, under the Guidelines, the inquiry is limited to assessing the counter tendencies efficiencies would likely have on price post-merger; namely, to assess the enhancement of market power (which tends to result in less elastic demand and higher prices) against the creation of efficiencies (which reduce marginal price and tend to result in a lower profit maximizing price). The Guidelines envision a relatively disciplined analysis of these counter tendencies and ask whether, on balance, consumers would be better or worse off after the merger in terms of price only.
- 2.4 An implication of considering efficiencies as a part of the competitive effects analysis is that the protection of consumers is implicitly the ultimate goal of the law as opposed to efficiency.

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<sup>11</sup> *Brown Shoe Co. v. U.S.*, 370 U.S. 294 (1962).

<sup>12</sup> *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

<sup>13</sup> See generally W. Kolasky and A. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, (2003) Antitrust L.J. 207.

### 3. TIMING AND TYPES OF EFFICIENCIES RECOGNIZED

3.1 In responding to these questions, the IBA Working Group, based on its international perspective, believes it may be of most assistance to the AMC to provide a summary of how some other key jurisdictions deal with these issues.

3.2 In general, we suggest that:

- (a) Any type of efficiency should be considered relevant, especially those that result in real resource savings and that are not exclusively pecuniary in nature. The key types of efficiencies to be considered should include productive, allocative, dynamic, and transactional efficiencies. The reason is that, to the extent any efficiencies are to be considered as factors to mitigate or offset any anticompetitive harm, society is most interested in the benefits these efficiencies will provide the greater economy as a whole. Once it has been determined that a private merger arrangement will result in harm to the public that warrants state intervention, it then becomes more relevant to assess and balance the public harm against the public good rather than private gains and losses. It is important to maintain flexibility in one's approach to efficiency assessment because of the creativity of businesses in finding new types of efficiencies to exploit to make them more competitive to the benefit of all.
- (b) There should be greater willingness to consider significant efficiencies that cannot plausibly be achieved without a particular merger where there is some suggestion that, in the long run, these efficiencies are likely to be passed on to consumers, and where, in the short run, there is not a substantial concern that the merger will significantly elevate prices or whose effects could be alleviated by other means.
- (c) There should be no arbitrary pre-set timeline within which efficiencies will be considered, but permit the recognition of all efficiencies that are credible and cognizable whenever they arise.
- (d) Efficiencies should be relevant to the merger analysis at any stage of the review, both at the competition assessment stage and in any subsequent balancing stage where the merger harm is to be weighed against its efficiencies.

3.3 A sample of how these issues are address in other jurisdictions is set out below.

#### **When should efficiencies be assessed?**

##### **(a) Canada**

Efficiencies can be “informally” considered as a factor in the initial competition analysis as well as a full defence to what is subsequently found to be a merger that will likely result in an SLC. The efficiencies defence applies to permit an otherwise anticompetitive merger where the efficiency gains are “greater than and offset” the anticompetitive effects of the merger.

##### **(b) United Kingdom**

In the first stage, efficiencies are conflated with other considerations to determine whether a merger is likely to result in an SLC. In the second stage,

upon determining that an SLC is likely, efficiencies as a feature of expected consumer benefits are weighed against the anticompetitive effects.

(c) **European Union**

Efficiencies are a part of the overall analysis of whether a merger will significantly impede competition. The Commission may find that the efficiencies generated are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of the consumers, thereby counteracting any anticompetitive effects of the merger.

(d) **Australia**

Efficiencies may be considered as part of the analysis of whether a merger is likely to substantially lessen competition in a market, in so far as any efficiency enhancing aspects of a merger may impact on overall competitiveness. They are most relevant, however, in the authorisation process where the public benefits from the merger (including efficiency gains) are assessed against its anticompetitive effects in the form of public detriments.

(e) **New Zealand**

Efficiencies are considered at two stages: (i) in the clearance process in determining whether the merger is likely to result in an SLC, focusing on price and output changes; and (ii) in the authorization process where efficiencies are weighed against the anticompetitive effects.

