

# RECOMMENDED FRAMEWORK FOR BEST PRACTICES IN INTERNATIONAL MERGER CONTROL PROCEDURES

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# **RECOMMENDED FRAMEWORK FOR BEST PRACTICES IN INTERNATIONAL MERGER CONTROL PROCEDURES**

## **1. INTRODUCTION**

### **1.1 PRELIMINARY STATEMENT**

This submission has been jointly prepared by BIAC and the International Chamber of Commerce in response to the OECD Competition Law and Policy Working Party No. 3's (the "Working Party") request for a draft "code of best practices" relating to international merger control procedures. It is styled as a "recommended framework" for best practices, as opposed to a "code," since we believe that a formalistic, "code"-oriented approach to the issues presented should be avoided. Indeed, undue formalism is oftentimes itself an impediment to best practices. Rather, we believe that a "recommended framework for best practices" better captures the spirit of the exercise by setting forth specific recommendations on basic principles, while recognizing the need for discretionary latitude in detailed implementation.

### **1.2 BACKGROUND AND APPROACH**

Over 60 jurisdictions now have some form of merger control regulation in place, up from only a handful only a decade ago. This fact, coupled with an increasing number of transactions having some international component, has resulted in a dramatic increase in the incidence of multijurisdictional merger reviews. Parties to international transactions of any consequence are today subject to merger control regulation in multiple jurisdictions as a matter of course.

That transactions having potentially significant competitive effects in a number of jurisdictions are now subject to multiple notification and review requirements is neither remarkable nor, in the abstract, objectionable. Where a transaction may have a significant competitive effect on the local economy in any given jurisdiction, there should be no dispute as to the local antitrust authority's legitimate interest in reviewing the transaction notwithstanding

the fact that the transaction's "center of gravity" (whether determined by reference to the nationality of the parties, location of productive assets, or proportionate sales volume) lies outside its national boundaries. In short, BIAC and the ICC firmly support the sovereignty of each jurisdiction to apply its own laws to mergers which have effects on its market. At the same time, however, it must be recognized that the proliferation of merger control regimes is imposing significant -- and unnecessary -- transaction costs on virtually all international transactions, and in particular on those transactions which do not raise any significant competitive concerns whatsoever.

BIAC and the ICC believe that a fundamental objective of "best practices" in the international merger review process should be directed at eliminating these unnecessary transaction costs in a manner which does not compromise the legitimate interests of any jurisdiction in enforcing its competition laws. Consistent with this objective, we believe that "best practices" should include the following basic elements:

- The adoption of clear, objective tests for determining whether any given transaction is subject to merger notification requirements;
- The elimination of notification requirements as to transactions lacking any appreciable jurisdictional nexus with the jurisdiction concerned and the adoption of clear, objective de minimis thresholds below which notification will not be required;
- The limitation of notification requirements to those aspects of a transaction which have some jurisdictional nexus with the jurisdiction concerned or, at a minimum, the elimination of suspensive effect as to those aspects of a transaction lacking any jurisdictional nexus with the jurisdiction concerned;
- The elimination of unnecessary timing restrictions on the parties' ability to file merger notifications and to trigger formal review of their transaction;
- The elimination of arbitrary filing deadlines, provided that it does not prejudice the ability of the local authority to review the transaction prior to implementation;

- The adoption of reasonable initial notification requirements designed to elicit the basic information needed to determine whether the notified transaction raises potential competitive issues meriting further examination by way of a more extensive investigation; and
- The adoption of reasonable deadlines within which review of the transaction will be completed.

A second key component of best practices relates to the adoption of procedural safeguards directed at ensuring that due regard is given to the fundamental fairness of the merger review process. This component has two dimensions in today's global environment. First, internal procedural safeguards are essential within the jurisdiction concerned, involving such elements as transparency of the process, non-discrimination and due process, including resort to an effective appeal from adverse determinations. In connection with multijurisdictional reviews, best practices should also include appropriate safeguards governing the exchange of confidential information between reviewing authorities.

The business community recognizes and accepts that in some instances it may be beneficial for enforcement agencies in different jurisdictions to be able to exchange confidential information in connection with multijurisdictional merger reviews. Among other things, close cooperation between enforcement agencies may be necessary for effective enforcement and to minimize the burden on parties to multi-national mergers, as well as third parties who may have an interest in a merger. Accordingly, the business community welcomes and endorses the suggestion that an attempt be made to develop a general protocol for cooperation among agencies, as well as a separate protocol that could be invoked jointly by merging parties and one or more enforcement agencies when it is considered desirable to provide a waiver or limited waiver of rights under the confidentiality laws of one or more jurisdictions.

