INTERNATIONAL COMPETITION NETWORK

IMPLEMENTATION HANDBOOK

EXAMPLES OF LEGISLATIVE TEXT, RULES, AND PRACTICES THAT CONFORM TO SELECTED ICN GUIDING PRINCIPLES AND RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES

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TABLE OF CONTENTS

INTRODUCTION

The Merger Notification and Review Procedures (N&P) subgroup has developed a set of Recommended Practices for Merger Notification and Review Procedures, which were adopted by the International Competition Network (ICN). These Practices address areas that public and private sector representatives have identified as the most important to facilitating convergence toward best practices in merger review: (1) sufficient nexus between the transaction's effects and the reviewing jurisdiction; (2) clear and objective notification thresholds; (3) flexibility in the timing of merger notification; (4) merger review periods; (5) requirements for initial notification; (6) conduct of merger investigations; (7) procedural fairness; (8) transparency; (9) confidentiality; (10) interagency coordination; (11) remedies; (12) competition agency powers; and (13) review of merger control provisions. These Recommended Practices are non-binding, and it is left to governments and agencies to implement them as appropriate.

Convergence toward these internationally recognized best practices promises to make notification and review of both domestic and cross-border mergers more efficient and effective. Accordingly, the subgroup has devoted considerable time and energy to promoting successful implementation of the Practices by ICN members as well as by non-members considering adopting new merger review rules.

In 2004-2005, a group of N&P participants undertook a study of 27 competition agencies to better understand how jurisdictions introduced conforming changes to their merger review regimes. One of the most common themes that emerged from the interviews for this study was agencies' desire for model language to facilitate implementation of the Practices. Because conformity with the Recommended Practices can be achieved through many different routes and the ICN memberships' diverse legal cultures and contexts, there is no single correct approach or set of model language, the subgroup decided that a compilation of conforming language examples would be useful.

Following the ICN's Fourth Annual Conference in June 2005, N&P participants began assembling examples of conforming language from competition laws and regulations around the globe. This handbook is the result of these efforts, providing examples of conforming language for eight of the Practices. It is limited to eight Practices because certain Practices lent themselves more easily to precise language or examples, while others, including those on procedural fairness, confidentiality, interagency coordination, competition agency powers, and review of merger control provisions, were less adaptable.

These examples are not "endorsed" by the ICN members, nor will they be put forward for adoption, as the Practices themselves were. This compilation is offered as a tool for those agencies interested in better understanding the Recommended Practices, and facilitating their implementation.

Chapter One
Thresholds

The Recommended Practices establish clear guidance in connection with establishing the jurisdictional scope of merger control.

1. Jurisdiction should be asserted only over those transactions that have an appreciable effect in the jurisdiction concerned – *i.e.*, through an appropriate local nexus (RP I (B)). Merger control tests should therefore incorporate appropriate standards of materiality as to the level of "local nexus" required. On this basis, any jurisdictional tests should require at least two parties to the transaction to have significant local activities, or at the very least the business being acquired to have a significant local presence (*e.g.*, assets or sales) (RP I (C)). As a general matter, a jurisdictional test should not be based on the acquirer's activities alone – the target business must have a significant local presence.

   The adoption of notification thresholds premised solely on the acquiring firm's local activities should not be utilised unless: (i) the competition agency would otherwise be deprived of jurisdiction over such transactions; and (ii) additional jurisdictional screens are included so as to minimize filing requirements for transactions that are unlikely to raise competition issues in the jurisdiction concerned.

   While the applicable merger control jurisdictional test may include a worldwide turnover component, in no circumstances should worldwide tests alone be sufficient to trigger a merger notification requirement (RP I(B)). Rather, to satisfy the local nexus requirement, threshold tests should include a reference to significant local activities, such as material sales or asset levels within the territory of the jurisdiction concerned.

2. The notification thresholds must be clear, understandable and be based on objectively quantifiable criteria – *e.g.*, thresholds based on assets or sales revenue data (RP II(B)). Market share tests are not appropriate because they are not objective; market shares cannot be established without detailed market analysis; and the exact market definition is open to interpretation depending on the circumstances of each case.

3. The jurisdictional tests should be limited to the businesses affected by the transaction, *i.e.* the merging parties, the parties to a joint venture or in the case of an acquisition - the buyer (including all subsidiaries or parent companies) and the part of the Seller's business being acquired. Where the transaction consists of the acquisition of one or more part(s) of a business, whether or not constituted as a subsidiary, only the turnover or assets of the part(s) acquired should be included for the purposes of satisfying the applicable local nexus thresholds (RP I (B)).

4. Appropriate guidance should be provided to assist parties in calculating the relevant threshold tests. For turnover and/or assets – this should include guidance on included and/or excluded elements, such as taxes and intra-company sales, depreciation (as to assets), and material events or transactions that have occurred after the last regularly-prepared financial statements (RP II (B)). The time component for the revenue/asset data required should also be clearly delineated – the previous financial or calendar year may be an appropriate benchmark, especially as companies will often present annual accounts so these data should be readily available. Key terms should also be

defined to assist merging parties (such as "acquiring person", "acquired person", "net turnover", and "ordinary activities", *etc*). Practical examples of such guidance are provided below.

EXEMPLARS: LOCAL NEXUS AND JURISDICTIONAL THRESHOLDS

Belgium	**Thresholds for Notification** [A notification will be required] if the firms have an aggregate consolidated [Belgian] turnover of more than €100 million and if at least two of the firms in question have a turnover in Belgium of €40 million each (Art. 11 - Amendment of the Royal Decree of 3 July 2005 (Belgian Official Gazette of 19 July 2005) – Taking effect on 19 July 2005). These two conditions are cumulative. Article 11 Competition Act as amended by the Royal Decree of 3 July 2005 (official translation). **Commentary**: This is an example of a jurisdiction threshold test with a two-stage turnover test that requires each of at least two parties to the transaction to have significant local revenues. In addition, there is also a requirement for the parties to have a significant combined local revenue. **Weblink**: http://mineco.fgov.be/organization_market/competition/competition_en_001.htm#Business%20concentrations
Canada	**Notifiable Transactions** <u>Size of parties test</u> [A notification will not be required unless the parties together with their affiliates] (a) have assets in Canada that exceed C$400 million in aggregate value . . .; or (b) had gross revenues from sales in, from or into Canada,. . . that exceed C$400 million in aggregate value, . . . and <u>Size of transaction test</u> [in the case of an acquisition of assets] (2) … of any of the assets in Canada of an operating business where the aggregate value of those assets, . . ., or the gross revenues from sales in or from Canada generated from those assets, . . ., would exceed C$50 million . . . or [in the case of an acquisition of shares] (3) of a corporation that carries on an operating business or controls a corporation that carries on an operating business (a) where

	(i) the aggregate value of the assets in Canada, . . ., that are owned by the corporation or by corporations controlled by that corporation, other than assets that are shares of any of those corporations, would exceed C$50 million, . . ., or (ii) the gross revenues from sales in or from Canada, . . ., generated from the assets referred to in subparagraph (i) would exceed C$50 million, . . . [The same structure and thresholds applies to combinations, partnership arrangements and joint ventures. In relation to amalgamations the same structure and tests apply with the exception that the value of assets or sales in Canada must exceed C$70 million instead of C$50 million.] Sections 109 and110 - The Competition Act, Part IX - Notifiable Transactions **Commentary:** This exemplar provides an example of a two stage test. First, the transaction must satisfy the size of parties test whereby the parties to the transaction must have assets in or revenues in, from or into the local jurisdiction exceeding a certain level. Second, the entity acquired or created as a result of the transaction must have physical assets in Canada or generate sales from the Canadian assets which exceed the applicable thresholds. The local assets requirement necessitates that the transaction has a significant local nexus to be notifiable. Weblink: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1316&lg=e
Croatia	**Thresholds for Notification** [Notification is required where] 1. the total turnover of all the undertakings – parties to the concentration, realized by the sale of goods and/or services in the global market, amounts to at least 1 billion Kuna in the financial year preceding the concentration, and 2. The total turnover of each of at least two parties to the concentration realized by the sale of goods and/or services in the domestic market, amounts to at least 100 million Kuna in the financial year preceding the concentration. Article 4 – The Competition Act - No.: 01-081-03-2640/2 Zagreb, 21 July 2003 (Official Translation) **Commentary:** This is an example of a threshold test with a two-stage turnover test that requires a combined worldwide turnover that exceeds a certain level and each of at least two parties to have significant local revenues. **Weblink**: http://www.crocompet.hr/eng/pdf/zakon/zztn.pdf

Netherlands	**Thresholds for Notification** The provisions of this chapter shall apply to concentrations, the combined turnover of the participating undertakings of which exceeded € 113,450,000 in the preceding calendar year, at least € 30,000,000 of which was realized in the Netherlands by at least **(**each) two of the undertakings involved. Section 29 - Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act) (official translation). **Commentary:** This is an example of a threshold test with a two-stage turnover test that requires each of at least two parties to have significant local revenues and a combined worldwide turnover that exceeds a certain level. **Weblink**: http://www.nmanet.nl/Images/14_26063_tcm16-24409.pdf
Romania	**Thresholds for Notification** The provisions of this chapter do not apply to economic concentrations where the aggregate turnover of the undertakings concerned does not exceed €10 million and there are not at least two undertakings involved in the operation who achieve, each in part, on the Romanian territory, a turnover exceeding €4 million. Article 15 - Consolidated Text from the official Gazette No. 875 of December 10, 2003, and Competition Law 21/19961 (Unofficial Translation) **Commentary:** This is an example of a threshold test with a two-stage turnover test that requires a combined worldwide turnover that exceeds a certain level and each of at least two parties to have significant local revenues. **Weblink**: http://www.competition.ro/pdf/en/l21_1996_mod.pdf
South Africa	**Thresholds Where Notification Is Not Required** [Notification is not required where] (a) Either – (i) The combined annual turnover in, into or from the Republic of the acquiring firms and the transferred firms is valued below R 200 million; or (ii) The combined assets in the Republic of the acquiring firms and the transferred firms are valued at less than R 200 million; or (iii) The annual turnover in, into or from the Republic of the acquiring firms plus the assets in the Republic of the transferred firms are valued at less than R 200 million; or

	(iv) The annual turnover in, into or from the Republic of the transferred firms plus the assets in the Republic of the acquiring firms are valued at less than R 200 million. AND (b) Either – (i) The annual turnover in, into or from the Republic, of the transferred firms is less than R 30 million; or (ii) The asset value of the transferred firm [in the Republic] is less than R 30 million. [South Africa draws a distinction between small, intermediate and larger mergers. Transactions falling below the above thresholds are classified as small and do not require notification. Transactions exceeding the above thresholds are classified as intermediate and require notification. Large transactions have more stringent notification requirements and are subject to an identical jurisdictional test with the exception of the applicable revenue/asset values, which are increased from R 200 million and R 30 million to R 3.5 billion and R 100 million respectively.] Notice 254 of 2001 - Determination of threshold under Competition Act, 1998 **Commentary:** This is an example of a threshold test that establishes size of transaction screens for notification requirements. Transactions below a certain threshold do not need to be notified and receive prior approval from the competition authority. Transactions that satisfy the applicable merger thresholds must be notified. The notification requirements differ depending on the classification of the merger as an "intermediate" or "large" merger. This exemplar also includes an example of a local assets test as an alternative to a local turnover test. **Weblinks**: http://www.compcom.co.za/thelaw/ConsolidatedAct.doc http://www.compcom.co.za/thelaw/GENERAL%20NOTICE%20254%200f%202001.doc

EXEMPLARS: DE MINIMIS

Argentina	**Exemption** When an operation, although the companies involved exceed the notification threshold of Pesos $200 million of net sales for activities in Argentina established by Article 8° of the Law, it is the case that the amount of the contract AND the value of the assets acquired, absorbed, transferred or controlled do not each one exceed the amount of Pesos $ 20 million, but only if it is not the case that: a) in the previous twelve (12) months there has been operations that in the aggregate exceed the amount of Pesos $ 20 million, or b) in the previous thirty six (36) months there has been operations that in the

	aggregate exceeds the amount of Pesos $60 million. In both a) and b) cases, operations must be referred to the same market. Argentina (from ICN N&P Merger Template) (legislative text only available in Spanish) **Commentary**: This exemplar provides that transactions meeting the applicable turnover thresholds do not need to be notified where the value of the transaction and the relevant assets are below a certain threshold, thereby exempting the need for small transactions to be notified. **Weblink**: http://www.internationalcompetitionnetwork.org/merger_templates/icn_template_form_argentina.pdf
Germany	**Exemption** (2) Subsection (1) shall not apply: 1. insofar as an undertaking which is not controlled within the meaning of Section 36 (2) and had a worldwide turnover of less than €10 million in the last business year, merges with another undertaking. Section 35 - Act Against Restraints of Competition **Commentary:** The so-called "de minimis" clause provides that transactions in which one of the two merging parties is a small business do not fall under German merger control, even if the general thresholds of Section 35 (1) ARC are met. **Weblink**: http://www.bundeskartellamt.de/wDeutsch/download/pdf/02_GWB_e.PDF
United States	**Acquisition of Foreign Assets** (a) The acquisition of assets located outside the United States shall be exempt from the requirements of the act unless the foreign assets the acquiring person would hold as a result of the acquisition generated sales in or into the U.S. exceeding $50 million (as adjusted) during the acquired person's most recent fiscal year. (b) Where the foreign assets being acquired exceed the threshold in paragraph (a) of this section, the acquisition nevertheless shall be exempt where: (1) Both acquiring and acquired persons are foreign; (2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years; (3) The aggregate total assets of the acquiring and acquired persons located in the United States…are less than $110 million (as adjusted); and

	(4) The transaction [does not involve an acquisition of voting securities or assets valued in excess of US$200 million (as adjusted)]. §802.50 Acquisitions of foreign assets. 67 FR 11903, Mar. 18, 2002, as amended at 70 FR 4995, Jan. 31, 2005 **Acquisitions of Voting Securities of a Foreign Issuer** (a) By U.S. persons. (1) The acquisition of voting securities of a foreign issuer by a U.S. person shall be exempt from the requirements of the act unless the issuer (including all entities controlled by the issuer) either: holds assets located in the United States…having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year. (2) If interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded. (b) By foreign persons. (1) The acquisition of voting securities of a foreign issuer by a foreign person shall be exempt from the requirements of the act unless the acquisition will confer control of the issuer and the issuer (including all entities controlled by the issuer) either: holds assets located in the United States … having an aggregate total value of over $50 million (as adjusted); or made aggregate sales in or into the United States of over $50 million (as adjusted) in its most recent fiscal year. (2) If controlling interests in multiple foreign issuers are being acquired from the same acquired person, the assets located in the United States and sales in or into the United States of all the issuers must be aggregated to determine whether either $50 million (as adjusted) limitation is exceeded. (c) Where a foreign issuer whose securities are being acquired exceeds the threshold in paragraph (b)(1) of this section, the acquisition nevertheless shall be exempt where: (1) Both acquiring and acquired persons are foreign; (2) The aggregate sales of the acquiring and acquired persons in or into the United States are less than $110 million (as adjusted) in their respective most recent fiscal years; (3) The aggregate total assets of the acquiring and acquired persons located in the United States … are less than $110 million (as adjusted); and (4) The transaction [does not involve an acquisition of voting securities or assets valued in excess of US$200 million (as adjusted)].

	§802.51 Acquisitions of voting securities of a foreign issuer. 67 FR 11904, Mar. 18, 2002; 67 FR 13716, Mar. 26, 2002, as amended at 70 FR 4996, Jan. 31, 2005 **Commentary:** These are examples of exemptions calculated to limit the reach of applicable merger control legislation where the transaction involves the acquisition of foreign issuers or foreign assets. Specifically, the examples provide that a transaction does not need to be notified if there is insufficient nexus with the local jurisdiction in terms of local sales revenue or assets acquired. **Weblinks**: http://frwebgate.access.gpo.gov/cgi-bin/get-cfr.cgi?TITLE=16&PART=802&SECTION=50&YEAR=1998&TYPE=TEXT ; http://frwebgate.access.gpo.gov/cgi-bin/get fr.cgi?TITLE=16&PART=802&SECTION=51&YEAR=1998&TYPE=TEXT

EXEMPLARS: GUIDELINES ON THE CALCULATION OF TURNOVER

Denmark	**Calculation of Turnover** [Extracts] Turnover 1. (1) "Turnover" shall mean the net turnover derived from the sale of products and the provision of services falling within the undertakings' ordinary activities after deduction of value added tax and other taxes directly related to sales . . . Group turnover 2. (1) The turnover of an undertaking concerned shall also comprise the turnover of associated undertakings . . . An undertaking concerned or an associated undertaking may also be a central, local or regional authority, or a municipal partnership. . . (2) The turnover of an undertaking concerned shall not include the turnover derived from the sale of products and the provision of services between the undertaking concerned and its associated undertakings or between the associated undertakings. 3. (1) "Associated undertakings" shall mean: i. Subsidiaries, *i.e.* undertakings etc. in which an undertaking concerned, directly or indirectly, has the power to exercise controlling interest pursuant to section 2 of the Danish Companies Act. ii. Parent companies, i.e. undertakings etc. which have the power to exercise controlling interest in an undertaking concerned.

	iii. Other undertakings in which a parent company has the power to exercise controlling interest. iv. Undertakings in which several undertakings etc. as referred to in (i) – (iii) jointly have the power to exercise controlling interest . . . Turnover in Denmark 10. The turnover in Denmark . . . shall comprise the sale of products and provision of services to customers who are resident in Denmark at the time when the agreement was made. Conversion of turnover into DKK 11. Turnover in foreign currency shall be converted into DKK on the basis of the average rate of exchange during the preceding accounting year of the undertaking concerned. Calculation of turnover in the Competition Act Executive Order No. 895 of 21 September 2000. **Commentary:** The guidelines are provided pursuant to the Danish Competition Act and provide clear definitions of key terms such as "turnover" and "group turnover". In addition, guidance is also provided on currency conversion rates, to assist parties in converting turnover figures into the local currency. **Weblink**: http://www.ks.dk/english/competition/legislation/exec_order_no_895/
European Union	**Notice on Calculation of Turnover** [Extracts] I.1.1 The concept of turnover 9. The concept of turnover . . . refers explicitly to "the amounts derived from the sale of products and the provision of services". Sale, as a reflection of the undertaking's activity, is thus the essential criterion for calculative turnover, whether for products or the provision of services. "Amounts derived from sale" generally appear in company accounts under the heading "sales". 10. In the case of products, turnover can be determined without difficulty, namely by identifying each commercial act involving a transfer of ownership. 11. In the case of services, the factors to be taken into account in calculating turnover are much more complex, since the commercial act involves a transfer of "value". 12. Generally speaking, the method of calculating turnover in the case of services does not differ from that used in the case of products: the

	Commission takes into consideration the total amount of sales… I.2 "NET" TURNOVER 18. The turnover to be taken into account is "net" turnover, after deduction of a number of components… The Commission's aim is to adjust turnover in such a way as to enable it to decide on the real economic weight of the undertaking. I.2.1 The deduction of rebates and taxes 19. … provides for the "deduction of sales rebates and of value added tax and other taxes directly related to turnover". The deductions thus relate to business components (sales rebates) and tax components (value added tax and other taxes directly related to turnover). 20. "Sales rebates" should be taken to mean all rebates or discounts which are granted by the undertakings during their business negotiations with their customers and which have a direct influence on the amounts of sales. I.2.2 The deduction of "internal" turnover 22. … states that "the aggregate turnover of an undertaking concerned shall not include the sale of products or the provision of services between any of the undertakings…", i.e. those which have links with the undertaking concerned (essentially parent companies or subsidiaries). 23. The aim is to exclude the proceeds of business dealings within a group so as to take account of the real economic weight of each entity. Thus, the "amounts" taken into account by the Merger Regulation reflect only the transactions which take place between the group of undertakings on the one hand and third parties on the other . . . I.3.2 Acquisitions of parts of companies 30. … provides that "where the concentration consists in the acquisition of parts, whether or not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the transaction shall be taken into account with regard to the seller or sellers". 31. This provision states that when the acquirer does not purchase an entire group, but only one, or part, of its businesses, whether or not constituted as a subsidiary, only the turnover of the part acquired should be included in the turnover calculation. I.3.4 Turnover of groups 36. When an undertaking concerned in a concentration … belongs to a group, the turnover of the group as a whole is to be taken into account in order to determine whether the thresholds are met. The aim is again

	to capture the total volume of the economic resources that are being combined through the operation. Commission Notice on calculation of turnover under Council Regulation EEC No. 4064/89 on a control of concentrations between undertakings (OJ C 66 of 02.03.1998) **Commentary:** The guidelines provide: • a concise description of the "concept of turnover"; • clear guidance on how to calculate "net turnover", with details of the appropriate deductions to be made; and • Details of how to allocate the buyer's and seller's revenues for the purpose of calculating the relevant turnover. **Weblink**: http://europa.eu.int/comm./competition/mergers/legislation/to406489_en.pdf
Lithuania	**Procedure for the Submission and Examination of Notification on Concentration and of Calculation of Aggregate Turnover** [Extracts] Section Two General Rules for the Calculation of Aggregate Turnover 11. The concept of aggregate turnover is understood as the amounts derived from the sale of goods (provision of services). Sales, as an indicator reflecting the activity of an undertaking, are an essential criterion for calculation of aggregate turnover. In financial statements of the undertakings registered in the Republic of Lithuania, the amounts derived from the sales are shown under the heading "Sales and services" (Profit (loss) account). Respective data of personal enterprises and partnerships are represented under the heading "Aggregate turnover (total revenue)" of the Income Declaration. 15. The combined aggregate turnover . . . are understood as the sum of aggregate turnover of the undertakings subject to concentration. 16. If a participant of concentration is an undertaking which belongs to the group of associated undertakings, its aggregate turnover shall be calculated as the total sum of the aggregate turnover of all the undertakings belonging to the group of associated undertakings . . . 17. The aggregate turnover of an undertaking participating in concentration, which belongs to the group of associated undertakings, shall be calculated avoiding any double calculation. The calculation of the aggregate turnover of an undertaking participating in concentration, which belongs to a group of associated undertakings, is

provided in the explanatory example below:

Example of calculation of aggregate turnover of a group of associated undertakings

Suppose, an undertaking A participates in concentration. The scheme presents the entire group of undertakings associated with the undertaking A. According to the levels of control, the undertakings are presented as follows: undertaking A participating in concentration; B - undertakings controlled by the undertaking A and undertakings (B1 and B2) controlled thereby; C - controlling undertakings and undertaking C1 controlling the latter; D - other undertakings controlled by undertakings C; E - jointly controlled undertaking belonging to the group. In this case undertaking A is the one participating in the concentration and its aggregate turnover shall be calculated including, in sequence, according to the level of control, the aggregate turnover of all controlled undertakings: aggregate turnover of three undertakings B, aggregate turnover of B1 and B2, aggregate turnover of E and aggregate turnover of controlling undertakings consistently according to the level of control: aggregate turnover of C and D controlled thereby, aggregate turnover of C and C1 controlling it. Note that in avoidance of double calculation the aggregate turnover of undertaking E is included only once.