### **Types of efficiencies**

The following is a brief summary of the types of efficiencies recognized in some key jurisdictions:

(a) **Canada**

The three categories of efficiencies relevant to a trade-off analysis in a merger review are: allocative efficiency, the degree to which available resources are allocated to their most valuable use; technical (productive) efficiency, the creation of output at the lowest resource cost (this would likely include certain transactional efficiencies); and dynamic efficiency, the optimal introduction of new products and production processes.<sup>14</sup>

On the other hand, efficiencies that would likely be attained through alternative means, efficiencies that are redistributive in nature, and savings resulting from a reduction in output, service, quality, or product choice are not considered in the trade-off analysis.<sup>15</sup> However, these efficiencies can be relevant in attempting to convince the Competition Bureau that they are factors that should

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<sup>14</sup> Competition Bureau Canada, *Merger Enforcement Guidelines* (September 2004) at ¶ 8.3.

<sup>15</sup> Competition Bureau Canada, *Report of the International Round Table on Efficiencies: Summary of Consultation with International Competition Authorities* (Final Version) (Gatineau: Competition Bureau Canada, 2005) at 2.

be considered in assessing whether a merger will lead to an SLC in the first place.

(b) **United Kingdom**

In the initial competition analysis, any changes in efficiency which may impact whether a merger is likely to result in an SLC may be relevant. At the second stage of the analysis, where it has been found a merger will likely result in an SLC and the authority is weighing consumer benefits against the SLC, only efficiencies that lead to lower prices, higher quality or greater choice of goods or services, or efficiencies that lead to greater innovation are considered.

(c) **European Union**

Any quantitative or qualitative efficiency benefiting consumers are relevant, except for efficiencies resulting merely from anticompetitive restrictions in output. Efficiencies considered include savings in production or distribution, with greater weight accorded to variable or marginal cost savings. Also considered are efficiency gains in innovation and research and development. Where possible, efficiencies should be quantified because claimed efficiencies are more likely to be counted where the supporting data is precise and verifiable.

(d) **Australia**

Any efficiency gain (that is, allocative, productive or dynamic) that impacts on the level of competition in a market is relevant to the analysis.

(e) **New Zealand**

All efficiencies, whether static, productive, or dynamic, may be relevant. Thus, consideration may be given to any efficiency that is likely to result from the transaction. Where possible, attempts should be made to quantify efficiencies, though benefits which are not quantifiable may also be considered.

**Time frames for considering efficiencies**

(a) **Canada**

There is no set time frame. In practice, consideration is given to all credible evidence as to likely efficiencies within any time frame. In *Superior Propane*,<sup>16</sup> the Competition Tribunal accepted evidence of efficiencies for ten years in the context of the use of efficiencies as a defence. In the context of using efficiencies as a factor in assessing whether there will be an SLC, the usual time frame for assessment is two years.

(b) **United Kingdom**

In analyzing whether a merger may substantially lessen competition, efficiencies considered are likely to be those expected to result within a “short

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<sup>16</sup> *Supra* note 2.

period of time”. On the other hand, in balancing efficiencies and anticompetitive effects, efficiencies considered are those which arise within a “reasonable period”. In practice, a “reasonable period” is likely to mean a “reasonably short period”.

(c) **European Union**

There is no time frame imposed on claimed efficiencies considered. However, the further the efficiency is projected into the future, the less weight is assigned to the efficiency claimed.

(d) **Australia**

There is no set time frame. In practice, consideration is given to all credible evidence as to likely efficiencies within any time frame, although the weight given to them will diminish the more the efficiencies are delayed.

(e) **New Zealand**

The time frame for considering efficiencies is generally three to five years.

4. **HOW SHOULD COURTS AND AGENCIES EVALUATE CLAIMS OF EFFICIENCIES?**

4.1 Again, in responding to these questions, the IBA Working Group believes it would be of most assistance to the AMC to provide a summary of how some other key jurisdictions deal with these issues. More particularly, in this section, we provide a summary of the issues of: merger specificity, weighing efficiencies in one market against harm in another, and whether efficiencies gained outside of the jurisdiction should be relevant.

