International Competition Network
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Report on the Costs and Burdens of Multijurisdictional Merger Review

Prepared by

Mergers Working Group
Notification and Procedures Subgroup

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I. EXECUTIVE SUMMARY

A key objective of the International Competition Network's Merger Working Group is to facilitate the "reduc[tion of] the public and private time and cost of multijurisdictional merger reviews." The Notification and Procedures subgroup of this Working Group (the "subgroup") seeks to further this objective by focusing on the procedural aspects of multijurisdictional merger review. To provide background reference for its work, the subgroup has studied the costs and burdens associated with multijurisdictional merger review. This Report summarizes existing literature and provides a reference point for the subgroup's projects, particularly its development of Guiding Principles and Recommended Practices for merger notification and review.

Realizing that it would be very resource intensive and perhaps duplicative to conduct this work itself, the subgroup instead seeks to review and describe the existing literature, as well as examples provided by non-governmental advisors working with the subgroup. The materials on which we relied, noted in the bibliography at the end of the Report, reflect a range of perspectives, including observations by government officials, the Final Report of the International Competition Policy Advisory Committee ("ICPAC Report"), recommendations prepared by various groups and commentators, and a recent survey by PricewaterhouseCoopers LLP that aims to quantify the costs and burdens of multijurisdictional merger review ("PWC survey").

Section II of the Report discusses the general costs and burdens of multijurisdictional merger review identified in the literature, focusing on three main areas: duration of review; external, direct costs - *e.g.,* legal fees, merger filing fees, other advisory fees, and translation and other miscellaneous costs; and internal, indirect costs - *e.g.,* time of in-house lawyers,

businesspersons, and value of other company resources. Because the PWC survey is the most recent, and the only survey that endeavors to quantify the general costs of multijurisdictional merger review incurred by business, this section of the Report focuses on the PWC survey, noting that it corroborates prior anecdotal evidence that multijurisidctional merger review imposes a "relatively small, but regressive tax" in relation to the overall value of the merger.

Following a summary of the PWC survey's main findings, we review additional commentary and studies to assess the effects of distinct costs and burdens on parties and agencies with respect to individual transactions. This literature suggests that some costs and burdens of multijurisdictional merger review can be significant and eliminated without negatively influencing the effectiveness of agency review. While these sources indicate that a substantial share of such costs and burdens are legitimate costs necessary to effective merger review, they also identify certain aspects of the multijurisdictional merger review process as imposing unnecessary costs and burdens on merging parties, in particular in transactions that do not raise material competitive concerns.

Section III reviews these "unnecessary" costs, which we classify into four categories:

- Costs associated with assessing notification requirements where notification thresholds are imprecise and/or subjective;

- Costs associated with complying with notification requirements for transactions lacking an appreciable nexus with the reviewing jurisdiction;

- Costs associated with complying with unduly burdensome filing requirements, including translation and formalistic procedural requirements; and

- Costs associated with unnecessary delays in the merger filing and review process.

The Report's postscript describes the subgroup's initiatives aimed at reducing or eliminating these costs without impeding effective merger review, emphasizing the subgroup's development of Recommended Practices for Merger Notification and Review. The subgroup has prepared eleven Recommended Practices to date, which it believes can significantly help to reduce unnecessary costs and burdens, if implemented by competition agencies worldwide. These Recommended Practices, which have been adopted by consensus of the ICN's membership, address: (i) nexus to the reviewing jurisdiction; (ii) notification thresholds; (iii) timing of notification; (iv) review periods; (v) requirements for initial notification; (vi) conduct of merger investigations; (vii) procedural fairness; (viii) transparency; (ix) confidentiality; (x) interagency coordination; and (xi) review of merger control provisions.[1]

The subgroup notes that the materials underlying this Report do not purport to be definitive assessments of the costs and burdens of merger notification. Each source has limitations and deficiencies and, even taken together, the literature presents only a rough picture of the subject under consideration. Further contributions to clarify the scope of the problem to be addressed, and thus to help point the way toward optimal solutions, are welcome.

