

## *Chapter 3*

# **MULTIJURISDICTIONAL MERGERS: RATIONALIZING THE MERGER REVIEW PROCESS THROUGH TARGETED REFORM**

The spread of merger control law has the potential to create significant benefits. Merger review regimes with advance notification requirements give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. At the same time, the marked increase in the number of jurisdictions possessing merger review regimes renders it increasingly likely that international mergers and acquisitions will be reviewed by multiple jurisdictions.

While recognizing the benefits of merger review systems, the Advisory Committee also sees that significant and sometimes unnecessary transaction costs may be imposed on proposed transactions through the notification and review procedures implemented by various jurisdictions. These costs are of particular concern given that the vast majority of transactions reviewed by competition authorities are permitted to proceed with no action, suggesting that the transactions are either competitively benign or beneficial to society.

In considering the consequences of multijurisdictional merger review, the Advisory Committee has sought to identify those problematic practices employed by various jurisdictions around the world, as well as the exemplary practices that others could usefully adopt. The Advisory Committee believes that the challenges identified in this chapter can most profitably be addressed by advocating targeted reform in individual merger control regimes through the promotion of best practices. Broadly speaking, the best practices that the Advisory Committee identifies in this chapter fall within two major categories: ensuring that each jurisdiction's merger review regime examines only those mergers that have a nexus to and the potential to create appreciable anticompetitive effects within that jurisdiction; and ensuring that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process. The Advisory Committee believes that identifying the beneficial and troublesome practices of various jurisdictions provides useful comparisons and ultimately provides countries with the ability to select those practices that will enhance their merger review processes while comporting with national legal and cultural characteristics.

The United States by virtue of its experience and developed practices can and should play a leading role in the effort to implement reforms in the international arena. Perhaps one of the most effective ways in which the United States can stimulate global reform is through leading by example. It is therefore important that the United States continue to examine and perfect its own merger review processes. After

addressing problems within its own borders, the United States is well positioned to advocate that other jurisdictions make modifications in their merger review systems.

In the previous chapter the Advisory Committee considered ways to bridge the differences between systems and to minimize the risk that differing substantive standards employed by reviewing jurisdictions will lead to diverging evaluation on the merits, incompatible or burdensome remedies, and international friction. This chapter examines those problematic features within merger review systems that heighten uncertainty about filing obligations and review schedules and generate unnecessary transaction costs. It also identifies concrete ways in which the United States and other jurisdictions constructively may begin to address these international challenges. The chapter first explores in greater detail both the benefits and the challenges presented by the proliferation of merger control regimes with antitrust notification obligations. It then identifies specific practices that require reform, together with ways in which the Advisory Committee believes that these reforms may be implemented most effectively. Finally, the Advisory Committee identifies the likely impact of its recommendations in the United States.

### **Benefits of Antitrust Merger Notification**

While mergers frequently lead to significant cost savings and other benefits, they also may be anticompetitive. Merger review regimes give competition authorities the ability to identify and remedy potentially problematic transactions, thereby benefiting consumers and competition. The U.S. Department of Justice (DOJ) has estimated that its merger review efforts during 1998 saved consumers \$4 billion.<sup>1</sup> Although the Federal Trade Commission (FTC) does not track total estimated consumer savings flowing from its enforcement efforts, estimates in two specific actions are notable. The FTC estimates that it has saved consumers approximately \$250 million annually since it obtained a preliminary injunction to prevent two office supply superstores from merging in 1997. The agency also estimates that it has saved consumers another \$300 million annually by blocking two nearly simultaneously proposed mergers in the drug wholesaling industry in 1998.<sup>2</sup> Recognizing the benefits created by merger review systems, scores of jurisdictions around the world have enacted merger control laws within the last decade.