4.2 In general, we believe:

- (a) Efficiencies should be merger specific, but that should not mean that they are considered if attainable through some other “possible” means, but rather if they are attainable by some other likely “plausible” means;
- (b) Efficiencies should be assessed on a market by market basis whether considered as a factor in SLC assessment or a defence or both (unless the efficiencies between markets are inextricably intertwined so that they would be completely lost if the merger was prohibited in the market in question);
- (c) Consideration of efficiencies should not be prohibited in so-called “merger to monopoly” scenarios based on the same logic that market shares should not be determinative of SLC; and
- (d) Efficiency gains and losses to foreigners need not be relevant to the analysis within a jurisdiction unless there is some way to prove these gains will find their way back to the jurisdiction.

4.3 A sample of how these issues are addressed in other jurisdictions is as follows.

**Merger specificity**

(a) **Canada**

According to the Competition Bureau's *Merger Enforcement Guidelines*, in order to be considered for the efficiency defence, claimed efficiencies must be merger specific such that they are unlikely to be attained by alternative means. Moreover, efficiencies must be verifiable objectively as to their nature, magnitude, and likelihood.<sup>17</sup>

However, it is important to note that, in the efficiencies defence context, the Competition Tribunal, in the *Superior Propane Case*, took what is referred to as the "order driven approach" at trial in determining which efficiencies will count in its assessment. This essentially means that, in its balancing exercise to determine whether a merger will benefit from the defence, the Tribunal will weigh the anticompetitive harm against all the efficiencies that would be foregone if the Tribunal grants the Bureau an order that prohibits all or some of the merger.

**(b) United Kingdom**

The test is broadly whether the efficiency gain would be unlikely to accrue without the merger. More specifically, in the initial stage of the competition analysis, efficiencies claimed must be demonstrable and will result within a short period of time, merger specific such that the efficiencies are a direct result of the merger, likely to be passed on to consumers and will increase rivalry among the remaining firms in the market. In the second balancing stage of the analysis, the only efficiencies considered are those which are clear, and where the relevant benefits are unlikely to accrue without the merger. Moreover, where the efficiencies claimed are cost savings, they must be quantifiable.

**(c) European Union**

Efficiencies must be caused by the merger and could not be achieved by less anticompetitive means. They must also be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialize.

**(d) Australia**

There must be a nexus between the efficiency and the proposed merger. Efficiencies which would be available in any event are given little weight.

**(e) New Zealand**

Efficiencies must be merger specific, as well as be a direct result of the transaction. Accordingly, benefits which would likely accrue without the merger are not considered.

**Market by market assessment of efficiencies**

**(a) Canada**

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<sup>17</sup> *Merger Enforcement Guidelines*, *supra* note 6, at 8.7, 8.8.

Generally, competitive harm and the impact of efficiencies are assessed on a market by market basis. However, efficiency gains could be considered across markets where a merger involves layers of markets (e.g. both local and national markets; or where the efficiencies are inextricably intertwined with particular markets).

(b) **United Kingdom**

In the first stage of the analysis, only efficiencies within the relevant market are likely to be considered in determining whether an SLC is likely to result. Conversely, in the second stage of the analysis, efficiencies can be considered in any market, but consumer benefits are normally expected to arise in the same market where competition concerns have been identified.

(c) **European Union**

Since the efficiencies considered relevant are those which benefit consumers in the markets in which anticompetitive concerns arise, it is unlikely that efficiencies and losses in other markets will be considered even if those markets are linked.

(d) **Australia**

The substantial lessening of competition test applied in merger analysis will take into account efficiencies that impact on competition in the relevant market. The public benefit authorisation process on the other hand, is concerned with balancing public benefits (including efficiencies) against the public detriments of a merger which substantially lessen competition.

(e) **New Zealand**

All relevant efficiencies and benefits are considered, including those arising in markets other than the affected market. However, only harm arising directly from the affected market is considered.

**Efficiency gains to foreigners**

(a) **Canada**

It is unlikely that any efficiency gains or for that matter harm to those outside Canada would be relevant.

(b) **United Kingdom**

Both stages of the competition analysis are confined to the United Kingdom, and efficiencies to foreigners are not considered. Likewise, harm to foreigners is unlikely to be counted against efficiencies within the United Kingdom.