Section Three
Application of the General Rule of Calculation of Aggregate Turnover in Certain Cases

18. When undertakings participate in concentration . . . and the acquired undertaking belongs to the group of associated undertakings, then the aggregate turnover of the acquired undertaking shall be calculated as the total sum of aggregate turnover of all undertakings which will belong to such group of associated undertakings after concentration. The provision implies that in case, only a certain part of the group of associated undertakings to which the undertaking being acquired belongs is concentrated instead of the entire group; only the aggregate turnover of such part shall be included in the calculation.

19. When undertakings participate in concentration . . . and the acquiring undertaking acquires a part of another undertaking (enterprise) or a part of the assets of an undertaking, or acquires the right to use a part of the assets of another undertaking, then the aggregate turnover of the acquired undertaking shall be calculated in proportion to the part of the assets acquired . . .

20. When undertakings participate in concentration . . .and the acquiring undertaking acquires a part of another undertaking (enterprise) or a part of the assets of another undertaking, or acquires the right to use on a long-term basis a part of the assets of another undertaking, which may be considered as an independent economic entity, and to which a certain turnover in a relevant market is explicitly ascribed, then the aggregate turnover ascribed to the acquired undertaking shall be calculated. The aggregate turnover ascribed to the acquired undertaking shall be audited or confirmed by the documents of

	mandatory financial statements. 21. Where foreign undertakings participate in concentration . . . the aggregate turnover shall be calculated as the sum of turnover derived on the product markets of the Republic of Lithuania. When calculating the turnover of foreign undertakings derived on product markets of the Republic of Lithuania, the following shall be included: 21.1. total amounts derived from sales to undertakings registered in the Republic of Lithuania; 21.2. total amounts of associated undertakings registered in foreign States derived from sales to the undertakings registered in the Republic of Lithuania; 21.3. Aggregate turnover of associated undertakings registered in the Republic of Lithuania. Procedure for the submission and examination of notification on concentration and of calculation of aggregate turnover (Resolution No. 45 of 27 April 2000 of the Competition Council of the Republic of Lithuania (as amended by 13 January 2005 No.1S-4)) (Non-official translation) **Commentary:** These guidelines relate to the merger notification process and include general rules on the calculation of turnover to assist notifying parties, with practical examples provided. **Weblink**: http://www.konkuren.lt/english/merger/legislation.htm
United Kingdom OFT	**Note on the Calculation of Turnover** [Extracts] The relevant period 1.7 The relevant period used for the purposes of determining turnover . . . is the business year preceding either: the date the enterprises ceased to be distinct, in the case of a completed merger; or the date of the OFT's decision whether or not to make a reference, in the case of a proposed merger. . . In practice, the OFT will usually consider the turnover for the last completed 'business year' preceding the date the enterprises ceased to be distinct (for a completed merger) or the date of notification (in the case of a proposed merger). 1.8 A 'business year' for these purposes is any period of more than six months for which accounts have been or will be prepared. In general, this will, of course, be a 12-month period. Where (perhaps because the enterprise has been newly formed) there is a period for which there is no preceding business year then the applicable turnover is the turnover for that shorter period. 1.9 If the preceding business year is not a period of 12 months, then turnover . . . is arrived at by adjusting the applicable turnover received in that period by the same proportion as 12 months bears to that

period. Thus, if the preceding business year for an enterprise ceasing to be distinct is a 9 month period during which the applicable turnover was £54 million, then turnover for this purpose (i.e., for determining whether the jurisdictional threshold is met) would be £72 million (£54 million ÷ 9 x 12).

Applicable turnover

1.11 The applicable turnover of an enterprise is the turnover of the enterprise arising during the previous business year. It comprises the amounts derived from the sale of products and the provision of services which it makes in the ordinary course of its business activities to customers (businesses or consumers) in the UK, net of any sales rebate, value added tax and other taxes directly related to that turnover. The calculation of turnover for these purposes should be interpreted in accordance with accounting principles and practices that are generally accepted in the UK…

1.16 For example [of applicable turnover]:

(i) Company A acquires Company B and also its subsidiaries B1 and B2: B and B1 and B2 are enterprises of interconnected bodies corporate which are treated as being under common control and their turnover is taken together in arriving at the applicable turnover of the enterprises ceasing to be distinct.

(ii) Company A acquires Company C which also has a significant shareholding – conferring at least material influence – in Company D. The turnover of Company C and Company D is taken together in determining the applicable turnover.

(iii) Partnerships A, B and C act together to secure control of Partnership D and form Partnership E. Partnerships A, B and C are associated persons and their turnover is added together. To determine the applicable turnover, the higher of the two turnover figures (that is, of A, B and C together or of D) is deducted from the combined turnover figure (of A, B, C and D).

Guidance note on the calculation of turnover for the purposes of Part 3 of the Enterprise Act 2002, July 2003.

Commentary: As well as providing short and concise guidance on the "period" for the calculation of the turnover and the interpretation of "applicable turnover", the guidelines also provide useful practical examples to explain some of the more difficult concepts contained within the relevant merger laws.

Weblink:
http://www.oft.gov.uk/NR/rdonlyres/6114AE81-0A3A-48C7-81F6-C6CF7A4E25FB/0/turnover.pdf

Chapter Two
Timing of Notification

The Recommended Practices provide clear guidance on when parties should notify the competition agency of the proposed transaction.

1. Parties should be permitted to notify transactions without undue delay. To avoid the filing of merely speculative transactions, parties may reasonably be required to submit some appropriate indicia that they intend to proceed with the transaction as a precondition to filing a merger notification. Such indicia may include: a letter of intent, a public announcement of the intention to make a tender offer, or a certification of a good faith intention to consummate the transaction. (RP III(A) comment 1)

2. Jurisdictions that prohibit closing until there has been an opportunity for the competition agency to review the transaction ("suspensive jurisdictions") should not impose a deadline upon the parties to file notification within a specified time after reaching an agreement. In suspensive jurisdictions, parties will have an incentive to file promptly after reaching an agreement because they know they will be unable to close their transaction until it has been reviewed. (RP III(B))

3. Jurisdictions that require notification but do not prohibit the parties from closing pending competition agency review ("non-suspensive" jurisdictions) have a legitimate basis for requiring a filing within a time-frame that will permit the competition agency to conduct a timely review. Where notification is required within a specified period following a triggering event, such period should be sufficient for the parties to prepare the submissions, and it should be clearly defined so as to permit the parties to determine the timing of their notification obligation in a definitive manner. (RP III(C) comment 1)

EXEMPLARS: APPROPRIATE INDICIA FOR DETERMINING TIMING OF NOTIFICATION REQUIREMENTS

Austria	**Requirements for Notification** A transaction can be notified even if the parties have not signed an agreement yet. The notification of a mere concentration plan (embracing the exact structure of the envisaged transaction) is sufficient provided that the parties thereto prove their sincere intent to effect the concentration in the near future. Austrian ICN N&P Merger Template **Weblink**: http://www.bwb.gv.at/NR/rdonlyres/6758EF47-2DA5-4DF9-8433-D269DBE5A788/0/MergerAustriatemplateICN.pdf

Czech Republic	**Requirements for Initiation of Proceedings** 1. Concentration approval proceedings shall be initiated on the basis of a notification. 2. In cases within the meaning of Article 12(1) and (5) [two party notifiable transactions], a concentration notification shall be filed jointly by the parties to the concentration, who intend to realise a concentration by the transformation or acquire control over a joint venture; in cases within the meaning of Article 12(2) and (3) [one party notifiable transaction], the undertaking which intend to realise a concentration by the acquisition of an enterprise or a substantial part thereof on the basis of a contract, or who is to acquire the possibility to control directly or indirectly another enterprise shall be obliged to file a concentration notification. 3. The concentration notification: may be filed also prior to conclusion of the agreement establishing the concentration or prior to acquisition of control over another undertaking in any other way; shall contain substantiation, documents certifying the facts decisive for the concentration and the requisites set out by the implementing legal regulation (Article 26). Consolidated Act on the Protection of Competition Act No. 143/2001 Coll. of 4 April 2001 on the Protection of Competition and on Amendment to Certain Acts as amended by Act No. 340/2004 Coll. of 4 May 2004, Act No. 484/2004 Coll. of 5 August 2004, Act No. 127/2005 Coll. of 22 February 2005, and Act No. 361/2005 Coll. of 19 August 2005. Requisites of the Notification are laid down in Decree No. 368/2001 Coll. Stipulating details relating to the notification of a concentration of undertakings as amended by Decree No. 427/2005 Coll. of 27 September 2005. **Weblink**: http://www.compet.cz/English/ICN.htm
European Union	**Prior Notification of Concentrations and Pre-notification Referral at the Request of the Notifying Parties** 1. Concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest. Notification may also be made where the undertakings concerned demonstrate to the Commission a good faith intention to conclude an agreement or, in the case of a public bid, where they have publicly announced an intention to make such a bid, provided that the intended agreement or bid would result in a concentration with a Community dimension. EC Merger Regulation, Article 4(1)

	Weblink: http://europa.eu.int/comm/competition/mergers/legislation/index_new.html
France	**Timing of Notification** The concentration must be notified to the Minister for Economic Affairs before its completion. This notification shall occur provided that the party or the parties to the transaction is or are able to submit a project which is sufficiently finalised to enable the instruction of the file, in particular when they have signed an agreement in principle, a letter of intent or as soon as they have announced a public offer. Referral by the Commission of the European Communities shall be valid as notification. French Commercial Code Article L. 430-3, ¶1 (unofficial translation) **Weblink**: http://alize.finances.gouv.fr/concentration/titre3uk.htm
Mexico	**Timing of Notification** The notification of the concentrations referred to under the terms of Article 20 of the Law must be made before any of the following possible events take place: 1. The legal act is completed in accordance with the applicable legislation or, should it be the case, the condition precedent is fulfilled to which this act is subject; 2. Control is acquired de facto or de jure, or exercised directly or indirectly over an other economic agent; or before assets, participation in trusts, partners' capital contributions or shares of another economic agent are acquired de facto or de jure; 3. A merger agreement is signed between the economic agents involved, or 4. In the case of a succession of acts, before executing that which, when completed, would result in the exceeding of the amounts laid down in the said Article. In the case of concentrations resulting from legal acts carried out in other countries, these must be notified before they have legal or material effects on Mexican national territory. Art. 17, Mexican Code of Regulations (unofficial translation) **Weblink**: http://www.cfc.gob.mx/cfc99i/Concentrations.asp

EXEMPLARS: DEADLINES FOR NOTIFICATION

Belgium	**Deadlines for Notification** Mergers must be notified to the Competition Council within one month of the conclusion of the agreement, the publication of the purchase or exchange offer, or the acquisition of a controlling share. The one-month period begins with whichever of these events occurs first. The parties may also notify the Council of a draft agreement provided that they explicitly declare that they intend to conclude an agreement that does not significantly differ from the draft notified with regard to all relevant items of competition law. Belgian Act on the protection of economic competition, 1 July 1999 Art. 12 § 1 (unofficial translation) **Weblink**: http://mineco.fgov.be/organization_market/competition/competition_en_001.htm
Jordan	**Deadlines for Notification** Enterprises wishing to carry out economic concentration operations which fall within the ambit of paragraph (B) of Article 9 of this Law shall submit a petition in this regard to the Directorate, on the form adopted by the Ministry, within thirty days after having reached a draft agreement or an agreement on the economic concentration activity. The Competition Law No. 33 of the year 2004, Art. 10(A) **Weblink**: http://www.internationalcompetitionnetwork.org/mergerjordanlaw.pdf

Chapter Three
Review Periods

The Recommended Practices advise that merger reviews should be completed within a reasonable period of time and should be subject to determinable time frames.

1. The Recommended Practice relating to merger review periods recognizes that competition agencies need to have sufficient time to properly review notified transactions, in particular in cases presenting complex legal and economic issues. The RP also recognizes that merging parties typically delay closing until the completion of the merger review process and that delays in the expiry of waiting periods or receipt of clearances can have adverse effects on the transaction or the parties, and may defer the realization of any efficiencies arising from the transaction. (RP IV(A), Comment 1). Accordingly, merger reviews should be concluded within a reasonable time frame. Reasonable review periods should take into account, *inter alia*, the complexity of the transaction and possible competition issues, the availability and difficulty of obtaining information, and the timeliness of responses by the merging parties to information requests (RP IV(A), Comment 1).

2. In order to facilitate international convergence, initial waiting periods should expire in six weeks or less, and extended reviews, where necessary, should be completed or be capable of completion within six months or less, in each case from the time of the initial notification (RP IV(C), comment 2; RP IV(D), comment 2). Reasonable time frames, *e.g.*, the six week/six month recommended time frames, should be utilized regardless of whether or not a jurisdiction requires suspension of closing pending the completion of the review period (RP IV(C), comment 2; RP IV(D), comment 2). For this reason, the exemplars below do not distinguish between review periods for suspensive and non-suspensive regimes.

3. Merger review systems should incorporate procedures that provide for expedited review and clearance of notified transactions that do not raise material competitive concerns. The vast majority of notified transactions do not raise material competitive concerns. Therefore, merger review systems should permit such transactions to proceed expeditiously, with minimal delay and disruption. (RP IV (B), Comment 1). Many jurisdictions provide for an expedited review procedure by conducting a preliminary review within an abbreviated initial review period. Only those transactions that appear to raise concerns are then subject to a subsequent extended review periods (RP IV (B), Comment 1). Agencies should have the authority grant early termination once they determine that a transaction does not raise material competitive concerns. (RP IV (C) Comment 5).

4. Jurisdictions should adopt appropriately tailored procedures to accommodate particular circumstances associated with non-consensual transactions and sales in bankruptcy. Notification procedures designed primarily to cover negotiated transactions may be ill-suited for non-consensual transactions such as public bids and tender offers. In such transactions, the acquired firm may be apathetic or even hostile to the proposed transaction and correspondingly disinclined to cooperate in any applicable notification and review process. Jurisdictions have adopted the following measures designed to address specific issues raised by non-consensual

transactions: shortened review periods (or, where applicable, waiting periods); permitting the applicable initial review period to commence upon filing by the acquiring party only (where filings by both the acquiring and acquired parties are normally required); discretionary waivers of information requirements relating to the target company in hostile situations; and/or discretionary derogations permitting the implementation of the bid during the review period, provided that the acquiring person does not exercise voting rights or does so only to maintain the full value of the shares. (RP IV (E) Comment 1). Jurisdictions should also consider adopting procedures for accelerated review of transactions involving sales of companies in financial distress which are subject to court supervised processes (*e.g.,* bankruptcy or similar restructuring). (RP IV (E) Comment 2).

EXEMPLARS: REASONABLE REVIEW PERIODS SUBJECT TO SPECIFIC AND DETERMINABLE TIME FRAMES

The exemplars below provide for varying levels of complexity in fashioning a set of review periods, however each incorporates reasonable review periods that are specific and determinable as to timing.

European Union	**Time limits for initiating proceedings and for decisions** 1. Without prejudice to Article 6(4), the decisions referred to in Article 6(1) shall be taken within 25 working days at most. That period shall begin on the working day following that of the receipt of a notification or, if the information to be supplied with the notification is incomplete, on the working day following that of the receipt of the complete information. That period shall be increased to 35 working days where the Commission receives a request from a Member State in accordance with Article 9(2)or where, the undertakings concerned offer commitments pursuant to Article 6(2) with a view to rendering the concentration compatible with the common market. 2. Decisions pursuant to Article 8(1) or (2) concerning notified concentrations shall be taken as soon as it appears that the serious doubts referred to in Article 6(1)(c) have been removed, particularly as a result of modifications made by the undertakings concerned, and at the latest by the time limit laid down in paragraph 3. 3. Without prejudice to Article 8(7), decisions pursuant to Article 8(1) to (3) concerning notified concentrations shall be taken within not more than 90 working days of the date on which the proceedings are initiated. That period shall be increased to 105 working days where the undertakings concerned offer commitments pursuant to Article 8(2), second subparagraph, with a view to rendering the concentration compatible with the common market, unless these commitments have been offered less than 55 working days after the initiation of proceedings. The periods set by the first subparagraph shall likewise be extended if the notifying parties make a request to that effect not later than 15 working days after the initiation of proceedings pursuant to Article 6(1)(c). The notifying parties may make only one such request. Likewise, at any time following the

	initiation of proceedings, the periods set by the first subparagraph may be extended by the Commission with the agreement of the notifying parties. The total duration of any extension or extensions effected pursuant to this subparagraph shall not exceed 20 working days. 4. The periods set by paragraphs 1 and 3 shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Article 11 or to order an inspection by decision pursuant to Article 13. The first subparagraph shall also apply to the period referred to in Article 9(4)(b). 5. Where the Court of Justice gives a judgment which annuls the whole or part of a Commission decision which is subject to a time limit set by this Article, the concentration shall be re-examined by the Commission with a view to adopting a decision pursuant to Article 6(1). The concentration shall be re-examined in the light of current market conditions. The notifying parties shall submit a new notification or supplement the original notification, without delay, where the original notification becomes incomplete by reason of intervening changes in market conditions or in the information provided. Where there are no such changes, the parties shall certify this fact without delay. The periods laid down in paragraph 1 shall start on the working day following that of the receipt of complete information in a new notification, a supplemented notification, or a certification within the meaning of the third subparagraph. The second and third subparagraphs shall also apply in the cases referred to in Article 6(4) and Article 8(7). 6. Where the Commission has not taken a decision in accordance with Article 6(1)(b), (c), 8(1), (2) or (3) within the time limits set in paragraphs 1 and 3 respectively, the concentration shall be deemed to have been declared compatible with the common market, without prejudice to Article 9. EC Merger Regulation – Article 10 **Weblink**: http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf
France	**Review Periods** I. The Minister of the Economy shall decide on the concentration within five weeks from the date of reception of the complete notification.

II. The parties to the concentration may commit themselves to taking measures aimed in particular at remedying, if applicable, the anti-competitive effects of the concentration either on the occasion of the notification or at any time before the expiration of the five-week period from the date of receipt of the complete notification, as long as the decision set forth by I has not been delivered. If the Minister receives commitments more than two weeks after the complete notification of the concentration, the period indicated in I shall expire three weeks after the date of receipt of these undertakings by the Minister of the Economy.
III. The Minister of the Economy may:

- either find, in a reasoned decision, that the concentration notified thereto does not fall within the scope defined by Articles L.430-1 and L.430-2;
- or authorise the concentration, possibly by subordinating this authorisation, in a reasoned decision, to the actual implementation of the commitments made by the parties.

However, if the Minister considers that the concentration is likely to adversely affect competition and that the commitments made are not sufficient to remedy this, he shall refer the matter to the Council on Competition for an opinion.
IV.- If the Minister does not take any of the three decisions specified by III within the period indicated in I, possibly extended pursuant to II, the concentration shall be deemed to have been authorised.

French Commercial Code Article L430-5

If a concentration is referred to the Council on Competition, pursuant to III of Article L.430-5, this shall examine whether the concentration is likely to adversely affect competition, particularly by creating or reinforcing a dominant position or by creating or reinforcing a purchasing power which places suppliers in a situation of economic dependence. The Council shall assess whether the concentration makes a sufficient contribution to economic progress to compensate for the adverse effects on competition. The Council shall take account of the competitiveness of the undertakings in question with regard to international competition.
The procedure applying to this consultation of the Council on Competition shall be that specified by the second paragraph of Article L.463-2 and in Articles L.463-4, L.463-6 and L.463-7. However, the notifying parties and the government commissioner must produce their observations in reply to the notification of the report within three weeks.

Before ruling, the Council may hear third parties in the absence of the notifying parties. The works councils of the undertakings party to the concentration shall be heard at their request by the Council in accordance with the same conditions.
The Council shall submit its opinion to the Minister of the Economy within three
months.

The Minister of the Economy shall immediately forward this opinion to the notifying parties.