[1] The Recommended Practices are available on the ICN's website at http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

II. GENERAL COSTS OF MULTIJURISDICTIONAL MERGER REVIEW

Over the past decade, the costs and burdens associated with the multi-jurisdictional merger review process have been the subject of considerable study and commentary. A range of commentators, including government officials, practitioners, and in-house counsel, have expressed concern that the proliferation of merger review laws, currently numbering approximately seventy-five, have imposed costs and burdens on merging parties that may act as a "tax" on trans-national mergers. For example, Konrad von Finckenstein, former Canadian Competition Commissioner and first Chair of the ICN Steering Group, noted that "[t]he growing multiplicity of antitrust laws means that some large mergers and other transactions are subject to review by numerous jurisdictions; such multiple reviews may impose real costs on the parties, costs that might sometimes function as a tax on efficient transactions."[2] Similarly, EC Competition Commissioner Mario Monti observed that "[f]rom the point of view of business, which have to take account of the different regimes that claim jurisdiction to control their mergers, acquisitions and joint ventures, the situation is one of increased transactional costs and uncertainty."[3]

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[2] Konrad von Finckenstein, Q.C., Commissioner of Competition, Canadian Competition Bureau, "International Antitrust Cooperation: Bilateralism or Multilateralism?," Address to joint meeting of the American Bar Association Section of Antitrust Law and Canadian Bar Association National Competition Law Section (May 31, 2001), http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/en/ct02240e.html. *See also,* Charles A. James, Assistant Attorney General for Antitrust, U.S. Department of Justice, "Perspectives on the International Competition Network," ABA International Antitrust Bulletin Vol. 4, Issue 3, http://www.abanet.org/antitrust/mo/premium-at/int/fallwinter01.pdf ("the burdens, costs, and uncertainties associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community. Among other things, they may discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions.").

[3] Mario Monti, Competition Commissioner, European Commission, "The EU Views on a Global Competition Forum," Address before the American Bar Association (Mar. 29, 2001), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/147|0|RAPID&lg=EN.

The literature surveyed also has attempted to identify the types of costs and burdens facing parties undertaking trans-national mergers. For example, the ICPAC Report notes that ascertaining potential notification obligations and filing multiple merger notifications are among the significant categories of costs facing parties to such mergers.[4] Similarly, the National Competition Law and International Law Sections of the Canadian Bar Association asserted that "procedural differences mean that businesses involved in trans-border mergers face substantial transaction costs due to the need to determine which jurisdictions require pre-closing or post agreement notification and to prepare and file materials, retain and coordinate different counsel and generally comply with antitrust regimes in multiple jurisdictions."[5]

In 2002, the International Bar Association (IBA) and the American Bar Association (ABA) Section of Antitrust Law commissioned PricewaterhouseCoopers LLP to conduct a quantitative assessment of the time and cost to business of multi-jurisdictional merger review; their report, published in June 2003,[6] is the first serious effort to quantify these costs and burdens.

Though ultimately based on a rather small sample -- information from forty-nine firms -- with an admitted "oversampling of European deals" and a bias toward transactions involving in-depth reviews,[7] the survey provides valuable information, addressing three main elements - the

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[4] Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust (2000), *available* at http://www.usdoj.gov/atr/icpac/finalreport.htm ("ICPAC Report").

[5] Submission on The Internationalization of Competition Policy, National Competition Law and International Law Sections, Canadian Bar Association (Aug. 1999) at 9, http://www.cba.org/cba/submissions/pdf/99-28-eng.pdf.

[6] "A tax on mergers? Surveying the costs to business of multi-jurisdictional merger review," commissioned by the International Bar Association and the American Bar Association, produced by PricewaterhouseCoopers (June 2003), available at http://www.pwcglobal.com/uk/eng/about/svcs/vs/pwc_mergers.pdf.

[7] The PWC survey captures a number of cost elements and burdens and presents the findings by way of summary statistics and regression analyses. The survey reports on 62 transactions, for which 382 notifications were filed

duration of the review process, and the external and internal costs to business attributable to the review.[8] The findings are summarized below.

A. Duration and External and Internal Costs of Review

1. Duration

The PWC survey found that the average duration of review for transactions was approximately seven months, with a median of five months. There was a wide range of review lengths, from one to sixteen months. The duration of the review for transactions subject solely to initial review was, on average, five months, with a median duration of three months. The longest initial reviews took approximately fourteen months. Of the thirty-four transactions involving at least one in-depth review, the average review lasted nine months, with the median duration approximately seven months and the longest taking approximately sixteen months. PWC conducted regression analyses that showed that the duration of all reviews for a transaction is a function of the number of jurisdictions assessing the transaction.[9]

2. External Costs

(approximately 6 filings per transaction) in 49 jurisdictions. Forty-five percent (28/62) of the transactions were subject solely to first-phase review, and fifty-five percent (34/62) of the transactions reviewed were subject to in-depth review (*i.e.*, a "Second Request" in the United States or a "Phase II" investigation in the EU) in at least one jurisdiction. Of the 34 transactions involving an in-depth review, 14 were subject to one such review, 14 to two, 3 to three, 2 to four, and 1 to seven in-depth reviews.

[8] These elements have been identified anecdotally in other studies and reports as well, *see e.g.,* ICPAC Report, *supra* n. 4, and Richard Whish & Diane Wood, MERGER CASES IN THE REAL WORLD – A STUDY OF MERGER CONTROL PROCEDURES (OECD, 1994) ("Wood-Whish Report").