The more established national competition laws, as well as many of those more recently implemented, include substantive prohibitions on anticompetitive mergers, acquisitions, and joint ventures. Many of the laws require advance notice of proposed transactions. In fact, commentators have noted that “[i]t is not hyperbole that perhaps the greatest U.S. export in the last decade has been the adoption of pre-

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<sup>1</sup> Department of Justice, Antitrust Division, FY2000 Congressional Budget Submission, at 64.

<sup>2</sup> *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998) (enjoining the merger of Cardinal Health Inc. with Brunswig Corp. and McKesson Corp. with Amerisource Health Corp.).

merger review processes, particularly in developing countries.”<sup>3</sup> Of the more than 80 jurisdictions currently possessing competition laws, it is estimated that at least 60 require (or provide for) antitrust merger notification.<sup>4</sup> This number undoubtedly will increase as other countries implement competition laws.

Advance notice is viewed as useful to competition authorities because it permits them to evaluate and either prohibit or restructure potentially anticompetitive transactions before the transaction is implemented. In this way, competition authorities avoid the widely acknowledged difficulties that accompany attempts to restore competition by “unscrambling the eggs” after allegedly anticompetitive transactions have been completed. The experience of the U.S. antitrust enforcement agencies before 1976 illustrates that imposing structural relief after a transaction has been consummated is often difficult, if not impossible. Attempting to prevent anticompetitive harm by relying on antitrust conduct cases after an anticompetitive merger has been implemented, according to the U.S. antitrust enforcement agencies, is a poor substitute for preserving competitive structure in the market in the first place. Even if postconsummation remedies were effective, consumers would suffer the harmful effects of the loss of competition during the interim period before remedies were imposed. Indeed, the stated purpose of the U.S. Congress in enacting the premerger notification regime embodied in the Hart-Scott-Rodino Act of 1976 (HSR Act or HSR) was to give the agencies “an effective mechanism to enjoin illegal mergers *before* they occur.”<sup>5</sup>

Reliance on premerger notification systems to provide advance notice of proposed transactions is based in large part on the recognition that competition authorities have neither the time nor the resources to monitor all business transactions in an attempt to identify those that pose a threat to competition. Nor do they have the ability to detect those “midnight mergers” that are consummated without public notice. Moreover, it is not practical to place the burden of notification on concerned competitors and consumers. Reliance on these entities to provide advance notice may prove imperfect either because these entities may not know about transactions before their consummation or because the transaction costs incurred by these entities in notifying the competition authorities may outweigh any benefits obtained by having the proposed transactions reviewed.

For these reasons, many jurisdictions view premerger notification regimes as the most efficient way of systematically obtaining advance notice of potentially anticompetitive transactions. Most competition law systems thus require merging parties to notify competition authorities of proposed transactions that meet certain criteria and to await the competition authorities’ review before consummating those transactions.

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<sup>3</sup> Submission by Michael H. Byowitz and Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, “Rationalizing International Pre-Merger Review,” ICPAC Hearings (Nov. 4, 1998), at 3 [hereinafter Byowitz and Gotts Submission].

<sup>4</sup> Most (approximately 50) merger control regimes provide for mandatory notification before closing, although some countries allow for postclosing or voluntary notification combined with the authority of the competition agency to intervene after consummation of the transaction. Annex 2-C identifies several antitrust merger notification systems.

<sup>5</sup> S. REP. NO. 94-803, at 72 (1976).

Parties to a proposed transaction that meets the threshold filing requirements of the HSR Act, for example, must file a premerger notification form with the DOJ and FTC and observe a 30-day initial waiting period before consummating the proposed transaction. If either of the agencies requests additional information before the expiration of the initial waiting period, the parties must wait an additional 20 days after substantially complying with the request for additional information before going forward with the proposed transaction.<sup>6</sup>