French Commercial Code Article L430-6

I. When the Council on Competition has been referred to, the concentration

	shall be decided on within four weeks from the submission of the Council's opinion to the Minister of the Economy. II. After having read the Council on Competition's opinion, the parties may propose undertakings likely to remedy the anti-competitive effects of the concentration before the end of a four-week period from the date of submission of the opinion to the minister, unless the concentration has already been decided on as specified by I. If the undertakings are sent to the minister more than one week after the date of submission of the opinion to the minister, the period referred to in I shall expire three weeks after the date of receipt of these undertakings by the minister. III. The Minister of the Economy and, if applicable, the minister responsible for the economic sector concerned may, in a reasoned decision: • either prohibit the concentration and order the parties, if applicable, to adopt any measures likely to re-establish sufficient competition; • or authorise the concentration by ordering the parties to adopt any measures likely to ensure sufficient competition or obliging them to observe requirements likely to ensure a sufficient contribution to economic and social progress to compensate for the adverse effects on competition. The orders and requirements specified by the above two paragraphs shall be imposed whatever the contractual clauses which may be concluded by the parties. The draft decision shall be sent to the interested parties which shall have a period for presenting their observations. IV. If the Minister of the Economy and the minister responsible for the economic sector concerned do not intend to take either of the two decisions specified by III, the Minister of the Economy shall authorise the concentration in a reasoned decision. The authorisation may be subordinated to the actual implementation of the undertakings made by the notifying parties. V. If none of the three decisions specified by III and IV has been taken within the period indicated in I, possibly extended pursuant to II, the concentration shall be deemed to have been authorised. French Commercial Code Article L430-7 **Weblink**: http://195.83.177.9/code/liste.phtml?lang=uk&c=32&r=3097

Germany	**Review Periods** (1) The Federal Cartel Office shall not prohibit a concentration notified to it unless it informs the notifying undertakings within a period of one month from receipt of the complete notification that it has initiated an examination of the concentration (main examination proceedings). The main examination proceedings should be initiated if a further examination of the concentration is necessary. (2) In the main examination proceedings the Federal Cartel Office shall decide by way of a decision whether the concentration is prohibited or cleared. If the decision is not issued within a period of four months from receipt of the complete notification, the concentration is deemed to be cleared. This shall not apply if: 1. the notifying undertakings have consented to an extension of the time limit, 2. the Federal Cartel Office has refrained from issuing the notice pursuant to subsection (1) or from prohibiting the concentration because of incorrect particulars or because of information pursuant to Section 39, 3. or Section 50 not having been provided in time; contrary to Section 39 sentence 2 no. 6, a person authorised to accept service in Germany is no longer named. (3) The clearance may be granted subject to conditions and obligations. These shall not aim at subjecting the conduct of the participating undertakings to a continued control. Section 12 (2) sentence 1 nos. 2 and 3 shall apply. (4) Prior to a prohibition, the supreme /DQG authorities in whose territory the participating undertakings have their registered seat shall be given an opportunity to comment. (5) In the cases of Section 39 (4) sentence 1, the time limits referred to in subsections (1) and (2) sentence 2 shall begin to run upon receipt of the referral decision by the Federal Cartel Office. (6) If the clearance by the Federal Cartel Office is reversed in whole or in part by a final and binding ruling, the time limit referred to in subsection (2) sentence 2 shall begin to run anew at the time at which the ruling becomes final and binding. Act Against Restraints of Competition – Section 40 **Weblink:** http://www.bundeskartellamt.de/wDeutsch/download/pdf/02_GWB_e.PDF

Malta	**Review Periods** 1st phase – 6 weeks but shall be increased to 2 months if after notification and not later than the end of the 5th week the undertakings concerned submit commitments. Also after end of the 5th week the undertakings concerned may request suspension of periods for a period of 3 weeks to discuss a new commitment proposed but would be granted at the discretion of the Director of the Office for Fair Competition. Under the simplified procedure duration of 1st phase is 4 weeks instead of 6 weeks. 2nd phase – 4 months but suspension for a period of up to one month may be requested by the undertakings concerned when they submit commitments and request will be generally acceded to. But concentration is suspended only during the 1st phase. Malta ICN N&P Merger Template **Weblink**: http://www.internationalcompetitionnetwork.org/merger_templates/icn_template_form_malta.pdf
Mexico	**Review Periods** The Commission is required to provide an answer (resolution) within 45 calendar days upon a fully integrated filing. A filing is fully integrated once the parties submit all requested information. The Commission can request information as follows: within 5 working days to request "basic data" after the submission; "additional data" within 20 calendar days either after the filing or after the parties have handed in the "basic data". If the data submitted from the beginning is complete, then there is no need to request either basic or additional information. In complex cases the Commission may extend twice the deadline up to 60 calendar days each. If the Commission remains silent, it is understood that the transactions has been legally approved. For the purposes of the article above, the following shall apply: I. The notice shall be made in writing and shall be attached to the draft of the legal act in question, and shall include the names or corporate names of the corresponding economic agents, the financial statements of the last fiscal year, their market share and all other data that reveals the intended transaction; II. The Commission may request additional data or documents within the twenty calendar days beginning on the day the notification is received. The interested parties submit this information before the Commission within fifteen calendar days. The period may be extended when duly justified; III. The Commission shall have forty five calendar days beginning on the day the notification is received, or as the case may be, of the additional documents requested, to issue its

	resolution. It shall be understood that the Commission has no objections if this period of time goes by and the Commission has not issued a resolution; IV. Under the responsibility of the President of the Commission, he may extend the term established under Sections II and III for up to sixty additional calendar days, in exceptionally complicated cases; V. The resolution of the Commission must be duly founded and motivated; and VI. A favourable resolution shall not bias the realization of other monopolistic practices forbidden by this Law, and therefore does not relief the corresponding economic agents from other responsibilities. Article 21 Federal Economic Competition Law, 1992 **Weblink**: http://www.cfc.gob.mx/cfc99i/concentrations.asp

Netherlands	**Review Periods** Section 34 The implementation of a concentration before the Board has been notified of the intention to do so and a subsequent period of four weeks has passed is prohibited. Section 37 1. Within four weeks of the receipt of a notification, the Board shall give notice as to whether a licence is required for the concentration to which the notification relates. 2. The Board may determine that a licence is required for a concentration if he has reason to assume that a dominant position that appreciably restricts competition on the Dutch market or a part thereof could arise or be strengthened as a result of the said concentration. 3. If subsection (1) is not applied within four weeks, no licence shall be required for the concentration. The term, referred to in the previous sentence, shall commence on the first day following receipt of the notification, provided this is not Saturday, Sunday or a public holiday, in accordance with the General Extension of Time-Limits Act.[7] 4. Pursuant to the Board's notice that a licence is not required for the concentration, the prohibition of section 34 shall cease to apply in respect of the said concentration. 5. The notice of the Board, as referred to in subsection (1), shall be announced in the Netherlands Government Gazette. Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act) **Weblink**: http://www.nmanet.nl/Images/14_26063_tcm16-24409.pdf
United States	**Running of Time** (a) Beginning of waiting period. The waiting period required by the act shall begin on the date of receipt of the notification required by the act, in the manner provided by these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such non-compliance in accordance with §803.3) from: (1) In the case of acquisitions to which §801.30 applies [see entry for 801.30 under tender offers, below], the acquiring person; (2) In the case of the formation of a corporation covered by Sec. 801.40 or an unincorporated entity covered by Sec. 801.50, all persons contributing to the formation of the joint venture or other corporation that are required by the act and these rules to file notification; (3) In the case of all other acquisitions, all persons required by the act and these rules to file notification.

	(b) Expiration of waiting period. (1) Subject to paragraph (b)(3) of this section, for purposes of Section 7A(b)(1)(B), the waiting period shall expire at 11:59 p.m. Eastern Time on the 30th (or in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), [bankruptcy transaction] the 15th) calendar day (or if §802.23 applies, such other day as that section may provide) following the beginning of the waiting period as determined under paragraph (a) of this section, unless extended pursuant to Section 7A(e) and §803.20 [second requests], or Section 7A(g)(2), or unless terminated pursuant to Section 7A(b)(2) and §803.11 [providing for early termination of waiting period]. (2) Unless further extended pursuant to Section 7A(g)(2), or terminated pursuant to Section 7A(b)(2) and §803.11, any waiting period which has been extended pursuant to Section 7A(e)(2) and §803.20 shall, subject to paragraph (b)(3) of this section, expire at 11:59 p.m. Eastern Time— (i) On the 30th (or, in the case of a cash tender offer or of an acquisition covered by 11 U.S.C. 363(b), the 10th) day following the date of receipt of all additional information or documentary material requested from all persons to whom such requests have been directed (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such non-compliance in accordance with §803.3), by the Federal Trade Commission or Assistant Attorney General, whichever requested additional information or documentary material, at the office designated in paragraph (c) of this section, or (ii) As provided in paragraph (b)(1) of this section, whichever is later. (3) If any waiting period would expire on a Saturday, Sunday, or legal public holiday (as defined in 5 U.S.C. 6103(a)) the waiting period shall be extended to 11:59 p.m. Eastern Time of the next regular business day. (c)(1) Date of receipt and means of delivery. For purposes of this section, the date of receipt shall be the date on which delivery is effected to the designated offices (Premerger Notification Office, Room 303, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, and Director of Operations and Merger Enforcement, Antitrust Division, Department of Justice, [Robert F. Kennedy Main Justice Bldg., 950 Pennsylvania Ave, NW, Room #3335, Washington, DC 20530]) during normal business hours. Delivery effected after 5:00 p.m. Eastern Time on a regular business day, or at any time on any day other than a regular business day, shall be deemed effected on the next following regular business day. Delivery should be effected directly to the designated offices, either by hand or by certified or registered mail. If delivery of all required filings to all offices required to receive such filings is not effected on the same date, the date of receipt shall be the latest of the dates on which delivery is effected. Example: In an acquisition other than a tender offer, assume that requests for additional information are issued to both the acquiring and acquired persons on the 26th day of the waiting period. One person submits the additional information on the 35th day, while the other responds on the 44th day. Under this section, the waiting period expires thirty days following the last receipt of

	additional information, that is, it expires on the 74th day (unless that day is a Saturday, Sunday or legal public holiday). (2) Deficient filings. If notification or a response to a request for additional information or documentary material received by the Commission or Assistant Attorney General does not comply with these rules, the Commission or the Assistant Attorney General shall promptly notify the person filing such notification or response of the deficiencies in such filing, and the date of receipt shall be the date on which a filing which complies with these rules is received. 16 C.F.R. §803.10. 43 FR 33548, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7083, Mar. 6, 1987; 66 FR 8696, Feb. 1, 2001; 70 FR 11514, Mar. 8, 2005 **Weblink**: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=d28315c24b6b4ea01478a25ecaa8f87b&rgn=div5&view=text&node=16:1.0.1.8.77&idno=16#16:1.0.1.8.77.0.46.10

EXEMPLARS: MERGER REVIEW SYSTEMS THAT INCORPORATE PROCEDURES FOR EXPEDITED REVIEW AND CLEARANCE FOR TRANSACTIONS THAT DO NOT RAISE MATERIAL COMPETITIVE CONCERNS

The exemplars below set out two different ways of explicitly providing for expedited treatment of non-problematic cases. In the Belgian "simplified procedure", expedited treatment may be allowed where at least one of a series of tests is fulfilled, each test attempting to measure whether the transaction is unlikely to raise competitive concerns. In the U.S. "early termination" example, the cited regulation describes the procedure for attaining early termination of the waiting period which is dependent primarily upon the U.S. agencies deciding to take no action. It is worth noting that in Germany, expedited clearance is frequently achieved in non-problematic cases. The one-month initial review period is often shortened by days or weeks in such cases, however there is no specific legislation in relation to this procedure.

Belgium	**Expedited Review** The simplified procedure applies to the following concentrations: 1. two or more undertakings acquire joint control of a joint venture, provided that the joint venture has no, or negligible, actual or foreseen activities in Belgium. Such cases occur where: a. the turnover of the joint venture and/or the turnover of the contributed activities is less than EUR 15 million in Belgium; and b. the total value of assets transferred to the joint venture is less than EUR 15 million in Belgium; 2. two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking, provided that none of the parties to the concentration are engaged in business activities in the same product and geographical market, or in a product market which is upstream or downstream of a product

	market in which any other party to the concentration is engaged; 3. two or more undertakings merge, or one or more undertakings acquire sole or joint control of another undertaking and: a. two or more of the parties to the concentration are engaged in business activities in the same product and geographical market (horizontal relationships) provided that their combined market share is less than 25 %; or b. one or more of the parties to the concentration are engaged in business activities in a product market which is upstream or downstream of a product market in which any other party to the concentration is engaged (vertical relationships), provided that their combined market shares is less than 25%; 4. the notifying parties are active on a so-called "small markets", to the exclusion of *inter alia* "emerging markets" and "innovative markets" The Competition Council will strive to take a decision within a shortened time period. It is the objective to take a decision within 25 days after notification. Unofficial English translation of extracted text from Joint notice of the Competition Council and the "Corps des Rapporteurs" regarding a simplified procedure for the treatment of certain concentrations **Weblink**: http://mineco.fgov.be/organization_market/competition/home_en.htm
United States	**Termination of Waiting Period** (a) Except as provided in paragraph (c) of this section, no waiting period shall be terminated pursuant to section 7A(b)(2) unless— (1) All notifications required to be filed with respect to the acquisition by the act and these rules (or, if such notification is not completed, the notification to the extent completed and a statement of the reasons for such non-compliance in accordance with §803.3) have been received, (2) It has been determined that no additional information or documentary material pursuant to section 7A(e) and §803.20 will be requested, or, if such additional information or documentary material has been requested, it (or, if a request is not fully complied with, the information and documentary material submitted and a statement of the reasons for such non-compliance in accordance with §803.3) has been received, and (3) The Federal Trade Commission and the Assistant Attorney General have concluded that neither intends to take any further action within the waiting period. (b) Any request for additional information or documentary material pursuant to section 7A(e) and §803.20 shall constitute a denial of all pending requests for termination of the waiting period. (c)The Federal Trade Commission and the Assistant Attorney General may in

	their discretion terminate a waiting period upon the written request of any person filing notification or, notwithstanding paragraph (a) of this section, sua sponte. A request for termination of the waiting period shall be sent to the offices designated in §803.10(c). Termination shall be effective upon notice to any requesting person by telephone, and such notice shall be given as soon as possible. Such notice shall also be confirmed in writing to each person which has filed notification, and notice thereof shall be published in the Federal Register in accordance with section 7A(b)(2). The Federal Trade Commission and the Assistant Attorney General also may use other means to make the termination public, prior to publication in the Federal Register in a manner that will make the information equally accessible to all members of the public. 16 CFR §803.11. 43 FR 33548, July 31, 1978, as amended at 54 FR 21427, May 18, 1989 **Weblink**: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=d28315c24b6b4ea01478a25ecaa8f87b&rgn=div5&view=text&node=16:1.0.1.8.77&idno=16

EXEMPLARS: PUBLIC BIDS AND BANKRUPTCY

The exemplars below provide for specific rules in relation to pubic bids (Netherlands, EC and U.S.), bankruptcy (France) and other situations that may merit early closing pending completion of the review (Netherlands, EU). In some cases, in practice it has been found that even jurisdictions with statutory power to allow parties to derogate from the obligation to suspend closing pending clearance, have sped up the normal review process rather than go through the specialised derogation process. This is may be due to the complexity or time involved in obtaining a derogation from the normal procedure, which in some cases may be greater than that involved in simply speeding up the normal assessment process.

European Commission	**Public Bids** 2. Paragraph 1 shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that: (a) the concentration is notified to the Commission pursuant to Article 4 without delay; and (b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3. European Commission Merger Regulation Article 7(2) 3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned

	by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction. EC Merger Regulation Article 7(3) **Weblink**: http://www.europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf
France	**Bankruptcy** 579. The administrators are invited to inform the DGCCRF (bureau B3) of the transactions likely to be notified under merger control rules from the time they know of the candidates to the takeover. This contact will allow a preliminary investigation into the sector and the merger so as to facilitate the relationship with the candidates to the takeover later on. 580. The potential acquirers can also present their offer to the DGCCRF as a pre-notification. This informal examination is particularly useful to facilitate the investigation process and avoid delays due to insufficient information being provided in the file; it also allows for the early identification of competition issues which could result from the takeover. In this way, the candidate for the takeover will be able to understand the consequences before making its takeover offer. Annex 4 of the Guidelines on French Merger Control (Bankruptcy situations) **Weblink**: http://alize.finances.gouv.fr/concentration/lignesdirectrices.pdf
Netherlands	**Public Bids** Section 39 1. Section 34 shall not apply in the case of a public acquisition or exchange bid aimed at the acquisition of a share in the capital of an undertaking, provided that the Board is notified of this immediately and the acquiring party does not exercise the voting rights attached to the said share in the capital. 2. If the Board gives notice that a licence is required, pursuant to section 37(1), in respect of a notification, as referred to in subsection (1), the concentration: (a) shall be reversed within thirteen weeks, if an application for a licence is not submitted within four weeks after the aforementioned notice is given, or if a licence is refused; (b) shall be brought into compliance with any such restrictions or conditions, if a licence is issued subject to restrictions or conditions, within thirteen weeks after the said licence is granted. 3. At the request of the notifying party, as referred to in subsection (1), in derogation from subsection (1), the Board may decide that the voting

	rights, as referred to in subsection (1), may be exercised in order to maintain the full value of the said party's investment. Section 40 1. At the request of the notifying party, the Board may, on important grounds, grant dispensation from the prohibition of section 34. 2. Dispensation may be granted subject to restrictions; conditions may be attached to a dispensation. 3. If, after granting a dispensation, as referred to in subsection (1), in respect of the aforesaid notification, the Director-General gives notice that a licence is required, pursuant to section 37(1), and the concentration has been implemented before such notice has been given, the concentration: (a) shall be reversed within thirteen weeks, if an application for a licence is not submitted within four weeks after such notice is given, or the application for a licence is withdrawn, or if a licence is refused; (b) shall be brought into compliance with any such restrictions or conditions, if a licence is issued subject to restrictions or conditions, within thirteen weeks after the said licence is granted. Act of 22 May 1997, Providing New Rules for Economic Competition (Competition Act) **Weblink**: http://www.nmanet.nl/Images/14_26063_tcm16-24409.pdf
United States	**Tender Offers and Acquisitions of Voting Securities from Third Parties** [See also (1) above for language on waiting periods for cash tender offers] (a) This section applies to: (1) Acquisitions on a national securities exchange or through an interdealer quotation system registered with the United States Securities and Exchange Commission; (2) Acquisitions described by §801.31; (3) Tender offers; (4) Secondary acquisitions; (5) All acquisitions (other than mergers and consolidations) in which voting securities are to be acquired from a holder or holders other than the issuer or an entity included within the same person as the issuer; (6) Conversions; and (7) Acquisitions of voting securities resulting from the exercise of options or warrants which are— (i) Issued by the issuer whose voting securities are to be acquired (or by any entity included within the same person as the issuer); and (ii) The subject of a currently effective registration statement filed with the United States Securities and Exchange Commission under the Securities Act of 1933. (b) For acquisitions described by paragraph (a) of this section: (1) The waiting period required under the act shall commence upon the filing of notification by the acquiring person as provided in §803.10(a); and (2) The acquired person shall file the notification required by the act, in accordance with these rules, no later than 5 p.m. Eastern Time on the 15th (or, in

	the case of cash tender offers, the 10th) calendar day following the date of receipt, as defined by §803.10(a), by the Federal Trade Commission and Assistant Attorney General of the notification filed by the acquiring person. Should the 15th (or, in the case of cash tender offers, the 10th) calendar day fall on a weekend day or federal holiday, the notification shall be filed no later than 5 p.m. Eastern Time on the next following business day. Examples: 1. Acquiring person "A" proposes to acquire from corporation B the voting securities of B's wholly owned subsidiary, corporation S. Since "A" is acquiring the shares of S from its parent, this section does not apply, and the waiting period does not begin until both "A" and "B" file notification. 2. Acquiring person "A" proposes to acquire in excess of $50 million (as adjusted) of the voting securities of corporation X on a securities exchange. The waiting period begins when "A" files notification. "X" must file notification within 15 calendar days thereafter. The seller of the X shares is not subject to any obligations under the act. 3. Suppose that acquiring person "A" proposes to acquire 50 percent of the voting securities of corporation B which in turn owns 30 percent of the voting securities of corporation C. Thus "A's" acquisition of C's voting securities is a secondary acquisition (see §801.4) to which this section applies because "A" is acquiring C's voting securities from a third party (B). Therefore, the waiting period with respect to "A's" acquisition of C's voting securities begins when "A" files its separate Notification and Report Form with respect to C, and "C" must file within 15 days (or in the case of a cash tender offer, 10 days) thereafter. "A's" primary and secondary acquisitions of the voting securities of B and C are subject to separate waiting periods; see §801.4. 16 CFR §801.30. 43 FR 33537, July 31, 1978; 43 FR 36054, Aug. 15, 1978, as amended at 52 FR 7082, Mar. 6, 1987; 66 FR 8690, Feb. 1, 2001 **Weblink**: http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=d28315c24b6b4ea01478a25ecaa8f87b&rgn=div5&view=text&node=16:1.0.1.8.75&idno=16#16:1.0.1.8.75.0.46.13

Chapter Four
Requirements for Initial Notification

The Recommended Practices suggest that initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation. In addition, notification requirements should: provide flexibility in order to reduce the burden on the parties filing; provide adequate guidance to assist parties in determining what materials need to be filed; and be reasonable in terms of translation requirements of documents.