In addition to promoting more effective enforcement, such protocols should seek to promote greater efficiency in the multi-jurisdictional merger review process generally, for

example, by promoting more expeditious completion of merger reviews; reduced divergence with respect to requests for information subsequent to the initial notification; an increased willingness to accept information filed in another jurisdiction; and increased coordination with respect to visits to production facilities and the scheduling of meetings. To encourage voluntary waivers of confidentiality, cooperation pursuant to a waiver should affirmatively seek to reduce the length of time that otherwise would be required to complete a merger review and to reduce the burden that otherwise would be imposed upon the party providing the waiver. It is hoped that the burden on merging parties can be further reduced by reaching an understanding that countries with a lesser interest in a specific transaction will defer the detailed analysis of at least some issues to the jurisdiction(s) having a greater interest in the transaction.

First, more detailed recommendations as to each of the foregoing areas are set forth in the sections which follow.

## **2. DETAILED RECOMMENDATIONS FOR BEST PRACTICES**

### **2.1 ELIMINATING UNNECESSARY TRANSACTION COSTS**

Given the large number of jurisdictions that now have merger control regulations in place, significant transaction costs are incurred merely in determining whether notification is required in any number of jurisdictions. Transaction costs associated with the multijurisdictional review process would be substantially reduced if applicable laws clearly identified the types of transactions subject to merger control and incorporated objective jurisdictional tests for determining merger notification obligations. These jurisdictional tests should also incorporate an appropriate jurisdictional nexus with the jurisdiction concerned to avoid imposing unnecessary transaction costs on transactions that lack an appreciable anticompetitive potential in that jurisdiction.

Where notification is required, additional measures should also be considered in connection with eliminating unnecessary transaction costs. First, more efficient management of the multijurisdictional merger review process by the merging parties would also be promoted by greater harmonization of the time at which they are permitted to file any required notification and by eliminating arbitrary filing “deadlines.” This would also facilitate concurrent review by the relevant authorities in connection with transnational mergers. Likewise, best practices should include a requirement that merger reviews will be completed within a reasonable period that is consistent with international norms.

Finally, unnecessary transaction costs would be reduced by imposing appropriate limitations on the scope of initial notification requirements so as to minimize the burden associated with the notification and review of transactions that lack anticompetitive potential in the jurisdiction concerned. This, too, not only benefits the merging parties but also promotes the more efficient utilization of enforcement resources.

Consistent with the foregoing principles, we would recommend the following as specific elements of appropriate best practices:

### ***2.1.1 Transactions Covered***

***2.1.1.1*** Potentially notifiable transactions should be clearly defined in applicable legislation or through appropriate interpretive guidelines. For example, potentially notifiable transactions could be identified by reference to the size of the transaction and/or by reference to percentages of shares to be acquired, as illustrated by the Hart-Scott-Rodino Act in the United States. Where notification is premised on a “change of control” (as in the EU and other jurisdictions) or an acquisition giving rise to “decisive influence” over an undertaking, these terms should be clearly defined to allow the parties to determine their notification obligations with certainty. To the extent possible, these definitions should be based on objective standards and harmonized by reference to common international practice.