(c) **European Union**

In principle, the Commission considers the transaction in light of the market in which it occurs, which may include efficiencies on a worldwide basis. In practice, the Commission is likely to consider only efficiencies that are capable

of benefiting consumers within the European Union. Similarly, harm to foreigners is unlikely to be considered unless a sufficient nexus exists with consumers of the European Union.

(d) **Australia**

Efficiency gains to foreigners will not be relevant in the assessment of the merger's impact on competition in the relevant Australian market. Under the public benefit authorisation test, benefits to foreigners may have some indirect benefits in Australia, and to that extent may be given some weight.

(e) **New Zealand**

Neither efficiencies nor harm affecting foreigners is considered. An exception to this rule is benefits which accrue to foreigners, but which in turn results in benefits to New Zealand.

5. **WHAT SHOULD BE THE BURDENS OF PRODUCTION AND PROOF FOR ESTABLISHING EFFICIENCIES?**

5.1 In connection with the issues of burden of proof, evidence, ultimate arbiter, and the utility of post-merger audits, the IBA Working Group recommends as follows:

- (a) It is appropriate that the burden to describe and substantiate the relevant efficiencies should be with the parties as they have the best access to that information. However, depending on whether efficiencies are being considered as a factor in SLC analysis or as a defence, the ultimate burden of proof may shift. More specifically, in the SLC context the burden is ultimately on the authority to show that notwithstanding the efficiencies, there will likely be an SLC. In the defence context, it should be the burden of the merging parties to show that their claimed efficiencies will outweigh the SLC established by the authority
- (b) Greater weight and credibility should be given to merger efficiencies, and such efficiencies are most credible if they have been described in pre-existing assessments and internal documents
- (c) There should be an ability to have merger efficiencies and their impact on mergers reviewed by a body independent of the enforcement authority because of the tension between the authority's responsibility and legitimate bias towards protecting the consumer. In some cases, an independent body one step removed from that which investigated and found anticompetitive harm will provide a fresh and dispassionate check on the efficiency assessment exercise.
- (d) Generally, post-merger audits and monitoring need not be available because they are difficult to administer for obvious reasons and may lead to unpredictability in the merger process. However, consider whether, in some rare cases where significant economy enhancing efficiencies are at stake and where the choice is between prohibiting an efficiency enhancing merger and the parties voluntarily agreeing to submit to some form of post-merger audit, it may make sense to facilitate some mutually acceptable mechanism to monitor and audit the effect of the merger and the realization of efficiencies with a

remedy/penalty regime. While the use of post-merger audits to overturn a deal long closed may lead to less predictability, such audits could also provide insights for future cases.

5.2 A sampling of how these issues are addressed in other jurisdictions follows:

### **Burden to prove efficiencies**

#### **(a) Canada**

The merging parties must prove the nature, magnitude and likelihood of efficiency gains, and whether such gains are greater than and offset the anticompetitive effects of the merger.<sup>18</sup>

Merging parties must prove the efficiencies claimed on a balance of probabilities that they are likely to materialize. However, the Competition Tribunal may discount efficiency claims that seem less probable, and is free to apply weight to the claims as it sees fit.<sup>19</sup>

#### **(b) United Kingdom**

In determining whether a merger is likely to result in a SLC, there is no burden of proof because efficiencies are part of the overall merger analysis. In the balancing stage of the analysis, however, the merging parties bear the burden of proving the efficiencies, and the burden is a considerable one.

#### **(c) European Union**

The burden is on the parties to provide information regarding claimed efficiencies and demonstrate they are merger specific and likely to be realised. The Horizontal Guidelines also suggest that, in the context of the EC's SLC analysis, "it is for the notifying parties to show what extent the efficiencies are likely to counteract any adverse effects ..."<sup>20</sup> This suggests that there is a reverse onus on the parties to show the efficiencies will counteract the SLC as opposed to the EC proving there will likely be an SLC in spite of the claimed efficiencies.

#### **(d) Australia**

The burden is on the merging parties to show that there is no substantial lessening of competition, or that the resulting public benefits (including efficiencies) outweigh the detriments of a merger which substantially lessen competition.