So that competition authorities need not review each proposed transaction, premerger notification regimes require notification only for proposed transactions that meet certain criteria.<sup>7</sup> Because substantive merger control laws are concerned with structural restraints of competition, merger notification regimes in the first instance generally limit notification requirements to those transactions that result in the change of control by one or more entities over one or more other independent entities.<sup>8</sup> Most regimes also generally limit their scope by requiring notification only for those transactions deemed large enough to justify the expenditure of agency resources. In the United States, for example, parties to a merger need not notify the DOJ or FTC unless the statutory “size of party” and “size of transaction” tests are met.<sup>9</sup>

### **Challenges Presented by the Proliferation of Merger Regimes**

While the spread of merger control law has the potential to create significant benefits, the growing tendency of nations to apply their laws to offshore mergers and the sheer volume of law that firms

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<sup>6</sup> 15 U.S.C. §18a(b)(1)(B) and (e); 16 C.F.R. §803.10(b)(1)-(2). In cash tender offers the initial waiting period is 15 days. In several other countries, such as Belgium, closings are not barred unless expressly ordered, but the parties may be limited from taking “irreversible” measures affecting operations in the jurisdiction.

<sup>7</sup> One commentator characterizes this feature of premerger notification regimes as the “filter” function. *See* Andre Fiebig, Esq., Gardner, Carton & Douglas, “The Limitations Imposed by International Law on the Extraterritorial Reach of Premerger Control Regimes,” (May 26, 1999), at 5, submitted by Mr. Fiebig for inclusion in the Advisory Committee record [hereinafter Fiebig Submission].

<sup>8</sup> Each jurisdiction has its own definition of when a transaction triggers the application of merger control law. Virtually all jurisdictions focus on a change in “control.” However, the boundaries of control often are blurred and vary greatly among jurisdictions. Merger control laws are presumptively triggered in a number of jurisdictions by monetary, stockholding or market share thresholds. For example, in Poland and Austria, acquisitions of 25 percent or more are considered mergers regardless of whether the minority shareholder may exercise control. Many antitrust regimes also incorporate a spectrum of control thresholds, where the lower control thresholds may be satisfied by relatively modest rights or abilities to influence (but not decisively influence) the management of a legal entity. For example, under EC jurisprudence, this spectrum ranges from “decisive influence” to “influence” to “no influence/passive investment.” *See* Barry E. Hawk and Henry L. Huser, “Controlling” the Shifting Sands: Minority Shareholdings Under EEC Competition Law, 17 *FORDHAM INT’L L.J.* 294 (B. Hawk ed., 1994).

<sup>9</sup> 15 U.S.C. §18a.

undertaking mergers must now consider may be a mixed blessing. As a result of this explosion in merger regulation, merging parties face an array of up to 60 merger regimes that require, among other things:<sup>10</sup>

- C Knowledge of and compliance with complex filing rules.
- C Completion of an array of forms in accordance with various national requirements.
- C Payment of substantial fees to the reviewing authorities (often designed to subsidize the operation of government agencies).
- C Knowledge of and compliance with review schedules and waiting periods.

Although no comprehensive data are available that quantify the overall public and private costs imposed by compliance with multijurisdictional merger notification and review requirements, the responses of firms and their advisors to ICPAC outreach efforts suggest that these costs are sizeable.<sup>11</sup> According to those responses, one significant category of costs imposed on international mergers results from having to ascertain potential notification obligations in literally dozens of separate jurisdictions. Determining whether merger control regulations exist in all potentially affected jurisdictions is in itself a daunting task, as is determining whether the disparate jurisdictional thresholds for merger notification in these various countries are met. Many jurisdictions' filing requirements are vague, subjective, or difficult to interpret. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which currently are employed by many jurisdictions (though not the United States). Mistakes may be costly: several jurisdictions, including the United States and the European Commission (EC), impose fines for failure to notify a reportable transaction.<sup>12</sup>

A second significant category of costs results from having to file multiple merger notifications. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which the merging parties operates. This information is required even for transactions those pose few or no competition issues. In some cases, filings must be made in countries having no reasonable basis for exerting jurisdiction

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<sup>10</sup> See Byowitz and Gotts Submission, at 3-5.