## **2.1.2 Jurisdictional Thresholds/Local Jurisdictional Nexus**

- 2.1.2.1** Jurisdictional thresholds for notification should be based upon readily-ascertainable, objectively-based criteria which incorporate appropriate *de minimis* “local contacts” thresholds. In particular, notification thresholds based on market shares should be eliminated. Examples of jurisdictions which are problematic in this respect include Brazil (20% market share or either party with worldwide sales of approximately \$220 million); Greece (35% Greek market share or combined/individual Greek turnover above specified levels); the Slovak Republic (worldwide turnover or 25% Slovak market share); Portugal (30% Portuguese market share or combined Portuguese turnover); and Spain (25% Spanish market share or combined/individual Spanish turnover above specified levels).
- 2.1.2.2** Parties should not be required to undertake a full-blown substantive review of a proposed transaction simply to determine whether notification is required in any given jurisdiction. In addition to the inherent difficulties associated with market definition generally, uncertainties associated with market share-based tests are heightened by interpretive ambiguities and inconsistencies. In the United Kingdom, for example, the alternative 25% test is not met where there is no overlap between the parties in the market concerned. In Spain and Greece, on the other hand, the applicable 25% market share thresholds can be satisfied even if there is no horizontal or vertical overlap between the parties.
- 2.1.2.3** Market share-based tests should be eliminated in favor of objectively quantifiable and readily accessible information, such as sales (or “turnover”) or assets located in the jurisdiction concerned. These thresholds should be expressed in terms of local currency values rather than by reference to other economic measures, such as monthly wage multiples. By way of example, appropriate models are provided in the following jurisdictions: EU Merger Regulation (EU/EEA turnover thresholds); Canada (Canadian assets/sales tests); Netherlands (Dutch turnover); France (French turnover); Switzerland (Swiss turnover); and the U.S. Hart-Scott-Rodino Act (foreign transaction exemptions based on U.S. assets and/or sales thresholds set forth in 16 C.F.R. § § 802.50 and 802.51). Further, such thresholds should be periodically reviewed and modified to take currency inflation into account.
- 2.1.2.4** Notification thresholds should also incorporate an appropriate (and objectively-based) *de minimis* threshold as to the level of “local contacts” required to trigger a notification requirement, especially as to “foreign-to-foreign” transactions. The most significant problem area in this respect is the so-called “effects” test, pursuant to which a transaction having any potential effect on the local market may be subject to a merger notification requirement. Examples of jurisdictions which assert jurisdiction over transactions on this basis include Brazil (worldwide turnover of either party of approximately \$220 million where transaction may have any effect on the Brazilian market); Poland (aggregate worldwide turnover of \$25 million Euro); and the Slovak

Republic (aggregate worldwide sales of at least approximately \$6.4 million and each of at least two parties with worldwide sales of at least \$2.1 million).

**2.1.2.5** Requiring notification on the basis of worldwide assets or sales (especially at these exceedingly low worldwide thresholds) as to transactions that lack any significant local nexus increase transaction costs without any corresponding enforcement benefit. Notification should not be required in any jurisdiction based on potential local “effects” or local business activity unless such effects or activity exceed objectively quantifiable *de minimis* standards measured both by reference to the target’s local activities and appropriate minimum local contacts by at least two parties to the transaction. Again, suitable models in this regard include Canada (target company business operations in Canada coupled with Canadian assets/sales thresholds); Netherlands (combined worldwide turnover plus parties’ individual turnover in the Netherlands); U.S. Hart-Scott-Rodino Act foreign transaction exemptions (16 C.F.R. § § 802.50 and 802.51 -- U.S. sales/assets tests); and the EU Merger Regulation (combined worldwide turnover plus EU/EEA turnover tests – although in the context of concentrative joint ventures, this jurisdictional test should be further refined to eliminate extra-territorial reach as to foreign joint ventures lacking any jurisdictional nexus with the EU/EEA, consistent with the following principle).

**2.1.2.6** Correspondingly, merger control regulations should only seek to assert jurisdiction over those aspects of a proposed transaction which have some jurisdictional nexus with the jurisdiction concerned. Those aspects of a transaction which are entirely foreign and have no relevance to the local economy should not be subject to notification in unaffected jurisdictions. In any case, those aspects of the transaction having no relevance to the jurisdiction concerned should not be subject to suspensive effect under the merger control regulation of an unaffected jurisdiction. The Hart-Scott-Rodino Act, for example, exempts acquisitions of foreign assets to which no sales in or into the United States are attributable from the Act’s requirements. *See* 16 C.F.R. § 802.50(a)(1).

### **2.1.3 Notification Timing/Filing Deadlines**

**2.1.3.1** Best practices should also permit parties to file premerger notification without undue delay. In many jurisdictions (including the EU), premerger notification is not permitted until the parties have actually executed a definitive agreement. This “definitive agreement” requirement is unnecessary and impedes the parties from orchestrating multijurisdictional filings in the most efficient manner. This “definitive agreement” requirement is intended to avoid burdening the agencies with reviewing speculative transactions, but this concern can be addressed with a “good faith intention to consummate” representation similar to the Hart-Scott-Rodino Act affidavit requirement. Moreover, it is unlikely that parties will undertake the significant burden and

expense associated with a Form CO-type filing in connection with a purely speculative transaction.