1. Information Required

Most transactions do not raise material competitive concerns so the initial notification should elicit the minimum amount of information necessary to initiate the merger review process. It should be used to collect information to verify that the transaction is properly before the competition agency in light of applicable jurisdictional requirements and notification thresholds and to determine whether the transaction raises competitive issues meriting further investigation. The initial notification also may be used to collect information that the competition agency needs for a clearance decision or to prepare other documentation required to terminate the review process. (RP V(A), comment 1) The amount of information required in the initial notification may vary depending on the approach to notification thresholds taken by the jurisdiction. Jurisdictions that review transactions of limited value, transactions with limited local nexus, or large numbers of transactions due to low jurisdictional thresholds should be particularly sensitive to any disproportionate burdens arising from the breadth of their initial filing requirements. (RP V(A), comment 2)

EXEMPLARS: INFORMATION REQUIRED

Germany	**Informal Notification Procedures and Modest Information Requirements** Section 39 (3) ARC provides that: "(3) The notification shall indicate the form of the concentration. Furthermore, the notification shall contain the following particulars with respect to every participating undertaking: 1. name or other designation and place of business or registered seat; 2. type of business; 3. the turnover in Germany, in the European Union and worldwide; instead of the turnover, the total amount of the proceeds within the meaning of Section 38 (4) shall be indicated in the case of credit institutions, financial institutions and building and loan associations, and the premium income in the case of insurance undertakings; 4. the market shares, including the bases for their calculation or estimate, if the combined shares of all participating undertakings amount to at least 20% in the area of application of this Act or in a substantial part thereof;

	5. in the case of an acquisition of shares in another undertaking, the size of the interest acquired and of the total interest held; 6. a person authorised to accept service in Germany, if the registered seat of the undertaking is not located in the area of application of this Act. […]" **Commentary**: In contrast to most jurisdictions, no specific supporting documents are required to be submitted with the filing. Section 39(3) of the Act against Restraints of Competition (ARC) sets out the information merging parties are required to provide the Bundeskartellamt. The parties may therefore submit the required information in a format of their choosing. Moreover, only a modest amount of information is required from the parties, although parties are free to submit additional information. **Weblink** [Filing Guidelines – German only]: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/Fusionsanmeldung.pdf
Norway	**Modest Initial Notification Requirements** **Standardized notification** The purpose of a "standardized" notification is to make the Competition Authority aware of the concentration and to provide it with basic information indicating whether the concentration might raise competition concerns in Norway. In cases of acquisition of control, information need only to be provided on the undertaking(s) acquiring control. Information requirements are modest: a. names and addresses of the parties to the merger or the party or parties who acquire control; b. information on the nature of the concentration; descriptions of the undertakings concerned and of undertakings in the same corporate group; description of markets in Norway, or which Norway is a part of, in which the undertakings concerned and undertakings in the same corporate group obtain combined market shares exceeding 20 percent as a result of the concentration; c. names of the five most important competitors, customers, and suppliers in each of the markets described in (d); d. annual reports and annual accounts of the undertakings concerned and of undertakings in the same corporate group, unless they are publicly available. Section 18, Norwegian Competition Act **Weblink:** http://www.konkurransetilsynet.no/internett/index.asp?strUrl=1005157i The Competition Authority can request a "complete" notification (which contains information needed for a more thorough review) within 15 working days following its receipt of a standardized notification. If it does not request

	the parties to submit a complete notification, the transaction is deemed to be approved. Decisions to intervene must be based on a complete notification. Guidelines for standardized notification of a concentration **Weblink:** http://www.konkurransetilsynet.no/archive/internett/vedlegg/konkurranseregler/juridiske_infoark/english/guidelines_standardized_notification.pdf **Weblink** [Regulation on the notification of concentrations]: http://www.konkurransetilsynet.no/internett/index.asp?strUrl=1005157i

2. **Flexibility**

In order to allow jurisdictions to receive necessary information without imposing unnecessary burdens on the filing parties, jurisdictions should adopt mechanisms that allow for flexibility in the content of the initial notification and/or with respect to additional information requirements during the initial phase of the review. (RP V(B), comment 1) There are various ways to provide flexibility in the initial review, including, *inter alia*, alternative notification formats, staff discretion to waive initial information requirements where the information is not likely relevant to the review, or abbreviated initial notification requirements where agency staff can require additional information during the initial review period. (RP V(B), comment 2). Jurisdictions should also be flexible regarding formal information requirements, particularly where responsive information may be kept in another format, *e.g.*, objectively quantifiable information kept in the ordinary course of business (RP V(B), comment 5).

EXEMPLARS: FLEXIBILITY

Austria	**Alternative Notification Format: Short Form** A short form-notification ("Vereinfachte Anmeldung" literally "simplified notification") may be filed if no markets are "affected" within the meaning of section 5 of the Form for Merger Notifications published by the Federal Competition Authority (FCA). Where merger parties submit a short form notification, certain portions of the standard notification form do not need to be completed. (Section 2 of the introduction to the notification form, the Formblatt für die Anmeldung von Zusammenschlüssen, identifies the sections of the form that need not be completed.) The FCA and the Federal Cartel Prosecutor may, in addition, waive their right to apply for an in-depth (second phase) investigation in cases that do not raise competition concerns before the end of the statutory 4-week first phase review period. (However, the merging parties will be required to provide sound reasoning as to why the matter is of urgency.) **Weblink** [Form – German only]: http://www.bwb.gv.at/BWB/Service/Formblaetter/fbz010106.htm [Additional information in the English language may be found in the Austria

	chapter of International Mergers: the Antitrust Process (Sweet & Maxwell, London, 2006).]
Barbados	**"Form A" and "Form B" Merger Notification Forms** Where a merger is not expected to give rise to competition concerns parties are only required to submit a Form A notification. Where a merger is expected to give rise to competition concerns, both a Form A and a Form B notification must be submitted. Form A information requirements include details about the proposed transaction, other regulatory notifications, the parties, affected markets, market shares and barriers to entry. The Form B notification requires additional information relating to competitive effects, efficiencies and the "failing firm" defence. **Weblink**: http://www.ftc.gov.bb/html/news_pub.htm
Belgium	**Merger Notification by "Simplified Procedure"** The Competition Council and Corps of Rapporteurs have issued a joint statement that outlines a "simplified procedure" (vereenvoudigde procedure / procédure simplifiée), not unlike that used by the European Commission, pursuant to which they will undertake to approve non-complex merger transactions within 25 days. The joint statement also identifies certain portions of the notification Form CONC C/C-1 that do not need to be completed in simplified procedure cases. According to the joint statement, the following cases qualify for processing under the simplified procedure: (a) the creation of joint ventures where the JV has no or negligible activities in Belgium; (b) conglomerate mergers (*i.e.*, no horizontal or vertical overlaps between the parties); (c) horizontal or vertical mergers where the post-merger market shares do not exceed 25%; and (d) mergers involving parties active in "small markets." **Weblink** [Joint Statement – Dutch and French only]: http://mineco.fgov.be/organization_market/competition/joint_communication.pdf [Additional information in the English language may be found in the Belgium chapter of International Mergers: the Antitrust Process (Sweet & Maxwell, London, 2006).]
Canada	**Merger Notification Alternatives include Application for Advance Ruling Certificate** Parties may notify a proposed merger by way of a short form or long form filing. Long form filings are generally reserved for transactions that are problematic and / or require intensive antitrust analysis.

	In lieu of a filing a short or long form filing the parties may submit an application for an Advance Ruling Certificate. Such requests are usually made in non-complex cases and ordinarily take the form of a letter that describes the parties, the proposed transaction and its competitive impact. The Competition Bureau has also issued guidance in its Fees and Service Standards Guidelines that outline the sorts of additional information that it generally finds of assistance in assessing mergers. When parties (voluntarily) supply such information the Competition Bureau will endeavour to complete its review within a specified time period. **Discretionary Waiver of Required Information by Party Filing** Parties are also entitled to not provide information that "could not, on any reasonable basis, be considered to be relevant to an assessment by the Commissioner as to whether the proposed transaction would or would be likely to prevent or lessen competition substantially". The Commissioner may, however, reject such a claim and require that such information be provided within seven days of a filing. Section 116, Competition Act **Weblink** (Competition Act): http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1140&lg=e **Weblink** (Fees and Service Standards Handbook): http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=116&lg=e
Denmark	**Short Form of Merger Notification** The Danish K2 notification form consists of a Part A (summary information about the concentration and the notifying parties) and a Part B (detailed information about the concentration and its competitive effects). Where no competition law issues arise, the merger may be notified in "short form", using the ordinary Form K2 but leaving out information in Part B that the parties do not consider relevant. (Paragraph 9.5 of Form K2 provides that "[u]nless all the information and documents indicated in the notification form K2 have been submitted, please explain why the information and documents which have not been submitted are not necessary for the Competition Council's assessment of the merger.") **Weblink** [Form K2 – Danish only]: http://www.ks.dk/konkurrence/anmeld-regl/anm.skemaer/ [Additional information in the English language may be found in the Denmark chapter of International Mergers: the Antitrust Process (Sweet & Maxwell, London, 2006).]
European Union	**Merger Notification by "Simplified Procedure"** The European Commission (EC) may allow a short form notification and dispense with a full-form notification in cases in which a merger will not

	raise competition concerns. If the Commission is satisfied that the concentration qualifies for the simplified procedure, it will normally issue a short form clearance decision within one month from the date of notification. The following categories of concentrations are eligible for simplified procedure treatment: (a) joint ventures with no, or negligible, actual or foreseen activities within the European Economic Area; (b) concentrations with no horizontal or vertical overlaps; (c) concentrations where the parties' combined market share is less than 15% in the case of horizontal overlaps and/or 25% in the case of vertical overlaps; and (d) situations in which a party is to acquire sole control of an undertaking over which it has joint control. The EC has also issued a notice on a simplified procedure for treatment of certain concentrations. **Ability to Waive Information Requirements** Article 4(2) of the Implementing Regulation provides that the Commission may dispense with the obligation to provide any particular information. **Weblink [**Implementing Regulation and Short Form CO]: http://europa.eu.int/comm/competition/mergers/legislation/impl_regulation.htm **Weblink [**Commission Notice on the simplified procedure**]**: http://europa.eu.int/comm/competition/mergers/legislation/procedures.htm
Norway	**Choice of Standardized or Complete Notification or Voluntary Notification for an Advance Ruling** Parties may decide to file either a standardized notification or a complete notification. Since the agency can require a complete notification following receipt of a standardized notification, choosing a complete notification at the outset allows parties to bypass the initial time period of 15 days associated with a standardized notification. Where a concentration does not lead to acquisition of control, parties can file a voluntary notification for an advance ruling concerning whether an intervention may be expected. [Such voluntary notifications must satisfy the requirements of a complete notification.] Competition Act, section 18, paragraph 4 **Waiver of Required Information** In individual cases, the Competition Authority may exercise its discretion to ease the requirements for a standardized notification or a complete notification. Competition Act of 2004, section 18 Notification on the regulation of concentrations, section 5

3. Pre-notification Guidance

Pre-notification guidance should be available to parties to help determine if a transaction is notifiable and, if so, the necessary information to be included in the notification. Such guidance is particularly useful for transactions that may present complex jurisdictional or competition issues. Such guidance may include pre-notification consultations at the request of the parties (RP V(C), Comment 1).

EXEMPLARS: PRE-NOTIFICATION GUIDANCE

European Union	**Pre-merger guidance** The European Commission encourages notifying parties to enter into pre-notification contacts with the relevant service. At the pre-notification stage, the parties can approach the Commission in order to discuss the exact type of information and documentation to be should be provided in a given case. **Weblink** [Best Practice Guidelines]: http://europa.eu.int/comm/competition/mergers/others/best_practice_gl.html
Japan	**Pre-notification guidance and prior consultations** The JFTC, through its Mergers and Acquisitions Division, offers pre-notification guidance, concerning whether the proposed transaction is subject to notification and if so, how to fill in the notification form. The JFTC made public a guide for notifications by foreign companies as follows: Notification System Concerning M&As by Companies Outside Japan **Weblink**: http://www.jftc.go.jp/e-page/legislation/ama/MAnotification.pdf Moreover, the parties, prior to statutory notification, can apply to the JFTC consultation concerning whether their plan violates the Antimonopoly Act or not, and the JFTC conducts an investigation and accordingly, notifies the parties the result of its investigation. The JFTC published the following policies how to deal with prior consultations. "Policies dealing with Prior Consultations regarding M&A Plans" **Weblink** [Japanese only]: http://www.jftc.go.jp/pressrelease/02.december/021211.pdf
Switzerland	**Pre-notification guidance** Prior to the notification of a merger, the enterprises involved and the Secretariat may mutually agree on particulars of the contents of the notification. The Secretariat may thereby grant an exemption from the duty to submit particular information or documents [normally required] if it is of the opinion that such information is not required for the assessment of the case. The duty to disclose additional information and documents pursuant to Article

	15 is reserved. Ordinance on the Control of Mergers of Enterprises of 17 June 1996) position as at 23 March 2004, Regarding Article 60 of the Cartel Act of 6 October 1995 **Weblink**: http://www.weko.admin.ch/imperia/md/images/weko/45.pdf

4. Translation and Formal Authentication

While a jurisdiction may require a notification to be in an official language, in order to reduce the burden on parties, extensive translation of supporting documents, such as transactional materials and annual reports, should not be required; instead, agencies should accept translated summaries or excerpts while preserving their ability to require full translations if a transaction appears to raise competition concerns (RP V, Comment 1).

Jurisdictions generally require that the actual notification filings be in an official language, although some also provide for filings in another non-official language such as English.

Jurisdictions are entitled to reasonable assurances of the validity of notifications. Where formal authentication is required, it should allow for perfection on the basis of duly authorized representatives of the parties residing in the jurisdiction, rather than requiring the parties' senior officials to provide for notarization or consularization personally.

EXEMPLARS: TRANSLATION AND FORMAL AUTHENTICATION

European Union	**Translation** Notifications shall be in one of the official languages of the Community. For the notifying parties, this language shall also be the language of the proceeding, as well as that of any subsequent proceedings relating to the same concentration. Supporting documents shall be submitted in their original language. Where the original language is not one of the official languages of the Community, a translation into the language of the proceeding shall be attached. EC Implementing Regulation, section 3, paragraph 4
Japan	**Translation** The JFTC requires all notification documents to be submitted in Japanese. Supporting documents may be filed in their original language with only merger-related parts translated into Japanese. Financial statements need not be translated.
Norway	**Translation** If the notifying parties so wish, a standardized notification may be submitted in the English language. A complete notification must be submitted in the Norwegian language.

	Formal Authentication A power of attorney is not needed. There are no special rules for foreign representatives or firms.

Chapter Five
Conduct of the Investigation

1. Effective, efficient, transparent and predictable merger review should be ensured at all stages of the merger review process. Relevant legal and factual issues should be dealt with as quickly as possible, with input from involved parties, with meetings and discussions at strategic points throughout the investigation (RP VI (A) and (B). Competition agencies should seek to avoid imposing unnecessary or unreasonable costs and burdens on merging parties and third parties (RP VI (E)). The possibility to submit any final adverse decision on the merits to review by a separate adjudicative body should aim to allow resolution of the case within a time frame during which the merger remains viable. Similarly, any dispute between merging parties and the competition agency during the investigation should be subject to timely review mechanisms (RP VI (E) and VII (E)).

EXEMPLARS OF EFFECTIVE, EFFICIENT, TRANSPARENT AND PREDICTABLE MERGER REVIEW

Australia	**Draft ACCC Merger Review Process Guidelines, December 2005** Communication between the competition agency and the merging parties: "The ACCC is conscious of the importance of having clear and direct lines of communication with merger parties and ensuring that the correct people (whether commissioners or staff) are involved to the appropriate degree. To assist merger parties in their communication with the ACCC, the guidelines outline the circumstances in which commissioners and staff would be available to meet with the merger parties or other interested parties. In addition, a procedure has been developed whereby merger parties and others (where applicable) will be advised of the appropriate contact person for a particular merger within the ACCC." Draft Guidelines, para. 4.94 **Commentary:** The draft Merger Review Process Guidelines set out when competition agency representatives would be available to meet with merging or interested third parties, as follows: a. Initial communication may occur prior to a transaction being completed, either by written submission or direct meetings with agency representatives; b. Following preliminary assessment, but prior to market inquiries, in order to advise merging parties of any competition issues which have been identified. Where these issues cannot be resolved, they will become the subject of market inquiries; c. Upon completion of market inquiries, in order to discuss any new issues that arose out of consultations with market participants. Where no issues have arisen, a final decision may be taken without further consultation. Where issues are apparent, a Statement of Issues may be drafted; d. Following issue of a Statement of Issues, allowing consideration of any steps merging parties may have taken to

	address the competition agency's concerns; e. Merging parties will be informed of the competition agency's final decision (regardless of its nature) before a public statement is made, thus allowing merging parties to prepare for any media inquiries the public announcement may provoke. **Weblink**: http://www.accc.gov.au/content/item.phtml?itemId=719293&nodeId=file43bca25d6ab24&fn=Merger%20Review%20Process%20Guidelines%20-%20December%202005.pdf
European Union	**Best Practices on the Conduct of EC Merger Control Proceedings** State of Play meetings: "The objective of the State of Play meetings is to contribute to the quality and efficiency of the decision-making process and to ensure transparency and communication between DG Competition and the notifying parties. As such these meetings should provide a forum for the mutual exchange of information between DG Competition and the notifying parties at key points in the procedure. They are entirely voluntary in nature." Best Practices, para. 30 **Commentary:** Merging parties are generally offered the opportunity to attend State of Play meetings with the competition agency at five points during the investigation: a. Before the expiry of the first three weeks of the Phase I investigation, where it appears that serious concerns are likely to emerge; b. Within two weeks of adoption of an Article 6(1)(c) decision (ie. the merger raises serious doubts as to its compatibility with the common market and an investigation will be opened); c. Before issuing a Statement of Objections; d. Following the reply to the Statement of Objections and the Oral Hearing; e. Before the Advisory Committee meeting, in order to discuss any proposed remedies and results of market testing. **Weblink**: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf
Netherlands	**Best Practices in Relation to Merger Cases** Asking questions informally: "To avoid unnecessary lengthening of the time required to process the case, in some cases the Merger Control Department's team processing the case may ask the notifying parties questions informally rather than directly asking additional questions formally which would suspend the deadline for processing the case… Informal questions may only be asked if:

	i. the time required for processing the case permits; and ii. the questions are relatively simple; and iii. the parties are expected to answer questions quickly (within three working days); and iv. the number of questions is limited." Best Practices, para 28-29 **Weblink**: http://www.nmanet.nl/Images/BEST%20PRACTICES%20IN%20RELATION%20TO%20MERGER%20CASES_tcm16-83487.pdf
New Zealand	**New Zealand Commerce Commission Best Practice** Merging parties are not formally required to consult with the competition agency before entering into a transaction. The parties themselves assess whether or not to notify the competition agency using a substantial lessening test. To assist merging parties to undertake the necessary self assessment, the New Zealand Commerce Commission Mergers and Acquisitions Guidelines set out "safe harbours", which provide an indicative guide as to when to notify the competition agency. "The objective of specifying safe harbours is to give guidance as to which business acquisitions are unlikely to substantially lessen competition, and hence contravene the Act. Safe harbours provide a screening device for the purposes of administrative convenience, and are not intended as a replacement for case-by-case analysis." Mergers and Acquisition Guidelines, para. 5.3 **Commentary:** Transparent merger review process: The competition agency encourages parties to apply for clearance as soon as there is a real likelihood that a proposed acquisition may proceed. Once the competition agency is notified of a merger, a formal and public merger review takes place. The competition agency maintains a public online merger register, which sets out the details of the proposed merger. The register does not include confidential or other sensitive information. Maximum input from both merging and third parties: Consultation between the competition agency and the merger applicant takes place on a confidential basis. To assist its merger analysis, the competition agency requires the party applying for formal merger clearance to complete an Application Form. This form sets out the information the agency requires. The competition agency also accepts oral or written submissions from third parties. Written decisions: The competition agency is required by law to give formal written reasons for its decision to clear or decline to clear a merger. The decision will set out the process, findings and reasoning of

	the competition agency in reaching its conclusion. Merits review of final adverse decision: If, in the competition agency's written decision it declines a clearance or an authorisation, there is a right of appeal to the New Zealand High Court. The appeal may be taken by the merging parties and any person who participated in a relevant merger conference (if one was held). The High Court undertakes a merits review of the papers, not a de novo hearing. **Weblinks**: http://www.comcom.govt.nz/BusinessCompetition/MergersAcquisitions/clearances.aspx http://www.comcom.govt.nz//BusinessCompetition/MergersAcquisitions/ContentFiles/Documents/Clearances%20Application%20form.pdf http://www.comcom.govt.nz/Publications/ContentFiles/Documents/MergersandAcquisitionsGuidelines
United Kingdom OFT	**Mergers - Procedural Guidance** Issues meetings: "In cases that raise more complex or material competition issues … the parties will be advised and invited to attend an issues meeting with the Branch. To help the parties prepare for this meeting, the case officer will send an 'issues' letter to the parties. This will set out the core arguments and evidence in the case. It is intended that 'issues' letters will set out the arguments in favour of a reference so that parties have an opportunity to respond to the reasons why a reference, if it follows, has been made." Procedural Guidance, para. 5.17 **Weblink**: http://www.oft.gov.uk/NR/rdonlyres/791B6BA9-E321-49DD-8040-01DB2E74F5C6/0/oft526.pdf

2. Pre-notification guidance and interaction between merging parties and competition agencies should be used to identify possible issues as early as possible, without limiting the agency's discretion to take appropriate decisions later in the investigation process. Any significant legal or practical issues that emerge during the investigation should be dealt with as soon as possible. Where appropriate, parties should have the opportunity to meet with the competition agency to discuss and resolve such issues. (RP VI (B)).

EXEMPLARS: PRE-NOTIFICATION GUIDANCE AND INTERACTION

Australia	**ACCC Merger Guidelines** Informal consideration of mergers: "The Commission encourages parties to approach it, on an informal basis, as soon as there is a real likelihood that a proposed acquisition may proceed, and certainly well before the completion of an acquisition."

	Merger Guidelines, para. 4.4 "Consultation prior to a proposed transaction being undertaken is critical to the success of the informal system. This consultation can be in the form of a submission providing relevant information, or through direct meetings and discussions with staff." Draft Merger Process Guidelines, para. 4.95 **Commentary**: Although there is no formal requirement to advise the competition agency prior to entering into a transaction, the agency encourages parties to approach it informally. Parties may contact the competition agency either confidentially, or on the basis that the transaction is already in the public domain. As well as providing a written submission, parties may request a meeting with the competition agency to discuss the proposed transaction. This initial contact with the competition agency allows merging parties to raise any issues or to seek guidance from the agency. **Weblinks**: http://www.accc.gov.au/content/item.phtml?itemId=304397&nodeId=file423f41da237c1&fn=Merger%20Guidelines.pdf http://www.accc.gov.au/content/item.phtml?itemId=719293&nodeId=file43bca25d6ab24&fn=Merger%20Review%20Process%20Guidelines%20-%20December%202005.pdf
European Union	**Best Practices on the Conduct of EC Merger Control Proceedings** Pre-notification: "In DG Competition's experience the pre-notification phase of the procedure is an important part of the whole review process. As a general rule, DG Competition finds it useful to have pre-notification contacts with notifying parties even in seemingly non-problematic cases. DG Competition will therefore always give notifying parties and other involved parties the opportunity, if they so request, to discuss an intended concentration informally and in confidence prior to notification." Best Practices, para. 5 **Commentary**: Jurisdictional and other legal issues, the scope of information required and all other key issues are open to discussion during pre-notification talks with the agency. **Weblink**: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf
Netherlands	**Best Practices in Relation to Merger Cases** Information line: Any minor questions that merging parties may have prior to submitting a notification, *e.g.*, as concerns the application of turnover thresholds or investigation deadlines, may be discussed with the competition agency's staff on its information hotline. Where necessary, questions can be referred to the Merger Control Department, which

	offers parties the option of requesting an informal opinion or pre-notification talks. Informal Opinions: Informal opinions relating to the competition agency's interpretation of the Competition Act may be requested prior to notification or pre-notification. No official deadlines apply for response to requests for informal opinions, however the competition agency aims to respond in writing within two weeks, with key aspects communicated earlier by telephone. Informal opinions generally relate to the obligation to notify a given transaction. Pre-notification: Pre-notification, often by way of submission of a draft notification, allows merging parties to communicate with the competition agency to identify whether, and if so how, to notify a transaction. For the competition agency, pre-notification provides insight into the scope of the imminent investigation. Following submission of written documents (draft notification form or outline of the transaction and markets concerned) a pre-notification meeting may be held to discuss possible issues. **Weblink**: http://www.nmanet.nl/Images/BEST%20PRACTICES%20IN%20RELATION%20TO%20MERGER%20CASES_tcm16-83487.pdf

3. Merging parties should be provided with sufficient and timely information to ascertain the factual and competitive concerns behind any adverse decision, and be granted a meaningful opportunity to respond to those concerns, before a final enforcement decision on the merits is issued (RP VII (B)). This should include informing merging parties of the reasons behind a decision to conduct an in-depth review not later than at the beginning of a second stage inquiry (RP VI (C)).