#### **(e) New Zealand**

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<sup>18</sup> *Merger Enforcement Guidelines*, *supra* note 6, at ¶ 8.5.

<sup>19</sup> Canadian Bar Association National Competition Law Section, *Treatment of Efficiencies in the Competition Act* (Ottawa: Canadian Bar Association, 2004) at 11, 18.

<sup>20</sup> EC Horizontal Merger Guidelines at ¶ 79.

The burden is on the merging parties to show that there is no SLC, or that the resulting public benefits outweigh the SLC.

### **Merger efficiency evidence**

#### **(a) Canada**

In order to allow for an objective verification of the efficiencies claimed, merging parties are required to provide the Competition Bureau with information describing the nature, magnitude and likelihood of each efficiency. Documentation prepared in the ordinary course of business is preferred. Both quantitative and qualitative efficiencies can be considered.<sup>21</sup>

#### **(b) United Kingdom**

Internal documents created before the merger clearance process are given more weight than those created specifically in support of the merger. Third party views are also given much consideration.

#### **(c) European Union**

Internal documents used to decide on the merger, statements from management to owners and financial markets, historical examples of efficiencies and consumer benefit, and pre-merger external expert studies on efficiencies are considered compelling, though the Commission is likely to accept any reliable evidence, in particular evidence from third parties.

#### **(d) Australia**

Efficiency claims must be supported by factual material.

#### **(e) New Zealand**

The Commerce Commission is required to examine a range of documents in its merger analysis and does not appear to favour one type of evidence over another. However, greater weight is placed on the views of independent experts than experts engaged by the merging parties. In an authorisation context the Commerce Commission will engage independent experts to conduct modelling *de novo* or to test the parties' modelling of the efficiencies.

### **Arbiter of merger efficiencies**

#### **(a) Canada**

The Federal Competition Tribunal has adjudicative powers over merger analysis, including the assessment of efficiencies. Tribunal decisions can be appealed to the Federal Court of Appeal.

#### **(b) United Kingdom**

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<sup>21</sup> *Merger Enforcement Guidelines*, *supra* note 6, at ¶¶ 8.8, 8.9, 8.33.

The decision of the Office of Fair Trading to clear a merger is binding, subject to appeal to the Competition Appeal Tribunal or judicial review. Where a merger is referred to the Competition Commission, the Commission's decision is final, subject to appeal to the Competition Appeal Tribunal or judicial review.

(c) **European Union**

The Commission decides under the *European Community Merger Regulation* on whether to clear or block a merger. Appeals may be made to the Court of First Instance, and to the European Court of Justice.

(d) **Australia**

The Australian Competition and Consumer Commission (ACCC) carries out competition assessments of mergers, and grants authorisations where the public detriment of an anticompetitive transaction is outweighed by the public benefits. Authorisations are subject to review by the Australian Competition Tribunal.

(e) **New Zealand**

The Commerce Commission assesses efficiencies, subject to appeal to the High Court which generally sits with a lay member economist. Subsequent appeals are made to the Court of Appeal and the Supreme Court.

**Post-merger audit**

(a) **Canada**

Post-merger audits of claimed efficiencies are not permitted under the current regime. However, generally a merger can be challenged up to three years post-closing. Permitting monitoring of mergers approved based on efficiencies has been suggested, but it has been criticized for increasing uncertainties over the future of an approved merger.<sup>22</sup>

(b) **United Kingdom**

Once a merger is cleared, it is not open to competition authorities to revisit the decision post-merger. One exception allowing for post-merger audits is where the parties have provided false or misleading information in the clearance process.

(c) **European Union**

Post-merger audits are unlikely to be within the Commission's powers to review transactions. Thus, the Commission is unlikely to challenge a merger where claimed efficiencies did not materialize. Again, the only exception is where the merging parties provided false or misleading information.

(d) **Australia**

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*Canadian Bar Association, supra* note 11 at 11.

The ACCC has no power to carry out a post-merger audit of claimed efficiencies.

(e) **New Zealand**

No post-merger audit of claimed efficiencies is permitted.