**2.1.3.2** Under the Hart-Scott-Rodino Act, parties are able to file their Premerger Notification and Report Forms as soon as a letter of intent, agreement in principle or contract to merge or acquire has been executed. Many other jurisdictions, such as Germany and Canada, likewise permit premerger notification prior to the execution of a definitive agreement. We believe that these regimes provide suitable models for best practices as to when notification should be permitted.

**2.1.3.3** The difficulties associated with the “definitive agreement” requirement are exacerbated by the fact that although the parties cannot file prior to the execution of a definitive agreement, in many of these jurisdictions, the parties must file within a short period of time following its execution. For example, under the EU Merger Regulation, the Form CO **must** be filed within one week following the execution of the definitive agreement. Similar requirements are imposed in Brazil (15 days), Finland (one week), Greece (10 days), Hungary (8 days), Poland (14 days), the Slovakia Republic (15 days) and South Africa (7 days). The Brazilian system has been even more problematic in this connection since CADE has in the past taken the position that the filing deadline is triggered by the execution of a letter of intent or memorandum of understanding. It is virtually impossible to prepare the required submissions within these specified periods, and, to the extent that the parties must observe mandatory waiting periods following their filings, these filing deadlines are entirely superfluous. Although the enforcement authorities in some of these jurisdictions (*e.g.*, the European Commission) are typically relatively accommodating in granting waivers respecting the filing deadline, having to sort through the maze of disparate jurisdictional tests on an accelerated basis in these “fast track” jurisdictions and thereafter having to seek waivers in multiple jurisdictions increases transaction costs with no corresponding enforcement benefit. Artificial filing deadlines of this type should therefore be eliminated.

**2.1.3.4** With respect to public offers, best practices in merger control procedures should take the particularized nature of these transactions into account, either through abbreviated review periods (as under the Hart-Scott-Rodino Act) and/or through specific derogations of suspensive effect, subject to appropriate undertakings (as in the EU). Applicable rules should not permit target companies to use competition law notification procedures to frustrate hostile public bids, and these rules should be harmonized with company law timeframes applicable to public bids generally.

#### **2.1.4 Notification Form**

**2.1.4.1** Competition enforcement agencies have a legitimate interest in obtaining sufficient information about a proposed transaction to make a threshold

decision on whether the transaction will affect competition in the jurisdiction concerned.

**2.1.4.2** Jurisdictions should not impose unnecessary burdens through the use of overly-detailed initial filing requirements. Initial filing forms should elicit the minimum amount of information necessary to determine whether the proposed transaction raises potential competitive issues. The contents of the initial notification and report form should be tailored so as to avoid imposing any unnecessary transaction costs on the notifying party.

**2.1.4.3** The framework for an initial filing form prepared by the OECD is an effective working model for purposes of considering the development of a harmonized international notification form. *See* Report on Notification of Transnational Mergers (DAFFE/CLP(99)2/FINAL).

**2.1.4.4** Initial filing forms should incorporate the following principles. Some modifications to the OECD model may be in order to ensure that these principles are respected:

- (1) Any information required should be maintained in the ordinary course of business or readily ascertainable from normal business operations.
- (2) The form should avoid subjectively-oriented information such as descriptions based on market definition or “share” of market. If such information is required, it should be subject to a materiality threshold.
- (3) The form should not require information on lines of business that are not part of the transaction or on generalized potential “upstream” or “downstream” relationships. Rather, information pertaining to actual vendor-vendee relationships might be requested.
- (4) Information regarding a party’s business operations should be required on the basis of defined common basis. In jurisdictions that do not currently require the use of a standardized industrial classification system (e.g., NAICS), a more effective approach may be the requirement that a party’s business operations be described by reference to “lines of business” employed by the parties in their regular course of business for accounting or reporting purposes. There exists some debate as to whether NAICS-type classifications actually bear a direct relationship to relevant product markets in an antitrust sense.
- (5) Geographic sales data should likewise be required only on the basis of actual sales areas, as opposed to subjectively-based geographic “markets.”
- (6) A competitive effects analysis should not be required, although parties should be permitted to present such analyses on a voluntary basis to facilitate expedited review. Under German notification procedures, for example, parties are required to supply market share information of their

combined shares amount to 20 percent or more, but no competitive effects analysis is required. Notifying parties nevertheless routinely supply such analyses in their notifications, recognizing that their interests are typically best served by such voluntary submissions.