<sup>11</sup> See J. William Rowley, QC and A. Neil Campbell, *Multi-jurisdictional Merger Review -- Is It Time for A Common Form Filing Treaty?* in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW: A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY, at 9 (1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter Rowley and Campbell Submission].

<sup>12</sup> Many other jurisdictions also impose fines for failure to comply with notification requirements; some of these are: Argentina (1 million pesos per day); Brazil (R\$55,000 to R\$5.5 million); Japan (up to Yen 2 million); Poland (1 percent of an undertaking's average monthly revenue); Taiwan (NT\$100,000 to NT\$1 million). Additional penalties may be imposed for closing without clearance. See *Getting the Deal Through: The International Regulation of Mergers and Joint Ventures*, GLOBAL COMPETITION REVIEW (2000).

over a transaction. Numerous premerger notification regimes set reporting thresholds at exceedingly low levels or require notification of transactions that lack any appreciable nexus to the economy of the reviewing jurisdictions. Precise statistics regarding the percentage of proposed transactions that ultimately are reviewed by multiple jurisdictions are not available. Anecdotal evidence collected by the Advisory Committee indicates, however, that it is not unheard of for merging parties to file notifications with a dozen or more jurisdictions.<sup>13</sup>

Direct costs of compliance include attorneys' fees, filing fees, and document production costs. Companies frequently must retain local counsel in a multiplicity of jurisdictions to obtain guidance on whether the proposed transaction is subject to notification requirements and on how to comply with premerger filing requirements, a task complicated by the fact that, in many jurisdictions, few attorneys may be experienced in competition law. As one submission to ICPAC observed, "local counsel must be retained to guide the parties through the complexities of the individual antitrust regimes and obtain the approval of the local antitrust authorities. Often the laws in a particular jurisdiction, including their standards for filing, are ambiguous, or the forms that must be submitted to the reviewing authorities are complex and call for detailed local information, requiring the active intervention of local counsel."<sup>14</sup>

Annex 3-A identifies the filing fees imposed by several jurisdictions and shows how quickly they mount when multiple jurisdictions are involved. The United States, for example, requires each acquiring party to pay a US\$45,000 filing fee; filing fees in the United States totaled \$195 million in fiscal year 1999.<sup>15</sup> Similarly, Canada in November 1997 introduced a filing fee of Cdn\$25,000 for each prenotifiable transaction and request for an Advance Ruling Certificate.<sup>16</sup> Although filing fees may account for only a tiny fraction of the total cost of a large transaction, multiple filing fees may impose relatively significant costs on smaller transactions.

Multijurisdictional merger review also imposes indirect and difficult-to-quantify costs that may exceed the direct costs identified above. These indirect costs include, for example, the drain on executives' time and productivity. One observer notes that:

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<sup>13</sup> See, e.g., Submission by the U.S. Council for International Business, ICPAC Hearings (Apr. 22, 1999), at 4 [hereinafter USCIB Submission] ("Presently, it is not unheard of that a multinational corporation with a proposed merger would be required to file in 20 or 30 jurisdictions.").

<sup>14</sup> James B. Kobak, Jr., and Anthony M. D'Iorio, Hughes Hubbard & Reed LLP, *The High Cost of Cross-Border Merger Reviews* in *THE GLOBAL ECONOMY AT THE TURN OF THE CENTURY, VOL. III INTERNATIONAL TRADE*, at 717, 720 (Gulser Meric and Susan E.W. Nichols eds. 1998) submitted by Mr. Kobak for inclusion in the Advisory Committee record [hereinafter Kobak Submission].

<sup>15</sup> U.S. DOJ Premerger Office.

<sup>16</sup> Competition Bureau Fee Charging Policy, *CANADA GAZETTE, PART I, VOL. 131, NO. 44*, at 3,446 (Nov. 1, 1997).