[9] While the average number of filings per transaction assessed in the PWC survey was six, at least one transaction for which information was provided required sixteen separate merger notifications. The PWC survey also reports on a significant number of transaction in which additional filings were considered (on average an additional 2.2 filings per transaction). Non-governmental advisors have reported experiences with transactions requiring an even higher number of merger notifications, and suggest that the number of multi-jurisdictional filings per transaction is likely to increase as the number of jurisdictions with pre-merger notification regimes increases.

PWC analyzed external costs to business attributable to the merger review process, including legal fees, merger filing fees, other advisory fees and translation and other miscellaneous costs, based on data provided for fifty-nine of the transactions surveyed. The average external cost per transaction was €3.28 million (median - €821,000), and the average external cost per filing was estimated at approximately €540,000. The survey notes that the large difference between the average and the median external costs per transaction indicates that some merger review processes impose much higher external costs.

The survey calculates that average external costs represent approximately 85% of the overall costs to business of merger review, of which legal fees comprise approximately 65%, merger filing fees 19%, other advisory fees 14%, and translation costs and other activities 1%. However, this breakdown differs depending on whether there was only an initial review or also an in-depth review.[10] The difference between the average and median costs was much more pronounced when the transaction was the subject of an in-depth review. Regression models showed that the number of filings is the most important determinant of the external cost of review, and that there are few economies of scale for external costs.

3. Internal Costs

Information provided on internal costs, including in-house lawyers, management time and other firm resources, generally was provided in terms of person-weeks, rather than currency

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[10] For the twenty-eight transactions subject only to initial review, the external costs per transaction averaged €545,000, with a median value of €465,000. The largest single component of external costs for initial reviews was legal fees, which accounted for approximately 77% of external costs, with merger filing fees representing 18% and other advisory fees accounting for 5%. The average external cost attributable to in-depth reviews were, as expected, much higher, at €5.438 million (with the median €2.133 million) per transaction. However, the breakdown of component costs differed as well. For the fourteen in-depth transactions for which a breakdown of component costs was provided, 54% of the external costs were attributable to legal fees, 23% to other advisory fees, 20% to filing fees and 3% to translation and other miscellaneous costs.

amounts, and could not be monetized easily. Average internal time dedicated to the review process cost 81 person-weeks, with a median of 25 weeks. For initial reviews, average internal costs were approximately 28 person-weeks, with a median of 14 weeks. Internal costs for in-depth investigations averaged 120 person-weeks, with a median of 29 weeks. The survey's regression models identified substantial economies of scale, finding that internal costs are primarily a function of the transaction's value. Following this assessment, the survey addressed burden of merger review for business.

B. Burden of Merger Review for Business

The PWC survey corroborated the existence of a small, generally regressive tax on mergers and delays in the multi-jurisdictional merger review process identified in other studies and by other commentators. The PWC survey found, however, that the external costs of review were relatively small in relation to the value of the overall transaction - 0.11%, with a median of 0.03% – and less than reported in prior published studies, which estimated a 2% tax on transactions. The survey also notes that costs associated with the merger review as a proportion of total merger process costs (the costs of executing the merger) are, on average, approximately 42% of merger process costs, with a median of 50%. Respondents surveyed described such merger costs as an "average" expense as compared to the costs of executing the transaction.

Whereas the PWC survey was a substantial effort to quantify the overall costs of multi-jurisdictional merger reviews to business, for confidentiality reasons, it generally did not identify or assess the effects of particular costs and burdens with respect to individual transactions, including non-controversial merger cases, or whether certain costs might be unnecessary to the review the process. Numerous other studies and commentators have examined these elements

and have identified significant, unnecessary costs that can be eliminated without impeding effective merger review.

III. WHICH COSTS AND BURDENS MAY BE CONSIDERED UNNECESSARY?

Studies and commentators surveyed have distinguished between costs of merger review that are appropriately related to the goal of effective and efficient merger review and costs that are either unnecessary or unduly burdensome. In this section, we review the literature on costs deemed unnecessary and unduly burdensome, focusing on four categories of costs: (i) ascertaining notification and filing requirements; (ii) complying with notification requirements for transactions lacking an appreciable nexus to the notified jurisdiction; (iii) complying with unduly burdensome filing requirements; and (iv) unnecessary delays in the merger filing and review process. While these categories are not exhaustive, they reflect the major costs identified by the subgroup based on its review of the literature.[11]

One of the most comprehensive studies of such costs is contained in the ICPAC Report.[12] This report was commissioned by the United States Attorney General to study the effect of globalization on U.S. competition and trade policy. Its mandate included multijurisdictional merger review and its recommendations provide approaches to facilitate substantive convergence and minimize conflict, and rationalize the merger review process through targeted reform. The Committee heard testimony from legal and economic experts including representatives of

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[11] This Report does not address other costs that cannot easily be categorized as unnecessary to effective merger review – *e.g.,* filing fees, which some commentators deem "unreasonable" in certain circumstances, such as when the fee does not reflect the cost of the agency's investigation. Similarly, and as with the PWC survey, this Report does not address opportunity costs of the merger review.