6. **WHAT IS THE APPROPRIATE STANDARD FOR ASSESSING EFFICIENCIES?**

6.1 As discussed above, it is trite to point out that virtually every competition regime in the world seeks to promote efficiency in one form or another to the ultimate benefit of the consumer (as the most efficient businesses will most likely provide consumers the best value products and services). In determining the appropriate standard to apply to analyzing merger efficiencies, however, one essentially determines the priority of efficiency in the hierarchy of socio-economic goals. There are obviously no right or wrong answers in this regard, but the choices are clear:

- efficiencies are only considered at the initial competition assessment stage where they must essentially “cleanse” the merger of its anticompetitive effects (as mentioned above, this likely translates into adopting some version of the price standard); and/or
- efficiencies are considered as a defence to an otherwise anticompetitive merger because the benefits to the broader economy more than offset the potential harm to any group of consumers

6.2 It is also likely true that efficiencies would only be determinative in the defence context, as opposed to the competition factor effects context, because, in the former, they would not have to meet what has been referred to as the “killer qualification”.

6.3 Our comments are merely intended to provide the AMC with perspectives on how to approach these choices. Also, we provide a sample of the standards adopted in other jurisdictions.

(a) **Canada**

There has been much recent discussion regarding the treatment of efficiencies in merger analysis. Under the current regime, efficiencies are treated as a defence to save potentially anticompetitive transactions. Recent discussions, however, contemplate treating efficiencies as one of the factors to be considered in the initial merger analysis in determining whether there is an SLC. Under the *Competition Act*, there is currently nothing preventing parties from making arguments and putting forward evidence that efficiencies will counteract any otherwise harmful effects to a merger, including by passing on efficiency savings to consumers.

Canada has adopted the balancing weights standard following the leading *Superior Propane* case. Under the current standard, certain mergers are permitted where:

- (1) the likely gains to society, as a whole, from a merger in terms of cost (or resource) savings (e.g., the benefits from the freeing up of resources to more valued uses); **exceed**
- (2)
  - (a) the misallocation of resources caused by the merger's anticompetitive effects (e.g., the loss from consumers switching to inferior substitutes because of, for example, price increases relating to the merging parties' products, which is known as the "deadweight loss"); **plus**
  - (b) the "socially adverse effects" of a merger, if any, such as the additional aggregate amount low income consumers would likely pay in the form of higher prices resulting from the merger.

The key consideration in these circumstances is whether a merger makes Canada wealthier, which is assessed by measuring the net effects of a merger as they relate to the use by society of its economic resources as a whole.

(b) **United Kingdom**

To date, efficiencies have not played a significant role in merger analysis. It is difficult to succeed on an efficiencies argument because competition authorities remain sceptical of efficiencies claimed by the merging parties. However, the increasing emphasis on economic analysis and increasing experience in examining efficiency claims will likely soften such scepticism.

It appears that a price standard would be applied because a merger will only be permitted where any claimed efficiencies are passed on to consumers. However, the legislation may potentially expand the standard from that of a price standard to some extent by considering efficiencies which lead to higher quality, greater choice, or increased innovation.

(c) **European Union**

The 2004 revisions to the *European Community Merger Regulation* explicitly recognized the relevance of efficiencies. The Commission has since published guidelines for considering efficiencies. To date, no case has discussed efficiencies in significant detail. However, the revisions and guidelines represent an acknowledgement of the important role of efficiencies in merger analysis.

It appears that a price standard would be applied because a merger will only be permitted where any claimed efficiencies are passed on to consumers. However, the legislation potentially expands the standard from that of a price standard to some extent by considering efficiencies which would benefit consumers likely including non-price benefits.

(d) **Australia**

While the ACCC recognises the value of efficiencies in assessing the public benefits of a merger, the standard of efficiency has not received detailed consideration. The ACCC has noted in its *Merger Guidelines* that the weight

and significance afforded to different types of efficiencies will depend on their magnitude and probability, the degree to which they will enable the merged firm to enhance competition and benefit consumers, and the delay in which the consumer benefits will be realised. The most recent Australian Competition Tribunal decision in Australia observed that the *'weight that should be afforded to benefits achieved by producers might depend on whether and to what extent any cost savings or other benefits were passed on to consumers.*

(e) **New Zealand**

The issue of merger efficiency has been litigated and it has been settled that the applicable standard is the total welfare standard. Under this standard, any wealth transfers between consumers and producers are regarded as neutral.