EXEMPLARS OF ADEQUATE AND TIMELY INFORMATION

European Union	**Best Practices on the Conduct of EC Merger Control Proceedings** Right to be heard: "The right of the parties concerned to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law." Best Practices, para. 48 "The Commission shall base its decision only on objections on which the parties have been able to submit their observations. The rights of defence shall be fully respected in the proceedings. Access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets." Article 18(3) of the Merger Regulation **Commentary**: Community law grants merging parties the right to request access to the competition agency's file after a Statement of

	Objections has been issued (see Article 18(3) of the Merger Regulation and Article 13(3) of the Implementing Regulation). Parties also have the right to consult documents received after that Statement of Objections was issued. Any issues relating to these rights may be raised with the Hearing Officer, who must ensure compliance with the right to be heard, right of access to the file, and fairness of proceedings (see Terms of Reference of Hearing Officers). **Weblink** [Best Practices]: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf **Weblink** [Merger Regulation]: http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l_024/l_02420040129en00010022.pdf Weblink [Implementing Regulation]: http://europa.eu.int/eurlex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf Weblink [Terms of Reference of Hearing Officers]: http://europa.eu.int/comm/competition/hearings/officers/index_new.html
Netherlands	**Best Practices in Relation to Merger Cases** Statement of Objections: Where concerns raised in the first phase of an investigation are confirmed in the second phase, the competition agency may set out its provisional assessment and the results of its investigation (which is the basis for that assessment) in a Statement of Objections. This is sent to the merging parties and, where appropriate, in non-confidential form to interested third parties. A hearing may then be organised during which parties may submit their views on the Statement of Objections. **Weblink**: http://www.nmanet.nl/Images/BEST%20PRACTICES%20IN%20RELATION%20TO%20MERGER%20CASES_tcm16-83487.pdf

4. Where investigation periods are not subject to definitive deadlines, procedures should be adopted to ensure that the investigation is completed without undue delay (RP VI (D)). Where appropriate, timing agreements or indicative timetables may be implemented. Requests for information should require response within a specified time limit, and should not delay the progress of the investigation.

EXEMPLARS: COMPLETION OF THE INVESTIGATION WITHOUT UNDUE DELAY

Australia	**Draft ACCC Merger Review Process Guidelines, December 2005** Indicative timelines: "The ACCC's indicative timelines are just that - indicators of when the ACCC expects to make its decisions and the relevant steps in the assessment process. By imposing such timelines, disciplines are placed on merger parties and third parties to meet submission deadlines, as well as on the ACCC to meet its own target decision dates. However, the informal process is founded on the need to be sufficiently flexible to accommodate the commercial practicalities that may arise in merger review…" Draft Merger Process Guidelines, para. 4.42 **Commentary**: The indicative timelines which will apply to a merger depend on whether the agency conducts a "Basic Review" (two to three weeks) or a "Comprehensive Review", which is based on a six to eight week investigation calendar. Timelines for specific matters are published in the public register on the agency's website. Merging parties may request in writing that a decision be issued earlier than foreseen in an indicative timeline. If the competition agency is satisfied that this request is based on genuine commercial considerations or deadlines, the agency will aim to adhere to the merging parties request. Where a merger raises complex issues in the context of a "Comprehensive Review", a secondary timeline will be drawn up, taking into account the merging parties' views on the time required to complete the secondary investigation. Transactions requiring a two-phase investigation can usually be completed within twelve weeks. "Stop the clock" mechanism: Certain events during an investigation may require alteration of the indicative timeline, or stopping of the clock altogether, such as the competition agency requesting additional information from the merging parties, and requests from the parties themselves to be granted additional time to respond to questions or requests. **Weblink**: http://www.accc.gov.au/content/item.phtml?itemId=719293&nodeId=file43bca25d6ab24&fn=Merger%20Review%20Process%20Guidelines%20-%20December%202005.pdf
Canada	**Fee and Service Standard Handbook** <u>Service Standards</u> The Bureau aims to provide a response to requests for merger notification and ARC requests within the service standard time frames indicated below. The service standards assume cooperation in the course of an examination. In the event that the Bureau is unable to meet these service

	standards, parties will be informed of such in advance of the service standard end date. *Merger Notification Filings and ARC Requests Service Standard:* non-complex - 2 weeks complex - 10 weeks very complex - 5 months Within five days of receipt of a complete request, parties will be informed of the complexity level and applicable service standard. The service standard commences the next business day after a complete request is received. A request is considered complete once all of the information requirements, as set out in the Bureau's *Fee and Service Standards Handbook*, have been fulfilled. In the vast majority of cases, the information requirements set out in the Handbook will be sufficient for the Bureau to complete its assessment. However, in exceptional circumstances, additional information may be required. If, during its review, the Bureau requires more information to complete its assessment, a supplementary information request will be made to the party(ies) in writing. The maximum number of days or weeks within which a supplementary information request should be responded to in order for the Bureau to meet the applicable service standard are set out below. If the supplementary information is not received within those time frames, the Bureau will suspend the service standard "clock" the day after the deadline and notice to this effect will be sent in writing to the parties. Once the supplementary information is received, the service standard "clock" will resume. Parties will be notified in writing that the service standard period has resumed and informed of the new date they should expect a response. *Time frames for supplementary information requests:* non-complex - 3 days complex - 2 weeks very complex - 3 weeks The service standard ends when the parties are advised that 1) the Bureau has no issues or 2) the Bureau believes the transaction raises serious competition concerns that, if left unresolved, may cause the Commissioner to file an application with the Competition Tribunal. Therefore, the time devoted to discussions or negotiations aimed at resolving issues, preparations required for proceedings before the Competition Tribunal, or the time required to conduct actual Competition Tribunal proceedings, are not included within service standard time frames. Weblink: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1337&lg=e

United Kingdom CC	**Competition Commission - Rules of Procedure** Administrative Timetable: Following appointment of an investigating team for the notified transaction, an administrative timetable is drawn up which provides for the major stages of investigation including information gathering, issuing of a statement of issues, and notification of provisional findings. In drawing up the timetable, account is taken of any views submitted by the merging parties. If at any time it appears that the administrative timetable cannot be met, a revised timetable may be drafted. **Weblink**: http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/15073compcommguidance1final.pdf
United States DOJ	**Department of Justice Merger Review Process Initiative** Indicative timelines: The competition agencies in the United States are required by law to complete their merger review within statutory time frames. Following the issuance of the request for additional information ("Second Request"), which must be issued 30 days after the notification filing, the agencies and the merging parties may enter into an agreement to govern the procedures for the duration of the investigation. Generally, there is no single model for procedural agreements. If an agreement would be appropriate, some of the potential commitments may include, for example: commitments for modification of and compliance with Second Requests and other discovery, including ordered or rolling production and compliance dates; access to the merging parties' technical personnel, discussions of timing and format of electronic production, deferral or waiver of hard copy production; dates for depositions of the parties' executives; dates for the mutual exchange of economic data and information and for discussions between the agency's and the parties' economists; dates by which the parties will submit white paper(s) and underlying datasets; dates by which agency staff will describe to the parties its recommendation to the agency decision makers, by which the parties will meet with decision makers, and dates before which the parties commit they will not close the transaction. Alternative investigative paths: Agency staff should also consider alternative plans if they believe that the investigation could be concluded upon the review of a particular issue in the transaction. For example, agency staff might identify certain potentially dispositive issues (*e.g.*, failing firm, entry) or documents (*e.g.*, bid documents) and agree to a schedule for a "quick look" at those issues or documents. If agency staff determines that the "quick look" is insufficient, they may agree to a schedule for the additional necessary phases of the investigation. Or the staff could agree to a schedule for a "quick look" at certain potentially dispositive issues or documents and excuse additional production in exchange for significant stipulations from the parties and adequate assurances of significant discovery, should the agency ultimately challenge

	the transaction. Weblink: http://www.usdoj.gov/atr/public/204895.htm

5. Merger investigations should be conducted with due regard for applicable legal privileges and related confidentiality doctrines. Competition agencies should establish principles for the handling of confidential information and for the exchange of confidential materials and information with other competition agencies.

EXEMPLARS: CONFIDENTIALITY AND LEGAL PRIVILEGE

Australia	**Draft ACCC Merger Review Process Guidelines, December 2005** Confidentiality: The competition agency has, historically, safeguarded the confidentiality of information received from the merging parties or acquired during market inquiries. For example, details relating to confidential merger proposals will not be included in the competition agency's public register. In the case of applications for authorisation of merger proposals, the competition agency must maintain the confidentiality of certain types of information (see Section 95(3)(a) of the Trade Practices Act): "…if the document or part of a document, or the submission or part of the submission, to which the request relates contains particulars of: 1. a secret formula or process; 2. the cash consideration offered for the acquisition of shares in the capital of a body corporate or of assets of a person; or 3. the current costs of manufacturing, producing or marketing the goods or services; the Commission shall exclude the document … from the register" The merging parties may also request that certain information be excluded from the public record, by reason of the confidential nature of the information in question. This, however, is at the agency's discretion (see Section 95(3)(b) of the Trade Practices Act): "…the Commission may, if it is satisfied that it is desirable to do so by reason of the confidential nature of matters contained in the document … exclude the document … from that register." Co-operation with other competition agencies: The competition agency may share non-confidential information relating to a transaction with other regulators, both nationally and internationally. Where necessary, the agency may request a confidentiality waiver from merging parties in order to exchange confidential information.

	Weblink [Draft Merger Review Process Guidelines]: http://www.accc.gov.au/content/item.phtml?itemId=719293&nodeId=file43bca25d6ab24&fn=Merger%20Review%20Process%20Guidelines%20-%20December%202005.pdf **Weblink** [Trade Practices Act]: http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/F6C5A3C20B2D1412CA256FE80001BAD5?OpenDocument&mostrecent=1
European Union	**Best Practices on the Conduct of EC Merger Control Proceedings** Confidentiality rules: "The members of the institutions of the Community, the members of committees, and the officials and other servants of the Community shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components." Article 287 EC Treaty As foreseen by Article 287 of the EC Treaty and Article 17(1) of the Implementing Regulation, the Commission safeguards the confidentiality of business secrets and other confidential information which is contained in submissions presented by all parties involved in a merger investigation. In order to adhere to the short deadlines for investigations, parties are required to clarify any queries relating to confidentiality of information without delay. **Weblink** [European Commission Best Practices]: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf **Weblink** [Article 287 EC Treaty]: http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:12002E287:EN:HTML **Weblink** [Implementing Regulation]: http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/l_133/l_13320040430en00010039.pdf
Netherlands	**Best Practices in Relation to Merger Cases** Cooperation within the European Competition Authorities (ECA): If an European CA member receives a merger notification that has been notified to any other ECA member(s), the receiving competition agency will inform the other ECA members by means of ECA notice. Case handlers may then contact each other if doing so may be useful for their investigation. However, confidential information may only be

	exchanged if strictly necessary for the investigation, if allowed by applicable national legislation, or when consent has been granted by the merging parties. **Weblink**: http://www.nmanet.nl/Images/BEST%20PRACTICES%20IN%20RELATION%20TO%20MERGER%20CASES_tcm16-83487.pdf
New Zealand	**New Zealand Commerce Commission Best Practice** Confidentiality: The competition agency has established internal processes to safeguard the confidentiality of information received from the merging parties or acquired during market inquiries. Likewise, information provided by third parties is kept confidential. The competition agency also has the power to issue a statutory confidentiality order to protect information received by it. Such orders prohibit the publication or communication of any information, document, or evidence furnished or tendered to, or obtained by the competition agency in connection with the operations of the competition agency; or the giving of evidence involving any such information, document, or evidence. Co-operation with other competition agencies: The competition agency may share non-confidential information relating to a transaction with other regulators, both nationally and internationally. Where necessary, the agency may request a confidentiality waiver from merging parties in order to exchange confidential information. **Weblink**: While neither the New Zealand Commerce Commission Merger Guidelines nor on its website specifically set out the above process, the competition agency, as a practical and procedural matter, complies with this ICN guideline.
United Kingdom OFT	**Office of Fair Trading - Mergers - Procedural Guidance** Confidentiality: "It is strict OFT policy to observe confidentiality in all aspects of its operation. Under Part 9 of the Act, information relating to any business of an undertaking may not be disclosed unless the disclosure is permitted under the Act. For example, such disclosure is permitted with the consent of the person carrying on that business, if such disclosure is for the purpose of facilitating the performance of the OFT's statutory functions, or in pursuance of a European Community obligation." Procedural Guidance, para. 5.9 **Weblink**: http://www.oft.gov.uk/NR/rdonlyres/791B6BA9-E321-49DD-8040-01DB2E74F5C6/0/oft526.pdf

6. Both merging parties and interested third parties should be afforded a meaningful opportunity to express their views. Such opportunities should extend without discrimination to foreign, as well as domestic firms (RP VII (A)). Third parties should be allowed to express their views during the merger review process (RP VII (C)) however this should not adversely impact the timing of the review.

EXEMPLARS: PROVISIONS THAT ALLOW THIRD PARTIES TO EXPRESS THEIR VIEWS

Australia	**ACCC Merger Guidelines** "If the requirements of the parties are that the proposed acquisition is confidential, the Commission is unlikely to be in a position to provide the parties with its finalised view about the acquisition. The Commission's position is that it requires the views of market participants prior to providing a final response to parties whether is considers that a proposed acquisition of shares or assets may or may not contravene the Act." Merger Guidelines, para. 4.6 **Commentary**: With the exception of a confidential review of merger proposals, the competition agency will usually seek the views of relevant third parties before responding to merging parties who have informally approached the agency prior to entering into a transaction, or who have made an application for authorisation. Market inquiries conducted by the agency generally include contacts with the merging parties' competitors, suppliers, customers, industry associations, as well as government agencies and departments, overseas agencies, consumer groups and trade unions. In case of applications for authorisation, third parties are invited to submit their views in writing which, subject to confidentiality claims, will then be placed on the public register. Where merging parties have requested the confidential review of a proposal, the agency will usually wish to undertake market inquiries when the transaction enters the public domain. **Weblink**: http://www.accc.gov.au/content/item.phtml?itemId=304397&nodeId=file423f41da237c1&fn=Merger%20Guidelines.pdf
European Union	**Best Practices on the Conduct of EC Merger Control Proceedings** Requests for information: "In carrying out its duties the Commission may obtain all necessary information from relevant persons, undertakings, associations of undertakings and competent authorities of Member States." Best Practices, para. 26 **Commentary**: This usually begins after notification, but may be

	initiated prior to notification where necessary. Information is generally sought by way of written Requests for Information. Triangular meetings: "In addition to bilateral meetings between DG Competition and the notifying parties, other involved parties or third parties, DG Competition may decide to invite third parties to a "triangular" meeting where DG Competition believes it is desirable, in the interests of the fact-finding investigation, to hear the views of the notifying parties and such third parties in a single forum. Such triangular meetings, which will be on a voluntary basis and which are not intended to replace the formal oral hearing, would take place in situations where two or more opposing views have been put forward as to key market data and characteristics and the effects of the concentration on competition in the markets concerned." Best Practices, para. 38 **Weblink**: http://europa.eu.int/comm/competition/mergers/legislation/regulation/best_practices.pdf
Netherlands	**Best Practices in Relation to Merger Cases** Involvement of third parties: "Third parties are an important source of information and may therefore play an important role in investigations of mergers. Through its contact with third parties, NMa can obtain a more complete view of the markets to be investigated, supplement the data (such as the size of the market) submitted by the notifying parties and, in some cases, even uncover a possible competition concern. The responses of third parties therefore often help to understand the markets and to analyse possible competition concerns. To guarantee a balanced investigation, where necessary, NMa collects information from various players on the relevant market(s) in order to obtain the most comprehensive possible understanding of these market(s)." Best Practices, para. 37 **Commentary**: On the notification form, merging parties must identify the most important third parties (customers, competitors, suppliers, branch organisations). Third parties are then invited to submit their views at a number of points during the investigation: a. Three to five days after receipt of a notification, a notice is published in the Netherlands Government Gazette. Third parties are invited to submit their views within seven days; b. Questions are often sent to third parties during the investigation; c. After submission of proposed remedies (so-called 'market testing of remedies'); d. During a hearing, either at the third party's own initiative or by

	invitation from the competition agency; If necessary, the competition agency may meet with third parties to discuss their response. **Weblink**: http://www.nmanet.nl/Images/BEST%20PRACTICES%20IN%20RELATION%20TO%20MERGER%20CASES_tcm16-83487.pdf
New Zealand	**New Zealand Commerce Commission Best Practice** The competition agency is required to give notice of the merger application to any other person who, in the competition agency's opinion, is likely to have an interest in the application. The competition agency will therefore seek the views of relevant third parties before responding to the merging parties. In some cases, third parties may be invited to submit their views in writing. Any confidential information contained in such submissions is protected from disclosure by the agency. The competition agency typically also will consult with any person who, in its opinion, is able to assist in making a formal merger determination. **Weblink**: While neither the New Zealand Commerce Commission Merger Guidelines nor on its website specifically set out the above process, the Commission, as a practical and procedural matter, complies with this ICN guideline.
United Kingdom OFT	**Office of Fair Trading - Mergers - Procedural Guidance** Invitation to comment: "The OFT will invite comments on any public merger situation under review from interested third parties by means of an invitation to comment notice published through the Regulatory News Service and on its website at www.oft.gov.uk, and will also take note of any unsolicited comments that are received." Procedural Guidance, para. 5.5 **Weblink**: http://www.oft.gov.uk/NR/rdonlyres/791B6BA9-E321-49DD-8040-01DB2E74F5C6/0/oft526.pdf

Chapter Six
Transparency

Transparency refers to the ability of the public to see and understand the workings of the merger review process. The RPs make clear that transparency is important to achieve consistency, predictability and, ultimately fairness in applying merger review laws, thereby enhancing the credibility and effectiveness of merger enforcement. Transparency also allows merging parties to better understand and predict the likely outcome of particular cases and the time and costs the review is likely to entail. (RP VIII(A) comment 1). The Recommended Practices recognize, however, that transparency requirements are limited by the obligation to protect confidential information.

There are many ways for competition agencies to promote transparency. These include, among others, publishing general guidelines and notices on substantive law and procedure, publishing individual enforcement and non-enforcement decisions, issuing press releases on important decisions; issuing statements explaining actions or non-actions that signify a change in enforcement policy, delivering speeches, and publishing informational materials. Methods can be combined for increased effectiveness. (RP VIII(C) comment 1). In the discussion that follows, the Working Group has attempted to provide examples of the various ways jurisdictions have made their laws, regulations, and other materials relevant to merger law, policy and practice readily available to the public.

1. Merger regimes should be transparent with respect to the jurisdictional scope of the merger review law. Publicly available materials should permit ready determination of: (i) the types of transaction to which the merger law applies; (ii) any exemptions or exclusions from the merger law; and (iii) the precise tests or thresholds that govern whether the parties must notify the transaction or whether the competition agency has jurisdiction over a transaction. (RP VIII(B) comment 1). Practical examples are provided in Chapter One of this Handbook. Some additional examples of the ways competition agencies have made the scope of their merger law transparent are provided below.