[12] *Supra* n. 4.

antitrust agencies and academia, as well as the business community and consumer groups. Other sources consulted in connection with the preparation of this section of the Report include the Wood-Whish Report,[13] an important early contributor to the discussion of international merger review, studies and recommendations prepared by BIAC/ICC in 2001 for the OECD's Competition Law and Policy Committee,[14] best practices commissioned by the Merger Streamlining Group,[15] articles, and papers by national bar groups.

The following discussion focuses on the four previously-mentioned categories of costs and burdens identified as unnecessary to effective merger review.

A. Costs associated with ascertaining notification and filing requirements

> *You know what [the] hugest transaction cost is – the thing that takes [firms] the longest to figure out – simply whether [they] should file or not.*[16]

One significant category of costs imposed on international mergers, identified in the literature reviewed, results from the need to ascertain potential notification obligations in each jurisdiction in which notification may be required or advisable. According to the ICPAC Report,

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[13] *Supra* n. 8. The Wood-Whish Report was designed to examine pre-merger review and regulatory approval, identify procedural differences among OECD Members that may potentially impede cooperation or add costs, and identify areas of potential procedural convergence and cooperation.

[14] OECD Business and Industry Advisory Committee & International Chamber of Commerce, *Recommended Framework for Best Practices in International Merger Control Procedures* (Oct. 4, 2001) http://www.biac.org/statements/comp/BIAC-ICCMergerPaper.pdf ("BIAC/ICC Recommendations").

[15] Merger Streamlining Group, "Best Practices for the Review of International Mergers," prepared in Sept. 2001, in Global Comp. Rev., Oct./Nov. 2001 ("MSG Best Practices"), *see generally* http://www.mcmillanbinch.com/mergerstreamlininggroup.html. The group of practitioners commissioned by the Merger Streamlining Group to complete this work included: Janet L. McDavid (Hogan & Hartson), Phillip A. Proger (Jones Day Reavis and Pogue), Michael J. Reynolds (Allen and Overy), J. William Rowley, Q.C. (McMillan Binch), and A. Neil Campbell (McMillan Binch).

[16] Testimony of Debra Valentine, Sept. 11, 1998, Tr. of ICPAC Meeting, at 98.

"[d]etermining whether merger control regulations exist in all potentially affected jurisdictions is in itself a daunting task, as is determining whether the disparate jurisdictional thresholds for merger notification in these various countries are met."[17] In many jurisdictions, filing requirements are vague, subjective, or otherwise difficult to interpret. Lack of transparency regarding filing requirements in many jurisdictions, particularly those with limited experience with merger control, has been identified as an impediment to tracking and interpreting notification requirements worldwide, and an unnecessary cost and burden to merging parties.[18]

Case in Point – Merging parties experienced difficulties ascertaining a South American jurisdiction's merger notification triggering event because the competition agency was inconsistent as to whether a confidentiality agreement between the parties (*i.e.,* an agreement permitting due diligence inquiries to begin) was sufficient to constitute a merger under the merger notification regime.

Commentators surveyed have also identified imprecise and subjective notification thresholds, particularly when based on market share, as imposing uncertainty and unnecessary burden on merging parties.[19] Drawbacks of using market share tests to determine reportability arise from the inherent subjectivity of market share calculations as well as the frequent lack of

[17] ICPAC Report, *supra* n. 4, at 91.

[18] *E.g.,* Submission by Lawrence W. Keeshan, General Counsel, PricewaterhouseCoopers LLP, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire, referring to the Pricewaterhouse/Coopers transaction, at 6-7 (Aug. 20, 1999); submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, "Rationalizing International Pre-Merger Review," ICPAC Hearings (Nov. 4, 1998), at 7.