- (7) Confidentiality should be assured for the submission and any accompanying documentation.

**2.1.4.5** Counseling advice from the competition agency with respect to the form should be made available on an anonymous basis. The individuals responsible for counseling within the agency should not have responsibility for passing on the proposed transaction.

**2.1.4.6** An effort should be made to narrow the legal and factual issues as early as possible. Jurisdictions should therefore consider making staff available for pre-notification meetings in order to narrow the requirements of the notifying parties, particularly in complex matters. Pre-merger notification meetings should not be required of the notifying parties, but should be permitted on a confidential basis.

**2.1.4.7** A policy should be established allowing notifying parties to voluntarily provide additional information to allow the agencies to narrow or resolve any potential competitive issues or engage in a focused inquiry into those issues.

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

## **2.1.5 Merger Control Proceedings**

### **2.1.5.1 Two-Phase Approach**

- (1) To avoid imposing unnecessary transaction costs on transactions that do not raise competitive issues and to promote harmonization of initial review periods, jurisdictions should apply a two-phase approach to merger review.
- (2) Phase I should require the merging parties, either jointly or individually, to submit the minimum amount of information necessary to determine whether the proposed transaction raises potential competitive issues.
- (3) A Phase II investigation should be initiated only when an agency, having conducted a diligent review of information submitted by the parties and collected, as necessary, from third parties concludes that the proposed

transaction raises potential competitive issues within the jurisdiction concerned that merit further investigation.

- (4) At the commencement of a second stage review, the reviewing agency should articulate to the merging parties the specific competitive concerns that are driving the investigation. This statement may be made orally or in writing and should contain a short but clear statement of the competitive concerns that cause the agency to undertake further investigation. The disclosure should not preclude the reviewing agency from pursuing any additional avenues of investigation or theories of competitive harm if new information comes to light.
- (5) Enforcement authorities should attempt to coordinate their Phase II reviews to the extent possible. At a minimum, this should include coordinating with respect to the timing and content of information requests, as well as the format in which the information is requested (e.g., fiscal vs. calendar year; net sales vs. gross sales; dollar sales vs. unit sales; gross prices vs. net prices). Coordination also would be desirable with respect to the timing of interviews and plant tours.
- (6) Enforcement authorities should give consideration to accepting information that has already been provided in another jurisdiction, where that information is substantially responsive to what is required. (This is a practice that is becoming increasingly common in Canada, where the Competition Bureau has saved merging parties substantial time and effort by accepting interrogatories and documents previously submitted to the U.S. DOJ or FTC.)
- (7) Seriatim requests for information should be avoided unless justified by the discovery of new facts or necessary for purposes of clarifying prior submissions.

#### ***2.1.5.2 Review Periods***

- (1) Merger review should be conducted within a reasonable timeframe. Jurisdictions should provide certainty with respect to review periods by means of appropriate notice to the parties, including prompt notification that any required submissions have been accepted for filing as complete. Specified review periods should not inhibit the speedy review of proposed transactions. Provisions for early termination should be included both as to Phase I and Phase II review periods.
- (2) The period for Phase I review should be set in regard of waiting period norms applicable in other jurisdictions. Accordingly, Phase I review should conclude within 30 days of the initial filing.
- (3) Jurisdictions should consider the establishment of a maximum Phase II review period of 4 months. If maximum review periods are not imposed,

the enforcement agency should enter into an agreement with the parties setting out a detailed investigative schedule culminating in a date certain for the ultimate enforcement decision. A four-month period should be targeted as the maximum review period in such undertakings, which should only be modified by agreement between the parties and the head of the enforcement agency.

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

#### ***2.1.5.3 Agency Authority***

- (1) Multiplicity of reviewing agencies within a single jurisdiction should be avoided. Each jurisdiction should identify the agency or agencies responsible for merger review and clearly delineate responsibilities.
- (2) A single federal authority responsible for merger review is the preferred approach. This approach is likely to maximize transparency and consistency in the application of competition policy.
- (3) Compartmental governments within a country should be prohibited or discouraged from engaging in the review of notified transactions. Mergers of sufficient size to trigger notification thresholds should be presumed to warrant the attention of federal agencies without need for subsidiary enforcement.
- (4) Where the proposed transaction involves areas traditionally subject to sectoral regulation, the sectoral regulators may have a legitimate role in the merger review process. The findings of the federal competition agency as to the competitive effects of the proposed transaction, however, should be binding on the sectoral regulator.