Canada	**Notifiable Transactions under Part IX of the Competition Act - Interpretation Guidelines** The set of eleven guidelines is intended to assist parties and their counsel in interpreting and applying the merger law relating to notifiable transactions. Guidance regarding whether a specific proposed transaction is notifiable may be requested from the Bureau through its program of written opinions. **Weblink**: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1747&lg=e
Germany	**Information Leaflet Relating to the German Control of Concentrations** This information leaflet briefly explains central terms that are relevant to the notification of concentrations such as thresholds, time limits, definition of a concentration, identification of participating enterprises, and outlines merger review procedures in Germany. **Weblink**: http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/

	Merkblaetter_englisch/00_MerkblattFuKoD_e.pdf
Korea	**A Brief Overview of the Korean M&A Reporting System** This overview answers a series of who, what, when where and how questions, including: which transactions to report; who is required to file a report; when the report should be filed; and how to file a report. **Weblink**: http://www.ftc.go.kr/icn/m_a_guide_5.doc
United States FTC	**Introductory Guide II to the Premerger Notification Program To File or Not To File: When You Must File a Premerger Notification Report Form** This guide is the second in a series of guides (discussed further below). It describes the criteria used to determine whether a transaction is subject to mandatory pre-closing notification, and uses a hypothetical transaction to illustrate the application of the Premerger Notification Rules. Each year, the FTC's Premerger Notification Office ("PNO") answers thousands of telephone queries regarding the HSR rules, providing informal advice on the potential reportability of transactions and on completion of the Notification and Report Form. To confirm the advice, the private bar often memorializes the interpretation in a follow-up letter stating the factual situation, the questions raised, and the advice given. The PNO has created a searchable database to provide quick access to these letters, which number in the thousands. The PNO publicizes this service on its website: "If after reviewing the statute and rules you still can't figure out if your transaction structure requires premerger notification, you can contact a Premerger Notification Office (PNO) staff member for informal guidance. This informal advice is not binding on the PNO, Commission staff or the Commission but is provided to assist your determination of reportability. Staff telephone numbers and e-mail addresses are at www.ftc.gov/bc/hsr/staffphone.htm. If you call and receive advice from the PNO, you may confirm the staff member's advice by sending a letter to the PNO. You should address the letter to the staff member and include the date you called, reiterate the facts presented, and state the conclusion reached. Note that letters received are subject to the Freedom of Information Act. Letters received can be reviewed in redacted form (confidential information such as names, *etc.* are removed) on the PNO's informal interpretation database, located at http://www.ftc.gov/bc/hsr/informal/index.html." **Weblink**: http://www.ftc.gov/bc/hsr/introguides/guide2.pdf

2. Merger regimes should be transparent with respect to the procedures applicable to merger review. The Transparency Recommended Practice recommends that publicly available materials permit ready determination of: (i) the identity and contact details of the competition agencies; (ii) any filing deadlines; (iii) notification procedures, including the information to be provided in the initial filing; (iv) any filing fee; (v) review periods; (vi) suspensive periods and any limits on implementing the transaction prior to clearance: (vii) investigative procedures; (viii) any deadlines that the merging parties, third parties, or the competition agencies must obey during the review period; (ix) procedures and deadlines for appealing adverse decisions or for challenging a merger: (x) procedural rights of merging and third parties; and (xi) enforcement procedures pertaining to violations of the merger laws. (RP VIII(B) comment 2)

Canada	**Notifiable Transactions and Advance Ruling Certificates (ARC) Under the Competition Act: Procedures Guide** The Procedures Guide provides an overview of merger notification requirements and sets out the general approach taken by the Competition Bureau (the "Bureau") with respect to prenotification and ARC procedures. Fees and Service Standards Handbook This handbook is intended to provide guidance as to the type of information that should be included as part of a competition brief or additional submissions appended to a merger notification or in a request for an ARC. These materials will assist the Bureau in its determination of the complexity of a proposed transaction or business conduct and will help expedite the review process. **Weblinks**: http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1287&lg=e http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1337&lg=e
ICN	**Merger Templates** To provide ready public access to information on ICN members' merger review systems, the Notification & Procedures Subgroup has established links to ICN Members' responses to a set of questions addressed to member agencies (the "template"). The template is designed to highlight important features of each member's merger review system, such as notification thresholds and review periods. **Weblink**: http://www.internationalcompetitionnetwork.org/mergercontrollaws.html

Ireland	**Revised Procedures for the Review of Mergers and Acquisitions** The Revised Procedures outline the Authority's approach to the examination of mergers and acquisitions, publication of notifications, preliminary assessment, requirements for further information, discussions with merging parties, special provisions for media mergers, submissions from third parties and determinations by the Authority. **Weblink**: http://www.tca.ie
United Kingdom OFT	**Mergers Procedural Guidance** This Guidance provides extensive details on the OFT's merger review procedures, including the various ways parties can ask the OFT to consider a merger, the content of submissions, and the assessment process. **Weblink**: http://www.oft.gov.uk/NR/rdonlyres/791B6BA9-E321-49DD-8040-01DB2E74F5C6/0/oft526.pdf
United States FTC	**Guide I: What is the Premerger Notification Program? An Overview** **Guide III: A Model Request for Additional Information and Documentary Material** **Guide IV: What Goes Where – How To Complete the Premerger Notification Report Form** Guide I is an overview of the premerger program and the way it operates, Guide III contains materials designed for the attorneys of the antitrust enforcement agencies to assist in preparing requests for additional information. It is included in this series to provide an example of what the parties might expect if either of the enforcement agencies issues a second request. Guide IV clarifies the correct method for providing the required information in the notification form and includes two sets of sample forms that illustrate the proper manner by which to complete the form (*i.e.*, for an asset acquisition and for a voting securities acquisition). **Weblink**: http://www.ftc.gov/bc/hsr/introguides/introguides.htm

3. Merger laws and regulations often are written in general terms, and the principles and criteria used to apply the substantive standard of review set forth in the basic legislation are often developed through administrative practice and case law. Accordingly, to achieve transparency, publicly available materials should include not only the basic legislation, but also the relevant case law, enforcement policies,

and administrative practices that clarify and develop the basic legal framework. In particular, these supplemental materials should provide insight into the substantive principals and criteria (i.e., analytical framework) that the competition agency uses in applying the law. After acquiring sufficient experience, competition agencies may wish to consider publishing guidelines on merger analysis, procedure, and/or jurisdiction to assist interested parties in handling future merger cases. Many competition agencies find it useful to obtain public input prior to issuing such guidelines.

ICN	**Merger Guidelines Workbook (forthcoming April 2006)** The workbook contains a checklist of topics that authors of new or revised merger guidelines may wish to cover, with an explanation as to why these topics have value in merger assessment and suggests how the topics might be assessed in practice. It is expected that the Workbook will represent a useful sourcebook on a framework for analysing the competition effects of mergers. The Merger Working Group also has undertaken a project on merger guidelines that describes how certain merger guidelines address key topics (market definition, unilateral effects, coordinated effects, barriers to entry and expansion, and efficiencies). Available at http://www.internationalcompetitionnetwork.org/seoul/analysisofmerger.html **Weblink**: http://www.internationalcompetitionnetwork.org/investigationandanalysis.html

4. The RPs advise that a reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice.

Australia	**Public Competition Assessments** To improve the handling of matters, and provide an enhanced level of transparency in its decision making, the ACCC has commenced a process of providing a Public Competition Assessment outlining the basis for reaching its final conclusion on a transaction proposal where: a merger is rejected; a merger is subject to enforceable undertakings; the merger parties seek such disclosure; or a merger is approved but raises important issues that the ACCC considers should be made public. **Weblink**: http://www.accc.gov.au/content/index.phtml/itemId/501191/fromItemId/6204
European Union	**Publications, press-releases and Commission decisions on individual cases** The EC posts publications, press-releases and Commission decisions on individual cases arranged by case number, company name, date, decision type and NACE code.

	Weblink: http://europa.eu.int/comm/competition/mergers/cases/
Germany	**Publication of Decisions** The Bundeskartellamt publishes all decisions to block a merger, to condition a clearance, or to clear a merger in phase II. **Weblink**: http://www.bundeskartellamt.de/wDeutsch/archiv/EntschFusArchiv/ArchivFusion.shtml
United States DOJ	**Issuance of Public Statements Upon Closing of Investigations** In December 2003, the Antitrust Division announced that on appropriate occasions it would issue a public statement describing the reasons for closing an antitrust investigation. According to the notice, the Antitrust Division will consider issuing a public statement in the following circumstances and with the following considerations in mind: The Division will consider issuing a statement only if the investigation has previously been publicly confirmed by the Department; the Division will evaluate whether the matter has received substantial publicity -- in general the more publicity that a matter has received the more likely it is that the Division will issue a statement; the Division will evaluate the value to the public in receiving information regarding the reasons for non-enforcement, including public trust in the Department's enforcement, and the value of the analysis for other enforcers, businesses and consumers. The Division, in its notice, identifies the steps that it will adhere to when issuing such a statement, including that no confidential or privileged information will be disclosed. **Weblink**: http://www.usdoj.gov/atr/public/guidelines/201888.htm
United States FTC	**Issuance of Public Statements Upon Closing of Investigations** The FTC has begun issuing public statements describing the reasons for closing certain investigations, although it has not issued a formal policy statement of its intentions to do so. See, for example: "Statement of the Commission In the Matter of Arch Coal, Inc., et al.," June 13, 2005. **Weblink**: http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf "FTC's Competition Bureau Closes Investigation into Comcast, Time Warner Cable and Adelphia Communications Transactions" **Weblink**: http://www.ftc.gov/opa/2006/01/fyi0609.htm

5. The RPs encourage agencies to publish materials on a publicly accessible, dedicated website. (RP VIII(C) comment 4)

ICN	To provide ready public access to information on ICN members' merger review systems, the Notification & Procedures Subgroup has established links to merger-related materials on ICN members' websites. On these linked pages, members have posted materials that may include their current merger legislation, implementing rules and regulations, guidelines, and related materials. **Weblink**: http://www.internationalcompetitionnetwork.org/mergercontrollaws.html

Chapter Seven
Remedies

1. **Addressing the Competitive Harm from the proposed transaction:** The RP's make clear that effective merger law enforcement requires a careful factual and economic analysis of the proposed transaction, including detailed analysis of the markets, entry, potential efficiencies, and the possibility of competitive harm.

   If the enforcement agency determines that the transaction would be unlawful, then the goal of that enforcement decision should be to prevent the competitive harm that might be created by the merger – that is, to maintain or restore the competition that would be lost in the transaction (RP XI (A) comment 1). In most cases, that goal can be achieved by imposing remedies that serve to ameliorate the anti-competitive effects – most often by requiring a divestiture. If, however, such remedies are unlikely to prevent that harm, or if the merging parties do not agree to such a remedy, the merger may need to be prohibited outright (RP XI (A) comment 2). In jurisdictions that have had an active merger enforcement program, the great majority of unlawful transactions have been dealt with by agreed-to remedies that permit the transaction, as revised, to go forward.

   An effective merger law enforcement program relies on the business and legal communities' full understanding of the agency's analytical framework and procedural regime. Accordingly, the agency should strive to make clear to the public how it examines mergers and what procedures are in place for resolving concerns through agreed-to revisions to the transaction. Some major enforcement agencies have made efforts in recent years to make their views understood, through formal issuance of "guides," "bulletins," "notices," and other public documents.

EXEMPLARS – GENERAL SOURCES:

Canada	**Draft:** Information Bulletin on Merger Remedies in Canada (2005) (DRAFT Canada Bulletin); **Weblink:** http://www.competitionbureau.gc.ca/PDFs/info_bulletin_mergerremedies_051017_e.pdf
European Union	Commission notice on remedies acceptable under Council Regulation (EEC) No. 4064/89 and under Commission Regulation (EC) No 447/98 (2001) (EC Notice); **Weblink:** http://europa.eu.int/comm/competition/mergers/legislation/remedies.htm

United States DOJ	Antitrust Division Policy Guide to Merger Remedies (2004)(DOJ Guide); **Weblink:** http://www.usdoj.gov/atr/public/guidelines/205108.htm
United States FTC	Frequently Asked Questions about Merger Consent Order Provisions (2002), (BC FAQs); **Weblink:** http://www.ftc.gov/bc/mergerfaq.htm Statement on Negotiating Merger Remedies (2003), (BC Remedies Statement); **Weblink:** http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm Statement on Guidelines for Merger Investigations (2002) (BC Investigations Statement); **Weblink:** http://www.ftc.gov/os/2002/12/bcguidelines021211.htm
United Kingdom OFT and CC	Application of divestiture remedies in merger inquiries: Competition Commission Guidelines (2004) (U.K. Guidelines); **Weblink:** http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/divestiture_remedies_guidance.pdf

All of these publications are useful tools for learning the positions and approaches that these particular agencies follow in examining how to remedy unlawful merger transactions. It would be useful for each enforcement agency to release such information for its own jurisdiction.

EXEMPLARS: OVERALL PURPOSE

Canada	"Remedies are required when a merger or proposed merger ("merger") is likely to prevent or lessen competition substantially in one or more relevant markets. In such cases, the Commissioner of Competition (hereinafter referred to as "the Bureau" or "the Commissioner") will take remedial action to prevent a merged entity, alone or in coordination with other firms, from having the ability to exercise market power. When the Bureau has reason to believe that a merger is likely to prevent or lessen competition substantially, it can either apply to the Competition Tribunal ("Tribunal") to challenge it under section 92 of the Competition Act ("the Act") or negotiate remedies with the merging parties to resolve the competition concerns by consent." DRAFT Canada Bulletin at ¶ 1.

European Union	"It is the responsibility of the Commission to show that a concentration creates or strengthens market structures which are liable to impede significantly effective competition in the common market. It is the responsibility of the parties to show that the proposed remedies, once implemented, eliminate the creation or strengthening of such a dominant position identified by the Commission. To this end, the parties are required to show clearly, to the Commission's satisfaction in accordance with its obligations under the Merger Regulation, that the remedy restores conditions of effective competition in the common market on a permanent basis." EC Notice at ¶ 6.
United States DOJ	"The purpose of this Guide is to provide Antitrust Division attorneys and economists with a framework for fashioning and implementing appropriate relief short of a full-stop injunction in merger cases. The Guide focuses on the remedies available to the Division and is designed to ensure that those remedies are based on sound legal and economic principles and are closely related to the identified competitive harm. The Guide also sets forth policy issues that may arise in connection with different types of relief and offers Division attorneys and economists guidance on how to resolve them." DOJ Guide at ¶ I.
United States FTC	"The Commission's remedial objective - to prevent the anticompetitive effects likely to result from a merger that the Commission has determined is unlawful - provides the framework for the staff's analysis of the scope of a proposed divestiture. That framework is supported by the conclusions the staff has drawn about the relevant market, barriers to entry, competitive effects, and likely efficiencies. If the Commission concludes that a proposed settlement will remedy the merger's anticompetitive effects in the relevant market, it will likely accept that settlement and not seek to prevent (or unwind) the merger." BC Remedies Statement (Footnotes omitted.)
United Kingdom CC	"Where the CC concludes that a relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition (SLC), it will decide whether action should be taken by the CC, and whether to recommend action be taken by others, to remedy, mitigate or prevent the SLC or any adverse effect resulting from the SLC. In either case, the CC will need to state in its report the action to be taken and what it is designed to address." U.K. Guidelines at ¶ 1.5.

EXEMPLARS: MAKING REMEDIES PUBLIC

United Kingdom CC	"The CC will start discussing possible remedies with the merger parties and others after publication of its notice of possible remedies with or following publication of provisional findings. The CC will consider remedy options

	proposed by the merger parties and others in addition to its own options. The onus will be on the parties to demonstrate that their proposed remedy options will address the expected SLC and the resulting adverse effects. The CC will consult customers, competitors and other relevant parties, as necessary, to test remedy options prior to arriving at a final decision on remedies. The CC will publish its decisions on the competition question and remedies together with supporting reasons and information in a final report. The report will contain sufficient detail on remedies to provide a firm basis for implementation by the CC through the acceptance of undertakings or the imposition of orders. The action the CC takes in respect of remedies must be consistent with the decisions in the final report unless there has been a material change of circumstances since the preparation of the report or the CC has a special reason for acting differently." U.K. Guidelines at ¶¶ 1.9 – 1.10.

2. **Providing a Transparent Framework for the Proposal, Discussion, and Adoption of Remedies:** The RPs underscore that it is incumbent on any enforcement agency, as noted above, to explain clearly both the analytical framework for its enforcement efforts and the procedures it will follow in pursuing those efforts (RP XI (B) comment 1). In the United States, the process is set forth in statutes, such as the Tunney Act, 15 U.S.C. § 16, et seq., and the Federal Trade Commission Act, 15 U.S.C. § 41, et seq., as well as the FTC's Rules of Practice, 16 C.F.R. § 0.1, et seq.

EXEMPLARS: STATUTES, RULES, LESS FORMAL GUIDELINES

European Union	"Pursuant to Article 6(2) of the Merger Regulation the Commission may declare a concentration compatible with the common market, where it is confident that following modification a notified concentration no longer raises serious doubts within the meaning of paragraph 1(c). Parties can submit proposals for commitments to the Commission on an informal basis, even before notification. Where the parties submit proposals for commitments together with the notification or within three weeks from the date of receipt of the notification, the deadline for the Commission's decision pursuant to Article 6(1) of the Merger Regulation is extended from one month to six weeks." EC Notice at ¶¶ 33 et seq.
United States	Tunney Act, 15 U.S.C. § 16, et seq.; Federal Trade Commission Act, 15 U.S.C. § 41, et seq.; FTC Rules of Practice, 16 C.F.R. § 0.1, et seq.
United States FTC	**"Opportunity to submit a proposed consent order:** (a) Where time, the nature of the proceeding, and the public interest permit, any individual, partnership, or corporation being investigated shall be afforded the opportunity to submit through the operating Bureau or Regional

	Office having responsibility in the matter a proposal for disposition of the matter in the form of a consent order agreement executed by the party being investigated and complying with the requirements of §2.32, for consideration by the Commission in connection with a proposed complaint submitted by the Commission's staff. (b) After a complaint has been issued, the consent order procedure described in this part will not be available except as provided in §3.25(b)." Rule of Practice 2.31, 16 CFR § 2.31
United States FTC	"Each merger remedy must be examined in the context of the underlying antitrust case. In the majority of horizontal merger cases, however, the Commission will require a divestiture to remedy the likely anticompetitive effects; there may be additional obligations imposed on the parties as the circumstances require. After the staff has identified likely anticompetitive effects from the merger, it will be prepared to discuss with the parties what it has learned and what it believes an acceptable divestiture must include. This discussion should involve on the Commission's side the investigating staff from the Bureau of Competition (including its Compliance Division) and the staff from the Bureau of Economics. The staff has found it productive at this point in the investigation to involve on the parties' side not only outside counsel (if the parties are so represented), but representatives from inside the firm as well, including individuals involved in operating the company." Statement on Negotiating Merger Remedies, generally.

Less formal explanations also appear in various enforcement guides, such as the Merger Guidelines, and other materials available on the FTC's and DOJ's websites and elsewhere.

Whether an agency has a strictly formal procedure for submitting proposed remedies, as at the EC, or follows a less formal approach, as at the U.S. agencies, it is important that a party know what type of remedy package will satisfy the agency. For example, the FTC Statement describes what steps a party must follow to propose, negotiate, and complete a remedy package that satisfies the agency. In this way, parties will know exactly where they stand, and, whether the two sides agree or not on the substance of the matter, there will be little disagreement about what steps the parties must take, and what issues they must address.

EXEMPLARS – HOW A REMEDY MAY BE RAISED

Canada	"When a merger is likely to prevent or lessen competition substantially, the Bureau generally prefers to negotiate an agreement with the merging parties without proceeding to litigation. This approach enables a less costly and more expeditious resolution of the matter. In negotiating a resolution, the Bureau aims to address competition concerns in all markets where a likely substantial lessening or prevention of competition has been identified. In cases where it is not possible to address all such competition issues on consent, where appropriate the Bureau is prepared to consider limiting or narrowing the scope of litigation. This enables the uncontentious parts of a merger to proceed while the Bureau challenges those portions that are likely to result in a substantial lessening or prevention of competition before the

	Tribunal. Such settlements normally require the merging parties to agree, at a minimum, to hold separate the businesses and/or assets that could be the subject of an order. Hold-separate provisions are described more fully in Parts II and III below." DRAFT Canada Bulletin at ¶ 4. **Commentary:** Not all jurisdictions follow this precise approach (allowing uncontentious parts of a merger to proceed), but parties involved with Canada's Competition Bureau understand the necessary element that they must show in proposing remedies to the Bureau.

EXEMPLARS: USE OF THE "MARKET TEST"

If an agency will follow the practice of consulting with appropriate third parties when considering proposed remedies (the "market test"), that practice should be clearly enunciated (RP XI (B) comment 2).

Canada	"Prior to agreeing to an asset package, the Bureau may seek information from the marketplace to determine whether a proposed remedy would be saleable, viable and ultimately effective in eliminating the substantial lessening or prevention of competition arising from a merger. This market testing, which is subject to confidentiality constraints, may include seeking information from industry participants such as competitors, customers and suppliers as well as from industry experts." DRAFT Canada Bulletin at ¶ 17.
United Kingdom CC	"The CC will consult customers, competitors and other relevant parties, as necessary, to test remedy options prior to arriving at a final decision on remedies." U.K. Guidelines at ¶ 1.9.
United States DOJ	DOJ also may consider the views of customers and suppliers. "Because the purpose of divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets will be redeployed elsewhere. Thus, there should be evidence of the purchaser's intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product. In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. However, in no case will they be given veto power over a proposed purchaser." DOJ Guide at ¶ IV.D.

United States FTC	The FTC may also solicit information from third parties during the process: The parties will likely negotiate the terms of the proposed decision and order with the staff at the same time they are negotiating terms of the purchase agreement with the proposed up-front buyer. The staff will not disclose to the buyer the details of the negotiations between the staff and the parties. The parties should be aware, however, that the staff will discuss relevant issues with the buyer, especially those concerning the scope of the assets to be divested. The staff may also discuss these issues with others who might be knowledgeable about the market and be able to evaluate the proposed divestiture, such as other competitors, customers, suppliers, and employees. The process, therefore, will be an iterative one; to the extent the staff continues to learn about the market and competition as it questions the proposed buyer, competitors, customers, suppliers, and others, changes to the asset package, the proposed decision and order, or the purchase agreement may be required. Such changes may include adding assets to or deleting assets from the package of assets to be divested; adding obligations to or eliminating obligations from the decision and order, or otherwise altering or modifying the proposed divestiture agreement." BC Remedies Statement **Commentary:** In addition, at a later point in the process when the FTC is considering whether to issue a proposed consent agreement, it solicits public comment on it and issues an accompanying "Analysis to Aid Public Comment," explaining the basis of its enforcement action. See Rule 2.34(c) of the FTC's Rules of Practice, 16 C.F.R. § 2.34(c). By making clear to the legal and business community how the agency will entertain and negotiate merger remedies, the agency's enforcement efforts will be more successful.

3. **Procedures and Practices Should be Established to Ensure that Remedies are Effective and Easily Administrable.** An enforcement agency should establish clear procedures for assuring that remedies are enforceable. Clear and precisely written documents are critical, both because the parties will fully understand their obligations and because the agency will be able to require compliance. It may therefore be necessary to include in remedy documents provisions that assure the agency's ability to obtain compliance.

   Comment: To be effective, and to enhance administrability, a remedy should define the parties'compliance requirements clearly and precisely. For example, it should define the businesses or assets covered by a remedy as well as the terms under which the divestiture is to be carried out, the specific characteristics of a suitable buyer, and any applicable deadlines.