[19] *E.g.,* BIAC/ICC Recommendations, *supra* n. 14, at § 2.1.2.2 and §2.1.2.3; MSG Best Practices, *supra* n. 15, at 27; ICPAC, *supra* n. 4, at 91; American Bar Ass'n Section of Antitrust Law, Report on Multijurisdictional Merger Review Issues, Presented to the ICPAC, May 17, 1999, at 8, available at http://www.abanet.org/ftp/pub/antitrust/icpac-mr.doc ("ABA Report").

reliable data available to the merging parties concerning the size of the relevant market.[20] Mistakes in determining reportability can be costly to the parties, given that most jurisdictions impose fines for failure to notify a reportable transaction.[21]

Case in point – One European jurisdiction, that relies on market share threshold as an alternative basis for compulsory merger notification, initiated infringement proceedings against one or more parties to a recent transaction for failure to submit a notification. The parties had not notified the transaction due to limited sales and market shares in the jurisdiction. The agency, however, deemed the transaction subject to notification based on the jurisdiction's market-share threshold, noting that the acquired party had a significant share of sales in one locality within the jurisdiction, even though the acquiring party had no sales or market threshold in that locality. After the parties completed the required notification and responded to subsequent information requests, the agency determined that the transaction did not raise competitive concerns in the jurisdiction, but the agency brought infringement proceedings based on the parties' failure to notify the transaction.

This example of the difficulties experienced by parties in applying market-share-based merger notification thresholds is not unique. A significant burden and cause of uncertainty for both parties and agencies applying such thresholds concerns market definition. In one Asian jurisdiction, this problem is exacerbated by the fact that the competition agency employs two different (and potentially conflicting) market definition tests to determine whether its merger notification thresholds are met.

B. Costs associated with complying with notification requirements for transactions that lack an appreciable nexus to the notified jurisdiction

[T]he trick is minimizing all this volume of merger control ... so that transactions that have little or no antitrust importance are screened out.[22]

All commentators surveyed identified merger regimes that require notification of transactions lacking an appreciable nexus to the reviewing jurisdiction as a source of significant

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[20] *See e.g.,* Testimony of Joseph F. Winterscheid and Janet L. McDavid, May 17, 1999, Tr. of ICPAC Hearing, and ABA Report at 8.

[21] *See generally, Getting the Deal Through: The International Regulation of Mergers and Joint Ventures in 53 Jurisdictions Worldwide,* GLOBAL COMP. REV. (2004).

[22] Testimony of Barry Hawk, Nov. 3, 1998, Tr. of ICPAC Hearing, at 46.

increased transaction costs for business without corresponding enforcement benefit.[23] These commentators point to inappropriate notification threshold tests as the main source of the problem. For example, filing thresholds that rely exclusively on the parties' worldwide, rather than domestic, sales or assets or set very low local domestic sales or asset thresholds do not adequately ensure that transactions for which notification is required engender domestic effects. Commentators surveyed agree that the filing threshold test causing the most difficulty in this respect is the so-called "effects" test, pursuant to which a transaction having any potential effect on the local market may be subject to a merger notification requirement.[24] They assert that such tests result in an ineffective and inefficient use of agency resources, given that the transactions subject to these thresholds are likely to lack material domestic competitive effects, and increase compliance costs and burdens for merging parties.

Case in point – The subgroup's non-governmental advisors provided the following example: A European jurisdiction required notification of a transaction valued at less than US $100 million in which the acquirer's subsidiary, which was active in a business unrelated to the business to be acquired, was located and had approximately US $7 million in assets in the jurisdiction. The target had no local presence, and its sales into the jurisdiction were valued at only €6,700 for the fiscal year preceding the transaction. Although the transaction, which raised no competitive issues, was cleared promptly, fees for local counsel for filing in the jurisdiction exceeded the target's local sales not only for the preceding financial year but also for the preceding decade.

Another example provided by the advisors concerns a European joint venture established by one US and one European firm. A South American jurisdiction required notification based on (i) the transaction's structure; (ii) world-wide sales of a single joint venture parent; and (iii) the fact that the joint venture's output potentially could be sold in the jurisdiction. The parties incurred substantial legal fees for filing. Moreover, and of interest to note is that the parties were required

[23] *E.g.,* ICPAC Report, *supra* n. 4, at 91 & 92; ABA Report, *supra* n. 19, at 9-11; BIAC/ICC Recommendations, *supra* n. 14, at § 2.1.2.4 and §2.1.2.5.

[24] *E.g.,* ABA Report, *supra* n. 19, at 9; BIAC/ICC Recommendations, *supra* n. 14, at § 2.1.2.4; ICPAC Report, *supra* n. 4, at 100.

to notify on the basis of preliminary transaction documents, and ultimately aborted the joint venture prior to clearance of the transaction, for business reasons.

C. Costs associated with complying with unduly burdensome filing requirements

Numerous jurisdictions also require merger parties to supply quantities of data that are often difficult, time-consuming and expensive to obtain yet add little real insight into the relevant substantive issues.[25]

Commentators surveyed, including those cited above, note that many jurisdictions require extensive information on a range of issues, from market conditions to customer and supplier lists, for all transactions in the initial stage, even when the parties have limited domestic activities and/or no vertical or horizontal relationships in the jurisdiction.[26] The literature reviewed also identifies overly burdensome information requests for both initial and in-depth reviews as a source of unnecessary cost of the merger review process for both parties and agencies.