#### ***2.1.5.4 Oversight***

- (1) Agencies should implement an effective oversight system to ensure that both competition policy and the merger review process are implemented consistently by agency staff.

- (2) Decisions to challenge a proposed transaction should be subject to independent review by a designated appellate authority. The appeal should incorporate the elements of due process and should permit a timely resolution of the matter. In this regard, jurisdictions should acknowledge the practical business difficulties in keeping a transaction alive for more than a few months following an agency challenge to a transaction. *See also "Procedural Safeguards," infra.*

#### **2.1.5.5 Cooperation**

- (1) Any nation has the right to enforce its antitrust laws against a transaction that threatens to adversely impact competition within its markets.
- (2) At the same time, nations should recognize that a challenge to a proposed transaction or the imposition of a remedy might have extraterritorial effects. To the greatest extent possible, remedies should be narrowly tailored to cure domestic problems.
- (3) Traditional principles of comity should play a role in guiding the decisions of competition agencies regarding proposed transactions with international implications.
- (4) Nations should strive to deepen cross-border cooperation in reviewing mergers. Convergence in approaches to merger review and the imposition of complementary remedies can best be achieved through consistent contact and open dialogue among competition agencies. Confidentiality safeguards should be in place to protect sensitive business information, both in the jurisdictions where information is provided by the parties and in jurisdictions to which such information is provided downstream. *See "Procedural Safeguards" infra.*
- (5) In appropriate cases, agencies should consider entering into bilateral or multilateral cooperation agreements with other jurisdictions to facilitate improved information sharing (in accordance with confidentiality safeguards), work sharing, analysis, and imposition of remedies.

#### **2.1.5.6 Filing Fees**

- (1) Jurisdictions are entitled to require the parties to a transaction to pay a reasonable filing fee. Fees should not be assessed, however, for consultations as to whether filing is required in the jurisdiction concerned.
- (2) The fee should be no more than necessary to cover the reasonable administrative cost of reviewing a transaction.
- (3) While the filing fee may be applied to the administrative costs of the agency, funding for the agency ideally should be de-linked from the filing

fees to ensure that the agency retains sufficient funding regardless of merger activity.

- (4) The filing fee may vary with the size of the transaction. The fee system, however, should not create incentives for the agency to undertake a more significant level of review (i.e., Phase II) in order to obtain additional fees.
- (5) Filing fees for merger notification should not be used as “license fees” for businesses nor as a means of extracting additional revenues from large businesses.

## **2.2 PROCEDURAL SAFEGUARDS**

As previously discussed, the second key aspect of best practices relates to the adoption of appropriate procedural safeguards both within each individual jurisdiction and in the context of multijurisdictional reviews. Set forth below is our recommended framework for best practices relating to procedural safeguards in each of these contexts.

### **2.2.1 Transparency**

**2.2.1.1** Merger control laws and regulations, as well as merger review procedures, principles and practices should be as transparent as possible.

**2.2.1.2** Among other things, merging parties and other persons with a potential interest in a merger should be able to clearly ascertain when a transaction will be assessed as a merger; the standards for determining whether a pre-merger notification will be required; any applicable time deadlines for making a pre-merger filing; the information required to be provided in a filing and in any voluntary submissions that may be considered helpful; how third parties can make their views known to the agency with respect to the merger; and the time periods, if any, within which any decisions must be made by the enforcement authority.

**2.2.1.3** Enforcement authorities should publish guidelines regarding the substantive and analytical standards employed in merger review, so that merging parties and other persons with a potential interest in a merger can know with reasonable certainty how potential transactions will be analyzed.

**2.2.1.4** Among other things, guidelines should include a clear explanation of when a transaction will be assessed as a merger; the test for determining when a “second phase” review will be commenced and the test for determining whether a merger will be challenged or approved; the potential theories of anti-competitive effects that may be considered; the extent to which political or other non-competition considerations may influence the determination of whether a merger may be approved or challenged; the principles applied in

defining the product and geographic dimensions of relevant markets; the manner in which market shares will be calculated; how ease of entry will be evaluated; and the role of efficiencies and other factors in the agency's analysis.