7. **ADDITIONAL RECOMMENDATIONS AND COMMENTS**

- 7.1 Under the current US approach, efficiencies are almost entirely viewed in terms of their marginal price effects on consumers. Only if a merger results in consumer pass-through of efficiencies in the form of lowered or unchanged prices will efficiencies be considered. The full benefits of efficiencies to the broader economy and producers are otherwise disregarded.
- 7.2 In general, the IBA Working Group recommends increased consideration of efficiency gains to the broader economy and producers. Under the current system, significant efficiencies to producers are ignored to the detriment of overall economic welfare unless the stringent pass-through test can be met. Merger efficiencies should not be disregarded if they provide benefit to many with relatively minor negative implications to few consumers.
- 7.3 To some extent, the 1997 *Horizontal Merger Guidelines* arguably mitigate the continuing requirement for immediate pass-through of efficiencies to consumers in the form of lower or equal prices (the "killer" requirement that removes the possibility of consideration of many efficiency claims from most mergers) by stating in Footnote 37 that "[t]he Agency will also consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market." The Footnote also notes that "Delayed benefits...from efficiencies will be given less weight because they are less proximate and more difficult to predict."
- 7.4 As mentioned previously, if efficiencies are cognizable and substantial, the trend of certain cases to dismiss significant efficiencies on the basis of a "structural presumption", e.g., of a 4 to 3 merger automatically resulting in anticompetitive effects, should be re-examined. If efficiencies exist, the removal of a competitor should not automatically be assumed to cause a reduction in competition, particularly where efficiencies may result in improvements to competition.
- 7.5 In addition, we also recommend as follows:
- (a) Efficiencies resulting in fixed cost reductions should be given greater consideration where they may result in price reductions. For example, industries with significant R&D investments may have pricing unrelated to marginal cost, but rather geared towards recouping large investments in fixed

costs. Large fixed cost efficiencies in such industries can directly affect price and should be given greater consideration where appropriate.

- (b) The focus on productive efficiencies as the principal consideration appears to be based on the assertion that productive efficiencies are most easily verifiable. The 1997 *Horizontal Merger Guidelines* do note that "[o]ther efficiencies, such as those relating to research and development, are potentially substantial but are generally less susceptible to verification". The Guidelines should clearly indicate that dynamic and allocative efficiencies which can be verified will be considered, and provide greater direction as to how and when such efficiencies will be considered. Even under a price standard, it may be possible to show that such efficiencies may result in pass-through to consumers.

7.6 Certain changes in the 1997 *Horizontal Merger Guidelines* make positive moves to increase the scope for the use of efficiencies which should be built upon:

- (a) For instance, the Guidelines reject a requirement that efficiencies be unique to the transaction. The Guidelines allow for only practical alternatives to achieving efficiencies to be considered, and that the Agency will not insist upon a less restrictive alternative that is merely theoretical. This position can be interpreted as meaning that the focus should not be on whether another method might exist to lower costs, but should instead be on whether another method is more or less costly than the merger.<sup>23</sup>
- (b) The AMC should consider further clarification on the scope of alternative methods of achieving efficiencies and provide examples such as where internal reorganization or expansion is not feasible, etc.

## 8. CONCLUSION

It appears clear that the reluctance of US Agencies and courts toward efficiencies is predicated on the antitrust law focus on consumer protection. However, the AMC provides the opportunity to modernise the current approach to efficiencies, either within the framework of the price standard or towards a new standard, which provides greater flexibility and opportunity to allow the realization of economy wide efficiency gains. Since the US economy is the largest world economy, it is important to both the American Economy and economies throughout the world that US businesses can employ their resources in the most efficient manner.

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<sup>23</sup> See Timothy J. Muris, *The Government and Merger Efficiencies: Still Hostile After All These Years*, (Spring 1999), 7 *George Mason Law Review* 729.

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