Case in point –The notification requirements in one European jurisdiction required the filing of a 40-page notification including detailed information on the parties, even though the transaction raised no competitive concerns and involved no overlapping product markets.

Similarly, studies and commentaries examined point out the cost and burden to merging parties arising from translation and certification requirements for which alternative less burdensome approaches are reasonably available. Examples of such requirements include full-text translation of transaction documents, which can be hundreds of pages, and notarization and apostille obligations, which can cost thousands of dollars as well as lost time for business.

Case in point – In one Latin American jurisdiction, parties to a transaction were required to provide apostilled copies of articles of incorporation and by-laws for five parent companies and

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[25] J. William Rowley, Q.C., and Omar K. Wakil, "The Internationalisation of Antitrust: The Need for a Global Competition Forum" (2001), http://strategis.ic.gc.ca/pics/ct/jwilliamrowley.pdf at 4.

[26] *See, e.g.,* Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, *supra* n. 18.

one subsidiary, even though original, certified copies of articles of incorporation and by-laws were included with the notification filing. Obtaining apostilled documents required coordination among at least eleven people in two jurisdictions and cost approximately US $20,000.

In a separate transaction in the same jurisdiction, the Secretaries of twelve separate entities comprising one of the parties were required to provide firm certifications individually, rather than permitting the General Counsel/Secretary of the parent corporation to certify on behalf of all of these entities, thus increasing internal resources expended on merger review compliance.

While commentators all agree that agencies have a legitimate interest in requiring parties to provide sufficient information to identify and assess competitively sensitive transactions and ensure the authenticity of the information, they also identify alternative, less burdensome approaches to achieving these goals.[27] The subgroup's Recommended Practices, discussed in the postscript to this Report, identify some of these approaches.

D. Costs associated with unnecessary delays and differentiated timing in the merger review process

Obviously the more agencies that look at a merger in a world without true harmonization, the more time and the more cost.[28]

Studies and commentaries surveyed identify costs arising from unnecessary delays to the merger review process as a crucial concern.[29] Mergers are almost always time sensitive; in some

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[27] *E.g.,* ICPAC Report, *supra* n. 4; ABA Report, *supra* n. 19; BIAC/ICC Recommendations, *supra* n. 14; MSG Best Practices, *supra* n. 15.

[28] Testimony of James Langenfeld, Nov. 3, 1998, Tr. of ICPAC Meeting, at 32-33.

cases delays may prove fatal to a transaction. During the time that transactions are delayed, the parties may lose savings, synergies, and efficiencies that motivated the transaction, also depriving consumers of any resulting benefits.[30] Businesses, particularly acquisition targets, may deteriorate during the merger review period, as managers postpone implementing new strategies, making significant changes, and even entering into commercial transactions while awaiting the outcome of the reviews.

The Wood-Whish report found that the cost of review increased with the length of a particular agency's review process. The report noted that even where all agencies began their reviews contemporaneously, which is rare, the lengthy review process of some agencies and the lack of a fixed endpoint by others both created cost and uncertainty for the parties.[31] This uncertainty makes it difficult for firms to engage in strategic planning, to contract with customers and suppliers, to retain valuable employees, and to hire new employees, and may result in loss of customers, sales, and employees.

Of course, the parties themselves may be responsible for certain delays. For example, in the most egregious cases, *e.g.,* some hostile takeovers, at least one of the parties to a transaction may have an incentive to delay or defeat the review. The Wood-Whish report provides an

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[29] *E.g.,* ICPAC Report, *supra* n. 4, at 93 & 108; Testimony of Charles Biggio, Feb. 26, 1998, Tr. of ICPAC Meeting, at 84.

[30] Submission by Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998), at 12-13. *See also*, "A Private Sector Perspective on Tools and Techniques Used in Merger Investigations," chapter of manual prepared by the non-governmental advisors to the ICN's Investigatives Techniques Subgroup, *available at* http://www.internationalcompetitionnetwork.org/seoul/mwg_its2_seoul.pdf.

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[31] Wood-Whish Report, *supra* n. 8, at 90-91.

example of this.[32] Similarly, this report also notes that parties may choose to forgo efficiencies, including coordination of timetables resulting from inter-agency cooperation, for reasons of perceived strategic advantage.[33]

Commentators surveyed have identified the extension of jurisdictional review periods via the issuance of seriatim information requests as a major source of costly delay to the merger review process.[34] Others note that overly burdensome information requests and certification requirements, identified in section C above, also result in significant delay to the completion of merger reviews.[35] Still others identify differing review timetables, *e.g.*, based on different approaches to notification triggering events, as a source of increased delay.[36]

Case in Point – The procedural delays to the transaction discussed in the second "Case in Point" of Section III.C, above, prevented the parties from meeting the jurisdiction's notification deadline. Consequently, the transaction was considered "not filed," a new filing and associated documents were required, and the parties were required to pay a second filing fee (approximately US $12,000).