EXEMPLARS: STATEMENTS AND SPECIFIC LANGUAGE

European Union	"Commitments are offered as a means of securing a clearance, with the implementation normally taking place after the decision. These commitments require safeguards to ensure their successful and timely implementation. These implementing provisions will form part of the commitments entered

	into by the parties vis-à-vis the Commission. They have to be considered on a case-by-case basis. This is in particular true for the fixed time periods laid down for the implementation, which should in general be as short as is feasible. Consequently, it is not possible to standardise these requirements totally." EC Notice at ¶ 44
United States DOJ	"A remedy is not effective if it cannot be enforced. Remedial provisions that are too vague to be enforced or that could be construed when enforced in such a manner as to fall short of their intended purpose can render useless the enforcement effort that went into investigating the transaction and obtaining the decree, leaving the competitive harm unchecked. The same is true of a decree that fails to bind a person or entity necessary to implementing the remedy. A defendant will scrupulously obey a decree only when the decree's meaning is clear, and when the defendant and its agents know that they face the prospect of fines or imprisonment if they disregard the decree. Courts are certain to impose such sanctions only when (a) the decree provisions are clear and understandable and (b) the defendant's agents knew, or should have known, about the decree provisions." DOJ Guide at ¶ II.
United States FTC	The FTC typically requires parties to include the following paragraph in a consent agreement: "By signing this Consent Agreement, Respondent represents and warrants that it can accomplish the full relief contemplated by the Consent Agreement and the attached Order, and that all parents, subsidiaries, affiliates, and successors necessary to effectuate the full relief contemplated by this Consent Agreement and Order are bound thereby as if they had signed this Consent Agreement and were made parties to this proceeding and to the Order."

Divestitures: RP XI (B) Comment 2: Remedies can take two basic forms: (a) structural remedies, which involve a change in the market structure (such as commitments to divest assets), and (b) behavioral remedies, which involve constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses). Certain remedies, such as commitments involving licensing of intellectual property rights or access to facilities, may be characterized as structural or behavioral, depending on the circumstances. Remedies adopted in respect of a proposed transaction may consist of structural and/or behavioral components. Structural remedies are easier to administer than behavioral remedies because they do not require medium or long-term monitoring to ensure compliance.

EXEMPLARS AND COMMENTARY: SCOPE OF THE DIVESTITURE PACKAGE

Canada	"The anti-competitive effects that are likely to arise from a merger result from a structural change to the market. Unless structural changes that have harmful effects on competition are challenged, they are often long-lasting and can adversely affect innovation, economic performance and consumer welfare. Accordingly, structural remedies are usually necessary to eliminate the substantial lessening or prevention of competition arising from a merger.

	Competition authorities and the courts generally prefer structural remedies because terms are clearer and more certain, less costly to administer and readily enforceable. Structural remedies avoid many of the disadvantages associated with behavioural remedies, including: • direct costs of monitoring the activities of the merged entity, and its adherence to the terms of the remedy; • indirect costs associated with efforts by the merged entity to circumvent the spirit of the remedy; and • costs to other market participants who must rely on arbitration proceedings arising from self-governing mechanisms. In addition, behavioural remedies are typically less effective than structural remedies because attempting to regulate conduct may prevent the merged entity from efficiently responding to changing market conditions and they may restrain potentially procompetitive behaviour by the merged entity or other market participants. Determining the appropriate duration of a behavioural remedy may also be difficult, especially because it often depends on how long it will take for new entry or expansion to be established." DRAFT Canada Bulletin at ¶¶ 9-10 (footnote omitted).
European Union	"Where a proposed merger threatens to create or strengthen a dominant position which would impede effective competition, the most effective way to restore effective competition, apart from prohibition, is to create the conditions for the emergence of a new competitive entity or for the strengthening of existing competitors via divestiture." EC Notice at ¶ 13.
European Union	"In a typical divestment commitment, the business to be divested normally consists of a combination of tangible and intangible assets, which could take the form of a pre-existing company or group of companies, or of a business activity which was not previously incorporated in its own right. Thus the parties, when submitting a divestiture commitment, have to give a precise and exhaustive definition of the intended subject of divestment (hereafter referred to as "the description of the business" or "the description"). The description has to contain all the elements of the business that are necessary for the business to act as a viable competitor in the market: tangible (such as R & D, production, distribution, sales and marketing activities) and intangible (such as intellectual property rights, goodwill) assets, personnel, supply and sales agreements (with appropriate guarantees about the transferability of these), customer lists, third party service agreements, technical assistance (scope, duration, cost, quality) and so forth. In order to avoid any misunderstanding about the business to be divested, assets that are used within the business but that should not, according to the parties, be divested, have to be identified separately." EC Notice at ¶ 46.

United Kingdom CC	"Structural remedies, such as divestiture or prohibition, are likely to be preferable to behavioural remedies, which seek to regulate the behaviour of firms, as structural remedies address the effects of a merger more directly and will usually require less monitoring or enforcement of compliance. However, behavioural remedies may be considered more suitable in some circumstances, for example where the SLC is expected to be of limited duration or where the relevant customer benefits expected from a merger are substantial and behavioural remedies are likely to be more effective in preserving these than structural remedies. In certain circumstances, it may also be necessary to add behavioural remedies to a structural remedy in order to provide an effective and comprehensive solution. For example, a divestiture may need to be supported by a commitment from the merged firm to supply inputs for a limited period at agreed prices." U.K. Guidelines at ¶ 1.8.
United States DOJ	"Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market. A carefully crafted divestiture decree is "simple, relatively easy to administer, and sure" to preserve competition. A conduct remedy, on the other hand, typically is more difficult to craft, more cumbersome and costly to administer, and easier than a structural remedy to circumvent." DOJ Guide at ¶ III.A.

Commentary – Additional Necessary Terms:

United States DOJ	Limited conduct relief can be useful in certain circumstances to help perfect structural relief. One example of a potentially appropriate transitional conduct provision is a short-term supply agreement. While long-term supply agreements between the merged firm and third parties on terms imposed by the Division are generally undesirable, short-term supply agreements on occasion can be useful when accompanying a structural remedy. For example, if the purchaser is unable to manufacture the product for a limited transitional period (perhaps as plants are reconfigured or product mixes are altered), a short-term supply agreement can help prevent the loss of a competitor from the market, even temporarily. In such a case, the potential problems arising from supply agreements are more limited, given their short duration, and may be outweighed by their ability to maintain another competitor during the interim. Similarly, temporary limits on the merged firm's ability to reacquire personnel assets as part of a divestiture may at times be appropriate to ensure that the purchaser will be a viable competitor. The divestiture of any portion of a business unit would normally involve the transfer of personnel from the merging firms to the purchaser of the assets. Incumbent employees often are essential to the productive operation of the divested assets, particularly in the period immediately following the divestiture (i.e., they may be integral to efficient operation of the other assets that are being divested). Current

	employees may have uncommon technical knowledge of particular manufacturing equipment or may be the authors of essential software. While knowledge is often transferrable or reproducible over time, the immediate loss of certain employees may substantially reduce the ability of the divested entity to compete effectively, at least at the outset. To protect against this impairment, the Division may prohibit the merged firm from re-hiring these employees for some limited period. DOJ Guide at ¶ II.B.E.1.
United States FTC	"If the parties are required to divest patents, technology, and know-how, they also may be required to provide technical assistance until the buyer understands the use of the patents, technology, and know-how. If certain employees are key to the use of the technology or know-how, the parties may be required to encourage those key employees to transfer to the buyer, for example, by providing financial and other incentives to assure that the buyer has access to the key employees. If reputation is a critical component of effective competition (which cannot be transferred), the parties must assure that the buyer is not at a competitive disadvantage because it lacks the reputation the parties have. The parties may be required to persuade customers to switch to the buyer and then remain with the buyer for some transitional period during which time the buyer will be able to establish its reputation." BC Remedies Statement

Approving the Acquirer: The goal of any merger remedy is to maintain (perhaps through prohibition, or more often through quick divestiture), or restore (through a divestiture that may occur some time after the merger transaction) the competition that would otherwise be eliminated in the transaction. Accordingly, the goal of a divestiture must be to "enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified." (RP XI (C) comment 4). Achieving this goal requires a close understanding of the facts, and, in particular, an in-depth review of the proposed acquirer for divested assets. The enforcement agency, to that end, should retain the authority to approve any proposed acquirer.

COMMENTARY AND EXEMPLARS

Canada	"In addition to approving the remedy package, the Bureau must approve the buyer of divested assets to ensure they are not sold to a less than vigorous competitor or to a firm who may increase the likelihood of coordinated behaviour. Requiring this approval increases the likelihood that the buyer will provide a competitive constraint." DRAFT Canada Bulletin at ¶ 54.
European Union	"In order to ensure the effectiveness of the commitment, the sale to a proposed purchaser is subject to prior approval by the Commission. The purchaser is normally required to be a viable existing or potential competitor, independent of and unconnected to the parties, possessing the financial resources, proven expertise and having the incentive to maintain

	and develop the divested business as an active competitive force in competition with the parties. In addition, the acquisition of the business by a particular proposed purchaser must neither be likely to create new competition problems nor give rise to a risk that the implementation of the commitment will be delayed." EC Notice at ¶ 49.
ICN	Comment 4: The remedy's effectiveness may also depend on the identity of the prospective purchaser of the assets to be divested. For a remedy to be effective, it should enable the prospective purchaser to be a viable and long-term competitor in the market in which the competitive harm was identified. Therefore, the agency should retain the authority and have appropriate procedures to approve a prospective purchaser. ICN Recommended Practices at XI(C), comment 4
United States DOJ	"The Division must approve any proposed purchaser. Its approval will be conditioned on three fundamental tests. First, divestiture of the assets to the proposed purchaser must not itself cause competitive harm. . . . Second, the Division must be certain that the purchaser has the incentive to use the divestiture assets to compete in the relevant market. . . . Third, the Division will perform a "fitness" test to ensure that the purchaser has sufficient acumen, experience, and financial capability to compete effectively in the market over the long term. Divestiture decrees state that it must be demonstrated to plaintiff's sole satisfaction that the purchaser has the "managerial, operational, technical and financial capability" to compete effectively with the divestiture assets." DOJ Guide at ¶ IV.D.
United States FTC	"In virtually all of the Commission's orders that require a post-order divestiture, the parties are ordered to divest certain assets within a certain time period "to a buyer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission." The Commission must thus approve both the buyer of the assets and the manner of the proposed divestiture, i.e., the purchase and sale contract and all related agreements. It is the parties' burden to prove that the proposed divestiture - both the buyer and the manner - meets the specific requirements of the Commission's order and satisfies its remedial purposes." BC Remedies Statement.
United Kingdom CC	"The merger parties will need to obtain the CC's approval of the prospective purchaser. The CC's approval of a purchaser may be subject to clearance by a relevant competition or regulatory authority." U.K. Guidelines at ¶ 4.2.

Not all jurisdictions set forth specific rules regarding what must be shown in order to obtain agency approval of a divestiture. For example, Rule 2.41(f) of the FTC's Rules of Practice provide for how a divestiture application is handled, but the informal staff guidance for the content of such applications appears elsewhere.

Commentary – What Must be Shown:

United States DOJ	"Because the purpose of divestiture is to preserve competition in the relevant market, the Division will not approve a divestiture if the assets will be redeployed elsewhere. Thus, there should be evidence of the purchaser's intention to compete in the relevant market. Such evidence might include business plans, prior efforts to enter the market, or status as a significant producer of a complementary product. In addition, customers and suppliers of firms in the relevant market are often an important source of information concerning a proposed purchaser's intentions and ability to compete. Accordingly, their insights and views will be considered. However, in no case will they be given veto power over a proposed purchaser.… In determining whether a proposed purchaser is "fit," the Division will evaluate the purchaser strictly on its own merits. The Division will not compare the relative fitness of multiple potential purchasers and direct a sale to that purchaser that it deems the fittest. The appropriate remedial goal is to ensure that the selected purchaser will be an effective, viable competitor in the market, according to the requirements in the consent decree, not that it will necessarily be the best possible competitor." DOJ Guide at ¶ IV.D.
United States FTC	"The staff will evaluate a proposed buyer very carefully to determine whether the buyer is financially and competitively viable. . . . To the extent possible (and consistent with confidentiality concerns), counsel for the parties should review balance sheets and other financial data to determine whether the buyer has the necessary financial resources. The parties and the buyer should assess whether any financial information would be of concern to the Commission, for example, significant debt due soon, other recent acquisitions that may implicate the financial position of the buyer, or imminent adverse financial announcements. The parties should inform the buyer that the staff will be requesting financial information directly from the buyer; it is in the parties' interest to attempt to assure the cooperation of the buyer. . . . The buyer must have the experience, commitment, and incentives necessary to achieve the remedial purposes of the order. These attributes can be shown, for example, by reference to the buyer's participation in related product markets or adjacent geographic markets, involvement in up-stream or down-stream markets, past attempts to enter the market (depending on why those attempts were not successful), or previous expressions of interest in the market. The buyer should not currently be a significant competitor in the market, although a fringe competitor may be an acceptable buyer in

	some cases." BC Remedies Statement.
United States FTC	"In evaluating a purchase agreement, the FTC staff will: review the divestiture agreement to ascertain whether the agreement transfers all assets required to be divested. . . . If the order imposes additional obligations on the parties, the staff will review the divestiture agreement to assure that all such additional obligations are satisfied. For example, if the order requires conveyance of an exclusive license, obviously the divestiture agreement should not convey a non-exclusive license. . . . If the parties are required to provide transitional services to the buyer, the provisions in the divestiture agreement that describe those services should also provide for "firewalls" to the extent that the provision of such services may result in the disclosure of competitively sensitive information. . . . The staff will also carefully review all provisions of the divestiture agreement to determine whether any are inconsistent with the terms or the remedial objectives of the order. In some instances, the staff will question suppliers, competitors, or customers about the operation, effectiveness, or necessity of certain provisions. For example, the staff will carefully evaluate any non-compete and non-solicitation clauses in the divestiture agreement to determine whether they are consistent with the objectives of the Commission's order to maintain or restore competition in the relevant market. A provision that establishes performance-based payments (e.g., royalties) will be disfavored because such an arrangement tends to skew competitive incentives or results in the disclosure of competitively sensitive information. The staff evaluates all provisions mindful of the fact that this is an agreement between two firms who will be competitors after consummation of the transaction." BC Remedies Statement.

EXEMPLARS: PROCEDURES

European Union	"Proposals for commitments submitted in order to form the basis for a decision pursuant to Article 8(2) must meet the following requirements: (a) they shall be submitted in due time, at the latest on the last day of the three-month period; (b) they shall address all competition problems raised in the Statement of Objections and not subsequently abandoned. In this respect, they must specify the substantive and implementing terms entered into by the parties in sufficient detail to enable a full assessment to be carried out; (c) they shall explain how the commitments offered solve the competition concerns. At the same time as submitting the commitments, the parties shall supply a

	non-confidential version of the commitments, for purposes of market testing." EC Notice at ¶ 41.
United States FTC	"(f)(1) All applications for approval of proposed divestitures, acquisitions, or similar transactions subject to Commission review under outstanding orders shall fully describe the terms of the transaction and shall set forth why the transaction merits Commission approval. Such applications will be placed on the public record, together with any additional applicant submissions that the Commission directs be placed on the public record. The Director of the Bureau of Competition is delegated the authority to direct such placement. (2) The Commission will receive public comment on a prior approval application for 30 days. During the comment period, any person may file formal written objections or comments with the Secretary of the Commission, and such objections or comments shall be placed on the public record. In appropriate cases, the Commission may shorten, eliminate, extend, or reopen a comment period. (3) Responses to applications under this section, together with a statement of supporting reasons, will be published when made, together with responses to any public comments filed under this section. (4) Persons submitting information that is subject to public record disclosure under this section may request confidential treatment for that information or portions thereof in accordance with §4.9(c) and the General Counsel or the General Counsel's designee will dispose of such requests in accordance with that section. Nothing in this section requires that confidentiality requests be resolved prior to, or contemporaneously with, the disposition of the application." Rule of Practice 2.41(f), 16 C.F.R. § 2.41(f).

Timely and quick divestitures:

Most jurisdictions have determined that timely (quick) divestitures are important. And, in certain circumstances, the agency will insist that the divestiture occur simultaneously with the merger transaction.

EXEMPLARS AND COMMENTARY

Canada	"A remedy is most effective when it is achieved in a timely manner. Timeliness reduces uncertainty for all affected parties by ensuring that competition is preserved or restored as quickly as possible, by minimizing the competitive harm, and by mitigating potential asset devaluation." DRAFT Canada Bulletin at ¶ 24.

ICN	Comment 5: Remedies should be implemented in a timely manner. In some transactions it may be appropriate for the remedy to be implemented no later than upon consummation of the main transaction, for example, where a rapid divestiture would prevent asset dissipation or where it is not certain that a suitable buyer may be found. ICN Recommended Practices at XI.C., Comment 5
United States DOJ	"The Division will require the parties to accomplish any divestiture quickly. A quick divestiture has two clear benefits. First, it restores premerger competition to the marketplace as soon as possible. Second, it mitigates the potential dissipation of asset value associated with a lengthy divestiture process. Depending on the size and complexity of the divestiture assets, the divesting firm normally will be given 60 to 90 days to locate a purchaser on its own. The consent decree may also permit the Division to exercise discretion in granting short extensions when it appears that the divesting firm is making good faith efforts and an extension seems likely to result in a successful divestiture. On the other hand, the Division may insist upon more rapid divestiture in cases where critical assets appear likely to deteriorate quickly or there will be substantial competitive harm before the purchaser can operate the assets. In situations where an investment banker or other intermediary conducts the shop, the Division may require that the intermediary's compensation be based in part on speed of the sale." DOJ Guide at ¶ IV.C.
United States FTC	"In recent cases, the [Federal Trade] Commission has required that all divestitures be completed within 3 to 6 months from the date the parties sign the Agreement Containing Consent Order. This means the respondent must find a buyer, negotiate a contract, submit that deal to the Commission for its approval, and complete the divestiture within that time. Respondent must submit its application early enough to allow for the 30-day public comment period (required by the Rules) and review by the Commission." BC FAQs at Q/A 28; see, also, Q/A 29-30.

Commentary – Fix-It-First and Buyer Up-Front:

European Union	"There are cases where the viability of the divestiture package depends, in view of the assets being part of the business, to a large extent on the identity of the purchaser. In such circumstances, the Commission will not clear the merger unless the parties undertake not to complete the notified operation before having entered into a binding agreement with a purchaser for the divested business (known as the "upfront buyer"), approved by the Commission." EC Notice at ¶ 20.

United States DOJ	"The Division will accept a fix-it-first remedy when it eliminates the competitive harm otherwise arising from the proposed merger. The same internal review is given to fix-it-first remedies as is given to consent decrees. Before exercising its prerogative not to file a case, the Division must be satisfied that the fix-it-first remedy will protect the market from any adverse competitive effects attributable to the proposed transaction. A fix-it-first remedy will not eliminate the Division's concerns unless the Division is confident that the proposed fix will indeed preserve the premerger level of competition." "The parties should provide a written agreement regarding the fix-it-first remedy. The agreement should specify which assets will be sold, detail any conditions on those sales (e.g., regulatory approval), provide that the Division be notified when the assets are sold, and state that the agreement constitutes the entire understanding with the Division concerning the divested assets. Unless the parties also enter into a timing agreement, a signed stipulation and consent decree (i.e., a "pocket decree") should be obtained that will be filed if the parties fail timely to comply with the written agreement." "Although the parties may propose a fix-it-first remedy because they face substantial time pressures, the Division must allow itself adequate time to conduct the necessary investigation, including an evaluation of the proposed purchaser." DOJ Guide at ¶ IV.A.
United States FTC	"An "up-front buyer" is one that has executed a final agreement with the parties before the Commission accepts the proposed order. The staff has carefully reviewed both the buyer and the agreement before the Commission considers the consent agreement. The buyer is named in the order; the agreement is attached to the order as a confidential exhibit and is incorporated into the order. An order that includes an up-front buyer typically requires that the parties divest to the up-front buyer within a very short time period and pursuant to the agreement attached to the order. In fact, the parties may consummate the up-front deal before the public comment period on the proposed decision and order terminates. To assure that the Commission can reject the up-front buyer if it determines to do so after the public comment period, a rescission clause is typically required in the purchase agreement. (As of March 2003, the Commission has never required rescission under such an agreement.)" BC Remedies Statement at footnote 10.
	"In those cases in which the Commission is concerned about the adequacy of the asset package or the possible lack of an acceptable buyer, the Commission will, by requiring a buyer up front, attempt to minimize the risk that the remedy will be ineffective. Buyers up front also reduce the risk of interim harm to competition by speeding up accomplishment of the remedy. Buyers up front have, thus, been used primarily (but not

	exclusively) when there was concern about whether the proposed asset package was adequate to maintain or restore competition or whether the asset package was sufficient to attract an acceptable buyer or buyers, when the pool of acceptable buyers was thought to be very limited because of specialized needs, or when there were concerns about deterioration of the assets (including human capital, good will and other intangible assets) pending divestiture. Up front buyers are more likely to be required when the respondent has urged that only selected assets be divested." BC FAQs, at Q/A 8.
United Kingdom CC	"Where the CC is in doubt as to the viability or attractiveness to purchasers of a proposed divestiture package (ie composition risk) or believes there may be only a limited pool of suitable purchasers (ie purchaser risk), it may require the merger parties to identify a suitable purchaser that is contractually committed to the transaction before permitting a proposed merger to proceed or a completed merger to progress with integration. Where the CC considers that the competitive capability of the divestiture package may deteriorate pending the divestiture (ie asset risk) or completion of the divestiture may be prolonged, it may also require that the up-front buyer completes the acquisition before the merger may proceed or, in the case of a completed merger, before the merger parties may progress with integration." U.K. Guidelines at ¶ 4.5

4. **Providing appropriate means to ensure implementation, monitoring of compliance, and enforcement of the remedy.** RP XI (D) comment 1: The terms of a remedy should identify and bind the entities that are to implement it. The terms should be sufficiently clear and precise to provide the parties adequate guidance in implementing the remedy and to enable the agency to verify whether the remedy has been implemented properly. The remedy should contain adequate means of ensuring its implementation and/or monitoring compliance.

EXEMPLARS: IMPLEMENTATION AND MONITORING OF REMEDY

Canada	"When designing remedies, terms must be clear and measures must be sufficiently well defined to ensure timely implementation, with minimal or no future monitoring or enforcement by the Bureau or the Tribunal. This also helps ensure that remedies can be enforced by way of contempt proceedings should a party not comply with them." DRAFT Canada Bulletin at ¶ 8 (footnote omitted).