**2.2.1.5** Consideration should be given to using speeches, press releases, information bulletins and/or other tools to disseminate information regarding precedential interpretations of statutes, regulations, policies or practices, or regarding the basis for the agency's conclusions with respect to high profile or important cases.

**2.2.1.6** The foregoing materials should be available on the agency's web-site.

## **2.2.2 *Non-Discrimination***

**2.2.2.1** Merger control laws should not discriminate between firms on the basis of nationality.

**2.2.2.2** Enforcement agencies, courts, tribunals and other persons or agencies involved in the merger review process or the adjudication of mergers or issues related to merger review should apply laws, regulations, policies, practices and procedures in a non-discriminatory manner and without reference to firms' nationalities.

**2.2.2.3** For greater certainty, and without limiting the generality of the foregoing, laws, regulations, policies, practices and procedures should not be applied to further the interests of local firms or industries.

## **2.2.3 *Due Process***

**2.2.3.1** Merger control procedures should operate within a framework that ensures that the fundamental due process rights of the parties concerned are respected, and that appropriate safeguards are in place to ensure the enforceability of those rights by the parties concerned.

**2.2.3.2** Mechanisms should be established to ensure decision-making in the first instance is based strictly on the facts and legal standards applied objectively in each case. While the decision to initiate Phase II procedures should rest in the sound discretion of the enforcement agency, mechanisms should be in place to ensure that the parties concerned have timely and effective rights of appeal before a court or other independent arbiter regarding the interpretation of laws, regulations and procedures; decisions relating to substantial compliance with filing requirements; the scope of information requests issued by the enforcement agency or of any oral examinations that may be sought; and final decisions of the agency with respect to a merger.

## 2.2.4 Exchange of Confidential Information<sup>1</sup>

### 2.2.4.1 General Principles for Legislation, Cooperation Agreements and Treaties

- (1) Considerations of transparency and due process dictate that the framework for cooperating with foreign enforcement authorities should be established by an appropriate legal framework which requires cooperation between enforcement authorities to be conducted pursuant to bilateral or multilateral cooperation treaties or agreements and which describes the minimum requirements that such treaties or agreements should contain.
- (2) Cooperation between enforcement authorities should be carried out within the parameters of a bilateral cooperation treaty or agreement, or pursuant to the terms of a waiver or limited waiver granted by the parties to the merger.
- (3) At a minimum, the aforementioned legal framework should require international cooperation treaties or agreements to:
  - stipulate the safeguards that must be established to protect the confidentiality of any information disclosed to a foreign enforcement agency, including requiring recipient agencies to commit that any confidential information which they may receive:
    - will be used exclusively for the purposes of the specific merger investigation in respect of which the information was sought;
    - will not be disclosed to any other persons, (including any other government agencies or departments, a court, tribunal or other body, or a private plaintiff in civil proceedings), for purposes other than proceedings commenced by that foreign authority without the express consent of the person who originated the information.
  - require notification to persons who have supplied information to an enforcement agency (whether they be parties to the merger or third parties) of:
    - the identity of the foreign agency to whom information is proposed to be sent;

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<sup>1</sup> The ICC's position regarding the exchange of confidential information between enforcement agencies is set forth in greater detail in its Policy Statement entitled *ICC Recommendations to the International Competition Policy Advisory Committee (ICPAC) on exchange of confidential information between competition authorities in the merger context*. (Document 225/525 dated 21 May 1999.)

- the terms and conditions under which the disclosing agency proposes to provide information to the recipient agency;
  - the domestic rules governing the use of confidential information which would bind the recipient agency;
  - the precise information proposed to be exchanged; and
  - the date of the proposed disclosure.
- require further notification if the scope of the information to be exchanged is modified;
  - provide persons who have supplied information to an enforcement authority (whether they be parties to the merger or third parties) with a right to refuse permission for the authority to disclose such information to anyone else, including a foreign enforcement authority;
  - describe the circumstances in which a requested party can refuse to comply with a request for information (i.e. national security);
  - require recipient parties to protect, to the greatest extent possible consistent with their confidentiality laws, the confidentiality of any information received under the treaty or agreement, and to oppose to the fullest extent possible consistent with that party's laws any application that may be made by a third party for access to the information;
  - protect any privilege that may exist in respect of confidential information (for example, if a person in jurisdiction A provides to an enforcement authority in jurisdiction B information that is subject to privilege protections in jurisdiction A, the legislation should prohibit the enforcement authority in jurisdiction A from obtaining that information from its counterpart in jurisdiction B);
  - include reciprocal assurances that the confidentiality laws of their jurisdiction are sufficient to protect the confidentiality of any information that may be disclosed pursuant to the cooperation treaty or agreement, and that the level of protection that will be accorded to any information received from the disclosing party will be substantially similar to the protection afforded to confidential information in the jurisdiction of the disclosing party;
  - include reciprocal assurances that any terms or conditions upon which information is disclosed under the treaty or agreement will be honored strictly, including conditions respecting applicable rights and privileges under the laws in the jurisdiction of the disclosing party;