Yet another case identified by the subgroup's non-governmental advisors involves a North American jurisdiction in which the agency agreed to an expedited decision during the second phase of the review to resolve "a few remaining uncertainties." As part of the agreement, the parties voluntarily provided several boxes of documents prior to the end of the first phase of

[32] *Id*. at 25-34.

[33] *E.g., id.* at 24, (statement on parties' perspective on the investigation process).

[34] *E.g.,* testimony of Stephen Bolerjack, Ford Motor Company, before ICPAC, (Apr. 22, 1999, Tr. at 117-118) (describing an experience in one jurisdiction in which "the waiting period is one month, but requests for additional information toll that period and the authority typically requests additional information several times in order to prolong the period.")

[35] *E.g.,* J. William Rowley, Q.C., and Omar K Wakil, "The Internationalisation of Antitrust: The Need for a Global Competition Forum," *supra* n. 25, at 4.

[36] *E.g.,* ABA Report, *supra* n. 19, at 6-7.

review and expected that the expedited review would conclude several weeks after the initiation of the second phase review. The agency staff appears to have concluded its investigation within this time frame and never indicated that there were any serious problems or additional issues with the transaction. However, the agency did not formally close its investigation. Due to transaction-related exigencies (*i.e.*, financing obligations), the parties were required to substantially comply with an extensive formal second-phase document request, incurring over $1.5 million in costs, in order to guarantee that the investigation would be closed pursuant to the formal procedures and before the financing collapsed. Following the submission of this information, the agency allowed the second phase to expire without action and without any further communication with the parties.

A separate case identified by the subgroup's non-governmental advisors involved a European jurisdiction's review of a transaction in which the three main shareholders increased their pre-existing share ownership in a venture. Only one of the four entities involved in the transaction had any business in the jurisdiction, and this purchaser's activities did not overlap with those of the target or the other venture partners. Following a five-month review, the competition agency determined that the transaction had no effect in the jurisdiction and did not require notification. The agency took 178 days to make this determination, during which time the transaction was suspended. The two other European jurisdictions requiring notification completed their reviews within 31 and 38 days of notification, respectively. Thus, this jurisdiction's review delayed the closing of the transaction by approximately 140 days.

Delay is not only problematic to the parties, but also impedes interagency coordination. Studies such as the Wood-Whish report note that ineffective agency cooperation and coordination can further delay the review process.[37] In short, unnecessary delays to the merger review process increase external and internal costs to business and deny agencies the ability to coordinate their reviews effectively.

IV. POSTSCRIPT – THE SUBGROUP'S INITIATIVES TO REDUCE UNECESSARY COSTS AND BURDENS

In identifying unnecessary costs and burdens associated with multijurisictional merger review, this Report highlights elements of merger notification procedures that deserve further

[37] Wood-Whish Report, *supra* n. 8, at *inter alia* 14-15.

subgroup attention.[38] Since preparing its draft report, the subgroup has developed eleven Recommended Practices aimed, in large part, at reducing or eliminating the costs and burdens identified in the Report without compromising competition agencies' effectiveness in enforcing their jurisdiction's competition laws. The subgroup plans to develop additional Practices in the future.

The current Recommended Practices address: (i) nexus to reviewing jurisdiction; (ii) notification thresholds; (iii) timing of notification; (iv) review periods; (v) requirements for initial notification; (vi) conduct of merger investigations; (vii) procedural fairness; (viii) transparency; (ix) confidentiality; (x) interagency coordination; and (xi) review of merger control provisions. The Practices are based, in large part, on proposals put forward by many of the studies and commentators identified in this Report.[39] The subgroup believes that these Recommended Practices, if widely followed, can significantly help reduce the unnecessary costs and burdens identified in this Report.