European Union	"The commitment will also set out the specific details and procedures relating to the Commission's oversight of the implementation of the divestiture: for example, criteria for approval of the purchaser, periodic reporting requirements . . ." EC Notice at ¶ 53. **Weblink:** http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf
United States DOJ	"Whether structured as a fix-it-first or a consent decree including structural or conduct provisions, the remedy agreed upon by the Antitrust Division and the parties must maintain competition at premerger levels. It is incumbent upon the Division, pursuant to its responsibility to the public interest, as well as to the court in the case of a consent decree, to ensure strict implementation of and compliance with the agreed-upon remedy. To do so, Division attorneys must first ensure that the decree correctly binds the appropriate parties, provides sufficient notice of the decree to any persons against whom the decree may be enforced, and provides a means for Division attorneys to gather information necessary to monitor compliance. The Division will commit substantial resources to monitor parties' implementation of and compliance with the remedy and will not hesitate to bring actions to enforce consent decrees, typically through the use of civil or criminal contempt proceedings." DOJ Guide at ¶ V. **Weblink:** http://www.usdoj.gov/atr/public/guidelines/205108.pdf
United States FTC	The FTC's Bureau of Competition maintains a separate division, staffed by senior attorneys, which is responsible for monitoring and assuring compliance with the FTC's antitrust orders. These attorneys participate in the drafting of consent agreements, receive and review compliance reports, and participate in federal court enforcement actions if the Commission determines that a respondent has failed to comply with its obligations.

RP XI (D) comment 2: Appropriate preservation and hold separate measures should normally be included to maintain the competitive potential of the assets to be divested.

EXEMPLARS: MAINTAINING VIABILITY OF TO-BE-DIVESTED ASSETS

United States DOJ	"Consent decrees requiring divestiture after the transaction closes should require defendants to take all steps necessary to ensure that the assets to be divested are maintained as separate, distinct, and saleable. A hold separate provision is designed to maintain the independence and viability of the divested assets as well as competition in the market during the pendency of the divestiture." DOJ Guide at ¶ IV.B. **Weblink**: http://www.usdoj.gov/atr/public/guidelines/205108.pdf
United States FTC	"Some settlements have raised the concern that competition may be harmed pending divestiture of the to-be-divested assets. In such cases, the Bureau will require an order to hold separate. Such an order will require the parties to maintain an independent entity, comprising at least all of the assets to be divested. If the parties have provided and will continue to provide any necessary services to the held separate business, the order to hold separate must address those services. The hold separate order will put in place the provisions necessary to protect the confidential information of the held separate assets." BC Remedies Statement. **Weblink:** http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm#Order%20to%20Hold%20Separate%20and/or%20Maintain%20Assets
United States FTC	The FTC may issue a separate order to hold separate and maintain assets: See, e.g., Order to Hold Separate and Maintain Assets, In the matter of Cytec Industries, Inc., FTC Docket No. C-4132. In addition, FTC divestiture orders often include a provision similar to the requirement in Cytec Industries requiring respondents "take such actions as are necessary to maintain the viability and marketability of the UCB Amino Resins Business and to prevent the destruction, removal, wasting, deterioration, or impairment of the UCB Amino Resins Business, except for ordinary wear and tear" pending divestiture of the assets. Paragraph II.E., Decision and Order, In the matter of Cytec Industries Inc., FTC Docket No. C-4132 **Weblink**: http://www.ftc.gov/os/caselist/0410203/050412do0410203.pdf

Commentary – Hold separate provisions however, are not a perfect substitute for an immediate divestiture:

Canada	"Once the Bureau determines that a merger is likely to lessen or prevent competition substantially and identifies the scope of remedies necessary to address the competition concerns, it will normally require the merging parties to "hold separate" assets or businesses that could be the subject of a Tribunal order until the divestiture is completed. Hold-separate provisions preserve the Bureau's ability to achieve an effective remedy pending its implementation. They reduce the likelihood that assets will depreciate during the divestiture process. Moreover, they ensure the merging parties do not combine their operations or share confidential information before divestitures occur thereby avoiding the problem of "unscrambling the eggs" if the merger has to be restructured at a later date. Hold separate provisions also preserve, if necessary, the Tribunal's flexibility to order an alternate remedy should the original divestiture(s) not be effected." DRAFT Canada Bulletin at ¶ 19.
Canada	"Hold-separate provisions, previously discussed in Part II, are required in most consent agreements pending completion of the agreed upon remedy. These provisions ensure that confidential information is not communicated to the vendor during the implementation phase of the remedy. They also ensure that the designated assets (including human resources) are preserved, are economically viable, and are operated at arm's length from the merged entity throughout the sale period. Hold-separate provisions are also necessary if significant investment in the assets must continue during the implementation phase of the remedy. In this instance, the vendor will be required to pay for ongoing investments, such as capital improvements and product development costs, as it will be the owner of the assets until the divestiture is completed." DRAFT Canada Bulletin at ¶ 48 (footnote omitted).
European Union	"It is the parties' responsibility to reduce to the minimum any possible risk of loss of competitive potential of the business to be divested resulting from the uncertainties inherent to the transfer of a business. Pending divestment, the Commission will require the parties to offer commitments to maintain the independence, economic viability, marketability and competitiveness of the business." EC Notice at ¶ 50. **Weblink**: http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf
United Kingdom CC	"In order to protect against asset risk, the CC will generally seek undertakings from the relevant parties which impose a general duty of care to maintain the divestiture package in good order and not to undermine the competitive position of the package. Where asset risk is

	perceived to be significant, the CC may also require 'hold-separate' undertakings. These will require the divestiture package to be held and managed separately from the retained business. The appointment of a 'hold-separate' manager or management team may also be required to manage the assets/business to be divested so as to maintain their competitiveness and separation from the retained assets." U.K. Guidelines at ¶5.3. **Weblink:** http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/divestiture_remedies_guidance.pdf
United States DOJ	"It is unrealistic, however, to think that a hold separate provision will entirely preserve competition. For example, managers operating entities kept apart by a hold separate provision are unlikely to engage in vigorous competition. Likewise, customers during the period before divestiture may be influenced in their purchasing decisions by the merger, even if the to-bedivested assets are being operated independently of the merged firm pursuant to a hold separate provision. Similarly, there may be some dissipation of the soon-to-be-divested assets during the period before divestiture, notwithstanding the presence of a hold separate agreement — valuable employees may leave and critical investments may not be made. For these reasons, a hold separate agreement does not eliminate the need for a speedy divestiture." DOJ Guide at ¶ IV.B **Weblink**: http://www.usdoj.gov/atr/public/guidelines/205108.pdf

RP XI (D) comment 2: It may also be appropriate to include terms on agency approval of one or more trustees who are independent of the parties.

EXEMPLARS: DIVESTITURE TRUSTEE

Canada	"When the sale of the asset(s) to be divested is not completed in the initial sale period and in the manner contemplated by the consent agreement (or the divestiture order in contested cases), the Bureau will require that a divestiture trustee be appointed to divest the assets. As mentioned in Part II, the inclusion of trustee provisions provides some assurance that the asset(s) will be divested in a timely and effective manner. The trustee period will normally be 3-6 months, depending on the circumstances." DRAFT Canada Bulletin at ¶ 57

European Union	"Consequently, in most cases, the Commission considers it appropriate to approve the appointment a trustee with responsibilities for overseeing the implementation of the commitments (the "divestiture trustee"). The divestiture trustee's role will vary on a case-by-case basis, but will generally include supervision which includes the right to propose, and if deemed necessary, impose, all measures which the trustee requires to ensure compliance with any of the commitments, and reporting at regular intervals. Where appropriate, the trustee's role will span two phases: in the first phase, he or she will be responsible for overseeing the parties' efforts to find a potential purchaser. If the parties do not succeed in finding an acceptable purchaser within the time frame set out in their commitments, then in the second phase, the trustee will be given an irrevocable mandate to dispose of the business within a specific deadline at any price, subject to the prior approval of the Commission." EC Notice at ¶¶53-54. **Weblink:** http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf
United States DOJ	"For divestiture to be an effective merger remedy, the Division must have the ability to seek appointment of a trustee to sell the assets if a defendant is unable to complete the ordered sale within the period prescribed by the decree. A selling trustee provision provides a safeguard that ensures the decree is implemented in a timely and effective manner. In addition, to the extent that defendants desire to control to whom the decree assets are sold and the price at which they are sold, the potential for a selling trustee to assume that responsibility provides an incentive for defendants to divest the assets promptly. Thus, every decree in a Division merger case must include provisions for the appointment of a selling trustee." DOJ Guide at ¶ IV.I.; *see also, e.g.*, ¶ V, Appointment of Trustee, Amended Proposed Final Judgment, U.S. v. Cal Dive Int'l, Inc., et.al, (D.D.C. Oct. 2005) available at http://www.usdoj.gov/atr/cases/f213100/213177.htm. **Weblink:** http://www.usdoj.gov/atr/public/guidelines/205108.pdf
United States FTC	Virtually all FTC and DOJ divestiture orders include a paragraph providing for the appointment of a "trustee" if the parties fail to divest the required assets within the time limit specified in the order, such as: "If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed,

	divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order." Paragraph VII.A., Decision and Order, In the matter of Procter & Gamble Company, et al, FTC Docket No. C-4151, available at http://www.ftc.gov/os/caselist/0510115/051216do0510115.pdf "Typically, Commission staff uses its sources in the industry, as well as the respondents, to provide names of trustee candidates. The staff assures that the candidates have no conflict, or appearance of conflict, of interest. Then it interviews candidates, speaks with references, and makes a determination whether a particular candidate should be recommended to the Commission. Staff is looking for someone who - in addition to having no conflict - may have experience divesting assets in the affected industry or under these type of circumstances. Staff's experience with both divestiture trustees and monitor trustees has been very positive to date." BC FAQs, Q/A 39 **Weblink:** http://www.ftc.gov/bc/mergerfaq.htm#Trustee%20Provision

EXEMPLARS: MONITOR TRUSTEE/HOLD SEPARATE TRUSTEE

Canada	"Normally, it is necessary to immediately appoint an independent manager ("hold-separate manager") to operate the asset(s) until the sale is complete. The Bureau requires a hold separate manager to have extensive experience in the market(s) in question and operate independently, i.e. at arm's length, from the vendor. In addition, the vendor must transfer to the hold-separate manager all rights, powers and authorities necessary to perform his or her duties and responsibilities under the consent agreement, and must not exercise any direction or control over the management of the assets. The hold-separate manager will be responsible for the day-to-day management of the assets and, if necessary, will report directly to an independent monitor.

	The Bureau will normally require the appointment of an independent third party to monitor compliance with the consent agreement ("monitor"). A monitor must have industry knowledge of the market(s) in question and have no ties, financial or otherwise, with the merging parties. The monitor must have complete access to all personnel, books, records, documents and facilities or to any other relevant information as he or she requests. The monitor will ensure that the vendor uses its best efforts to fulfill its obligations under the consent agreement. The monitor reports in writing to the Bureau as set out in the consent agreement." DRAFT Canada Bulletin at ¶¶ 49-50 (footnotes omitted)
European Union	"As the Commission cannot, on a daily basis, be directly involved in overseeing compliance with these interim preservation measures, it therefore approves the appointment of a trustee to oversee the parties' compliance with such preservation measures (a so-called 'hold-separate trustee'). The hold-separate trustee will act in the best interests of the business to be divested. The commitment will set out the specific details of the trustee's mandate. The trustee's mandate, to be approved by the Commission, together with the trustee appointment, will include for example, responsibilities for supervision, which include the right to propose, and, if deemed necessary, impose, all measures which the trustee considers necessary to ensure compliance with any of the commitments, and periodic compliance reports." EC Notice at ¶ 52 **Weblink:** http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf
United Kingdom CC	"Where hold-separate undertakings are in place, the CC will usually require the appointment of an independent monitoring trustee to oversee the performance of the hold-separate manager and the parties' compliance with the undertakings. The need for a trustee may be avoided if the CC can be satisfied that the hold-separate management will be appropriately independent. The trustee will have an overall duty to act in the best interests of the divestiture package. The trustee will oversee the ongoing management of the divestiture package and will have the right to propose and direct measures necessary to ensure compliance with the hold-separate undertakings. The trustee will report to the CC at regular intervals." U.K. Guidelines at ¶ 5.4. **Weblink:** http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/divestiture_remedies_guidance.pdf

United States DOJ	"A monitoring trustee is responsible for reviewing a defendant's compliance with its decree obligations to sell the assets to an acceptable purchaser as a viable enterprise and to abide by injunctive provisions to hold separate certain assets from a defendant's other business operations. In a typical merger case, a monitoring trustee's efforts would simply duplicate, and could potentially conflict with, the Division's own decree enforcement efforts." DOJ Guide at ¶ IV.I.3 **Weblink:** http://www.usdoj.gov/atr/public/guidelines/205108.pdf
United States FTC	"[I]n many of the cases in which the parties have proposed divestiture of less than an autonomous, on-going business, the parties may need additional assistance. If that assistance results in a continuing relationship between the parties and the buyer, or imposes obligations of a complex or technical nature, the staff will recommend that the Commission appoint an independent third party to monitor compliance with the terms of the Commission's order. These monitors are typically from the industry or have consulted to the industry, and they have no financial or other tie with the parties or the buyer. They serve as the "eyes and ears" of the Commission and the staff, but with the appropriate experience and know-how. The obligation of the monitor is to the Commission; however, the parties will be responsible for compensating the monitor. In many of the cases in which the Commission has appointed a monitor (and the same is true for the category of monitor referred to as "hold separate trustee," see discussion below), the monitor was recommended by the parties. The most effective monitors have been those who established a positive working relationship with the parties (as well as with the buyer). For that reason, the first candidates that the staff considers typically are suggested by the parties. The parties can facilitate the process if - in those cases in which it appears that appointment of a monitor is likely - they have investigated possibilities early in the process and have provided names to the staff. The staff has rejected candidates suggested by the parties in situations where there appear to be conflicts resulting from stock ownership or pension benefits. In some cases (typically when expertise of a highly technical nature is required), the staff has rejected candidates who do not have the requisite expertise." BC Remedies Statement. **Weblink:** http://www.ftc.gov/bc/bestpractices/bestpractices030401.htm#If%20the%20Commissions%20order%20imposes

United States FTC Standard Language	The FTC's monitor paragraph typically requires that: "At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a Monitor to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order . . . ." *See, e.g.*, Paragraph IV.A., Decision and Order, In the matter of Occidental Petroleum Corporation, FTC Docket No. C-4139, available at http://www.ftc.gov/os/caselist/0510009/050719do0510009.pdf.

RP XI (D) comment 3: The competition agency should have the means to investigate compliance, such as the ability to inspect and copy records or conduct reviews and/or to require periodic or one-time reporting obligations by the parties and/or the trustee(s) on the implementation of one or more components of the remedy.

EXEMPLARS: INVESTIGATING COMPLIANCE

Canada	"The Bureau will commit the necessary time and resources to ensuring the merged entity complies with the required remedies. During the implementation phase of the remedy, the Bureau will have the ability to interview officers, directors, employees and agents of the merging parties as necessary, to ensure compliance with the divestiture order." DRAFT Canada Bulletin at ¶ 68.
European Union	"Whilst commitments have to be offered by the parties, the Commission may ensure the enforceability of commitments by making its authorisation subject to compliance with them. A distinction must be made between conditions and obligations. The requirement for achievement of each measure that gives rise to the structural change of the market is a condition – for example, that a business is to be divested. The implementing steps which are necessary to achieve this result are generally obligations on the parties, e.g. such as the appointment of a trustee with an irrevocable mandate to sell the business. Where the undertakings concerned commit a breach of an obligation, the Commission may revoke clearance decisions issued either under Article 6(2) or Article 8(2) of the Merger Regulation, acting pursuant to Article 6(3) or Article 8(5)(b), respectively. The parties may also be subject to fines and periodic penalty payments as provided in Article 14(2)(a) and 15(2)(a) respectively of the Merger Regulation. Where, however, the situation rendering the concentration compatible with the common market does not materialise, that is, where the condition is not fulfilled, the compatibility decision no longer stands. In such circumstances, the Commission may, pursuant to Article 8(4) of the Merger Regulation,

	order any appropriate action necessary to restore conditions of effective competition. In addition, the parties may also be subject to fines as provided in Article 14(2)(c)." EC Notice at ¶ 12. **Weblink:** http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/c_068/c_06820010302en00030011.pdf
United Kingdom CC	"The role of the inquiry group will normally expire on its acceptance of final undertakings from the parties or the making of a final order. The CC's Remedies Standing Group will then be responsible for monitoring implementation of the divestiture undertakings or order until the divestiture is complete and will deal with such matters as reviewing reports from monitoring trustees, approving the appointment of divestiture trustees and the purchaser of the divestiture package and reviewing divestiture agreements. Further information about the role of the Remedies Standing Group can be found on the CC's web site. Compliance with ongoing aspects of divestiture or behavioural remedies will be monitored by the OFT." U.K. Guidelines at ¶ 7.2. **Weblink:** http://www.competition-commission.org.uk/rep_pub/rules_and_guide/pdf/divestiture_remedies_guidance.pdf
Commentary **United States** **DOJ**	FTC and DOJ typically include in their merger remedy orders a provision requiring that the parties grant representatives of the agencies access to files and employees for purposes of determining whether the parties are complying with the orders. DOJ has required that the parties: "For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the United States Department of Justice, including consultants and other persons retained by the United States, shall, upon written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the defendants, be permitted: 1. access during the defendants' office hours to inspect and copy, or at the United States' option, to require the defendants to provide copies of, all books, ledgers, accounts, records and documents in the possession, custody, or control of the defendants, relating to any matters contained in this Final Judgment; and

United States FTC Standard Language	2. to interview, either informally or on the record, the defendants' officers, employees, or agents, who may have their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by the defendants." ¶ X.A., Compliance Inspections, Amended Proposed Final Judgment **Weblink:** http://www.usdoj.gov/atr/cases/f213100/213177.htm For example, the Commission has required that the parties: "shall permit any duly authorized representative of the Commission: A. access, during business office hours of Respondent, in the presence of counsel, and as permitted by and in accordance with the laws, rules and regulations of the company, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order; and B. upon five (5) days' notice to Respondent and without restraint or interference from Respondent, to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters." Paragraphs VII.A., B., Decision and Order, FTC Docket No. C-4143 **Weblink:** http://www.ftc.gov/os/caselist/0510029/051101do0510029.pdf
Commentary **United States FTC**	In addition, virtually all FTC and DOJ divestiture remedies include standard reporting requirements, pursuant to which the merging firms must affirmatively show that they are complying with each provision of the remedy. The Commission's Rules of Practice require that certain reporting obligations are imposed: "In every proceeding in which the Commission has issued an order pursuant to the provisions of section 5 of the Federal Trade Commission Act or section 11 of the Clayton Act, as amended, and except as otherwise specifically provided in any such order, each respondent named in such order shall file with the Commission, within sixty (60) days after service thereof, or within such other time as may be provided by the order or the rules in this chapter, a report in writing, signed by the respondent, setting forth in detail the manner and form of his compliance with the order, and shall thereafter file with the Commission such further signed, written reports of compliance as it may require."

	Rule of Practice 2.41(a), 16 C.F.R. ¶ 2.41(a). **Weblink**: http://a257.g.akamaitech.net/7/257/2422/11feb20051500/edocket.access.gpo.gov/cfr_2005/janqtr/16cfr2.41.htm In addition to the initial report that the Rules of Practice specifically require, an FTC order will also typically require annual reports: "One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order." *See, e.g.*, Paragraph VIII.B., Decision and Order, In the matter of Valero, L.P., et a.l, FTC Docket No. C-4141, available at http://www.ftc.gov/os/caselist/0510022/050726do0510022.pdf. A typical reporting paragraph in a DOJ decree will require: "Upon the written request of a duly authorized representative of the Assistant Attorney General in charge of the Antitrust Division, the defendants shall submit written reports, or responses to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested." ¶ X.B., Compliance Inspections, Amended Proposed Final Judgment, U.S. v. Cal Dive Int'l, Inc., et.al, (D.D.C. Oct. 2005) available at http://www.usdoj.gov/atr/cases/f213100/213177.htm.

RP XI (D) comment 4: A mechanism should be provided for the adjustment of the remedy in the event of unforeseen and material changes of circumstances.

EXEMPLARS: MODIFYING ORDERS

United States FTC	"(a) Scope. Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part. (b) Contents. A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part, or that the public

	interest so requires. (1) This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail: (i) The nature of the changed conditions and the reasons why they require the requested modifications of the rule or order; or (ii) The reasons why the public interest would be served by the modification. (2) Each affidavit shall set forth facts that would be admissible in evidence and shall show that the affiant is competent to testify to the matters stated therein. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing." Rule of Practice 2.51 (a), (b). **Weblink:** http://a257.g.akamaitech.net/7/257/2422/11feb20051500/edocket.access.gpo.gov/cfr_2005/janqtr/16cfr2.51.htm

RP XI (D) comment 5: In the event of an implementing party's failure to comply with a remedy, the terms of the remedy should be enforceable by the competition agency directly or through the courts.

EXEMPLARS: PENALTIES FOR FAILURE TO COMPLY

United States DOJ	"If the Antitrust Division concludes that a consent decree has been violated, the Division will institute an enforcement action. There are two types of contempt proceedings, civil and criminal, and either or both may be used. Civil contempt has a remedial purpose – compelling compliance with the court's order or compensating the complainant for losses sustained. The Division may consider seeking both injunctive relief and fines that accumulate on a daily basis until compliance is achieved. Civil contempt is established under 15 U.S.C. § 25 (Clayton Act, §15) and 15 U.S.C. §4 (Sherman Act, §4)." "Criminal contempt is not remedial — its purpose is to punish the violator, to vindicate the authority of the court, and to deter others from engaging in similar conduct in the future. Criminal contempt is established under 18 U.S.C. § 401(3) by proving beyond a reasonable doubt that there is a clear and definite order, applicable to the person charged, which was knowingly and willfully disobeyed. The penalty may be a fine or imprisonment, or both. In some situations, rather than seeking sanctions for contempt where the correct interpretation of a judgment is disputed, it may be appropriate simply to obtain a court order compelling compliance with the judgment." DOJ Guide at ¶ V.D.

United States FTC	"Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission." 15 U.S.C. § 45. **Weblink:** http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000045----000-.html

RP XI (D), comment 6: The terms and means of implementation, monitoring, or enforcement should be specified in generally available statutes or rules or in the remedy agreement or order.

See Discussion re: Comment 1, above.