- require the recipient agency to return or destroy expeditiously any confidential information that may have been received pursuant to the cooperation treaty or agreement, at the completion of the specific merger review in respect of which the information was disclosed;
  - require prompt notice of any breach of confidentiality that may occur; provide the company whose information has been disclosed with the right to obtain the immediate return of its confidential information from the recipient agency, as well as the possibility of obtaining judicial relief (including orders for the return of all or part of the documents provided, and constraining the use by the foreign agency of all or part of the disclosing company's confidential information); and require the cooperation agreement or treaty to be terminated if (a) expeditious action was not taken to minimize the adverse consequences of such breach for the person(s) whose information was disclosed, and/or (b) the recipient agency fails to satisfy the disclosing agency that similar breaches will not occur in the future; and
  - provide that electronic exchanges of confidential information should be encrypted.
- (4) As a general principle, information exchanged between enforcement authorities should be limited to the necessary minimum.

#### **2.2.4.2 Waivers and Limited Waivers**

- (1) Requests for waivers of rights from merging parties to facilitate enforcement cooperation should make it clear that no adverse consequences will arise if the request is not granted - in other words, merging parties and other persons who may have an interest in a merger should not be coerced, or in any way feel pressured, into agreeing to provide a waiver to one or more enforcement authorities.
- (2) Enforcement agencies should develop model waivers and limited waivers, while maintaining sufficient flexibility to tailor waivers to deal with the specific needs of each case.
- (3) Enforcement agencies should endeavor to use limited waivers to the extent possible, especially where serious *prima facie* issues are not raised in the home jurisdiction or where there is a limited nexus between a merger and the jurisdiction.
- (4) Based on experience to date with waivers in the Canada-U.S.-Europe context waivers should stipulate:
  - the specific purpose for which the waiver or limited waiver has been provided;

- the specific type of information in respect of which the waiver or limited waiver has been provided;
- that the waiver does not cover any materials asserted to be privileged;
- that the waiver does not extend to any rights that the party providing the waiver may have under confidentiality laws, policies and practices regarding the protection against the direct or indirect disclosure of information to a third party;
- that the disclosing agency will continue to protect the confidentiality of the waiving party's information *vis-à-vis* other parties in accordance with its confidentiality laws, policies and practices;
- that any information obtained pursuant to the waiver or indirectly from another enforcement authority will be accorded the same protections as if the information had been obtained in a compulsory fashion directly by the recipient agency from the person providing the waiver; and
- that the recipient agency will notify the party providing the waiver within 10 days if a third party makes a request for any information obtained pursuant to the waiver.

- (5) Enforcement authorities should develop and make available to the public a policy regarding the manner in which they treat confidential information that is received and regarding the framework within which they exchange such information with foreign enforcement authorities.

### 3. CONCLUSION

We believe that the foregoing principles, if adopted, would promote greater efficiency and confidence in the international merger review process without jeopardizing the legitimate enforcement interests of any jurisdiction concerned. To the contrary, adoption of these proposals would also promote more efficient utilization of enforcement resources and greater efficiency in cooperative enforcement efforts in the increasingly prevalent international context.

Achieving these objectives will inevitably require some compromises by the international enforcement community -- not because any given set of practices is qualitatively inferior, but to achieve efficiency-enhancing transparency and commonality in the multijurisdictional review

process. While we should perhaps resist concessions dictated by mere expediency, unless different practices are dictated by genuine differences in underlying policy objectives or fundamental statutory constraints, it is submitted that the objective of achieving international harmonization under "best practices" principles should prevail.