For example, several of the Recommended Practices advocate approaches to reduce the costs associated with assessing notification requirements where notification thresholds are imprecise and/or subjective. In particular, the Recommended Practice on Notification Thresholds provides, in part, that notification thresholds should be clear and understandable and based on objectively quantifiable criteria. Similarly, Section C of the Practice on Requirements for Initial Notification suggests that competition agencies provide for the possibility of pre-notification guidance to parties, including with respect to whether the transaction is notifiable. In addition, the Recommended Practice on Transparency aims to ensure that merger control

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[38] The subgroup's webpage has extensive information on the subgroup and its work; *see* http://www.internationalcompetitionnetwork.org/notification.html.

regimes are transparent with respect to a range of issues, including the jurisdictional scope of the merger control law. The combined effect of these Practices, if implemented, should be to clarify applicable merger thresholds and to ensure their objectivity. Other subgroup projects, in particular the subgroup's template and weblink projects, also help to limit the costs associated with ascertaining notification and filing requirements. Specifically, by facilitating access to merger rules and key features of merger systems worldwide, these projects help increase transparency of merger thresholds and filing requirements, and thus can limit the cost of ascertaining such requirements.[40]

Moreover, the Recommended Practice on Jurisdictional Nexus directly addresses the costs associated with complying with notification requirements for transactions lacking appreciable nexus to the notified jurisdiction. This Practice provides for a range of approaches aimed at eliminating this unnecessary cost, by encouraging jurisdictions not to assert jurisdiction over transactions that are unlikely to result in appreciable competitive effects within their territory. For example, the Practice recommends that competition agencies assert jurisdiction only over transactions that have an appropriate nexus with the jurisdiction concerned, *i.e.,* that meet an appropriate standard of materiality, in particular based on the sales and/or assets of the business(es) to be acquired within that jurisdiction.

Similarly, the Recommended Practices also provide a number of approaches aimed at reducing costs associated with complying with unduly burdensome filing requirements. For example, the Practice on Requirements for Initial Notification proposes methods for limiting the

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[39] *E.g.,* ICPAC Report, *supra* n. 4, Recommendations in Chapter III; MSG Best Practices, *supra* n. 15.

[40] Links to weblinks and templates of most ICN members with merger laws are available at http://www.internationalcompetitionnetwork.org/mergercontrollaws.html.

information initially requested from parties to that needed to determine whether the transaction exceeds jurisdictional thresholds and whether the transaction raises competitive issues meriting further investigation. Moreover, the Practice on Conduct of Merger Investigations advocates a range of options, from ensuring that information requests for merger investigations are reasonably tailored to obtain the information needed to complete the investigation and to take any necessary enforcement action, to focusing information requests on the aspects of the proposed transaction that raise potential competitive concerns, to ensuring opportunities for frank and open dialog between the agency and the merging parties to better focus the investigation.

The Recommended Practices also provide mechanisms by which costs associated with unnecessary delays and different timing in the merger review process can be reduced or eliminated. The Practice on Review Periods confronts timing issues directly, providing that merger reviews should be completed within a reasonable time period (with initial review periods expiring within six weeks or less and extended reviews capable of completion in six months or less). This Practice also addresses the time-sensitive nature of particular transactions, such as non-consensual transactions and sales in bankruptcy, calling for appropriately tailored procedures to accommodate these cases, including by reducing delay.

Further, additional Practices also have, as one of their aims, the elimination of the costs resulting from such unnecessary delays and differentiated timing. For example, the Practice on Timing of Notification provides that parties should be permitted to notify transactions without undue delay, upon certification of a good faith intent to consummate the proposed transaction, in an effort to promote efficiency and to facilitate coordination of multi-jurisdictional filings. Similarly, the Practices on Requirements for Initial Notification and Conduct of Merger

Investigations set forth mechanisms by which legal and factual issues can be clarified as early as possible to increase merger review efficiency and timeliness. Moreover, the Recommended Practice on Interagency Coordination offers a range of options to promote the coordination of merger reviews in an effort to increase efficient and effective merger review and enforcement, including through more consistent review timetables.

These are not the only benefits to be afforded by the Recommended Practices, but they are the most important in the context of this Report. We hope that the Recommended Practices will bring more consistency to the merger review process and will make the process more efficient and effective, while at the same time reducing delay and the investigative burden on merging parties and agencies alike, once implemented. To achieve any of these benefits, however, the Recommended Practices must be implemented by a broad range of agencies. The subgroup, the ICN and, importantly, interested members of the private bar increasingly promote conformity with the Recommended Practices, and monitor reform with this goal in mind.[41]

In identifying the costs and burdens associated with multijurisdictional merger review, this Report seeks to provide background reference for the work of the subgroup and others seeking to contribute to achieving the same goals.

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[41] The recent report of the Merger Streamlining Group on implementation of the first four Recommended Practices adopted by the ICN's membership is an excellent example of this type of initiative. *See* "International Competition Network's Recommended Practices for Merger Notification Procedures: Final Report," Bus. Law Int'l, Vol. 5, Issue 1, January 2004, *see generally* http://www.mcmillanbinch.com/mergerstreamlininggroup.html. *See also* 2004-2005 subgroup workplan http://www.internationalcompetitionnetwork.org/2004_2005_mergernpsworkplan.pdf.

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