Executives' time and productivity lost due to a protracted investigation (or series of investigations) takes a heavy toll on the parties to the transaction. In each jurisdiction where some form of compliance is required, senior officers of the companies involved will have to spend many hours conducting, coordinating, and supervising the search for financial and market information that will have to be produced to each of the regulating authorities involved. The senior officers will also likely have to make themselves available to counsel and to the authorities for interviews and other information gathering activities, which distract the senior officers from the business of the firm.<sup>17</sup>

The same observer notes that the "loss to the company of the executives' time and productivity will compound with each follow up request propounded by the regulating authorities."<sup>18</sup>

Other intangible costs arise from the delays that may be engendered by the review process in a number of jurisdictions. Delays imposed on proposed transactions result from the lack of strict deadlines and lengthy review periods. At the extreme, the merging parties may abandon the transaction. Mergers are almost always time sensitive; delays may prove fatal to a transaction, particularly if it relates to a high-technology industry, such as electronics, computers, or software, with a very short life cycle. In addition, delay breeds uncertainty in product, labor, and capital markets, enabling competitors to raid customers and staff.<sup>19</sup>

Delays also create lost opportunity costs. For example, "[d]uring the time that deals are delayed, the parties to a transaction lose the savings, efficiencies and synergies (assuming there are any) that induced their respective business decisions to do the deal in the first place, and the economy is denied whatever competitive benefits would result."<sup>20</sup> One ICPAC hearing participant testified that he is aware of a merger where the annual efficiencies exceed a billion dollars. "This particular merger will take at least a year to

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<sup>17</sup> Kobak Submission, at 721-22. The parties to the Halliburton/Dresser transaction estimate that they spent approximately \$3.5 million to comply with notification and investigation requirements in the six jurisdictions where notification was required (Australia, Brazil, Canada, the EU, Mexico, and the United States). In addition, company officials spent a great amount of time compiling requested data and preparing for and undergoing formal depositions. The United States deposed 12 executives, and informal interviews were conducted with a few key executives by the authorities in Mexico and the EU. The EU also conducted a site visit. Submission by Lester L. Coleman, Executive Vice President and General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire regarding the Halliburton/Dresser transaction (March 9, 1999) [hereinafter Coleman Submission].

<sup>18</sup> Kobak Submission, at 722.

<sup>19</sup> Submission of Barry Hawk, Skadden, Arps, Slate, Meagher & Flom, "Reforming Merger Control to Reduce Transaction Costs," ICPAC Hearings (Nov. 3, 1998), at 12-13 [hereinafter Hawk Submission].

<sup>20</sup> Joe Sims and Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 885-86 (1997).

clear, and that's one merger out of a world of mergers."<sup>21</sup> Other opportunity costs may include the inability of the individual parties to accept business that the merged entity would have been well positioned to accept because of the anticipated synergies realized from combining their operations.

Despite these escalating costs, the Advisory Committee was presented with no evidence suggesting that transaction costs associated with multijurisdictional merger review have slowed the pace of the global economy.<sup>22</sup> However, some ICPAC hearing participants cautioned that as more and more countries adopt competition laws, transaction costs incurred by global firms tend to increase, creating the danger that those costs could "cancel out the efficiency gains that one would expect from the globalization process."<sup>23</sup>

### **Rationalizing the Merger Review Process in Light of Globalization**

After looking at the transaction costs that result from multijurisdictional merger review, the Advisory Committee considered whether they are merely costs of doing business in multiple jurisdictions or whether they are excessive and could be minimized while still ensuring that enforcers have the tools necessary to identify and remedy anticompetitive transactions. *In the Advisory Committee's view, many of the transaction costs imposed by merger regimes are rationally related to the efficient review of transactions that have the potential to create appreciable anticompetitive effects within the reviewing jurisdiction and therefore should be taken in stride by companies as a cost of doing*

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<sup>21</sup> Testimony of J. William Rowley, McMillan Binch, ICPAC Hearings (Nov. 3, 1998), at 145. A company representative estimated that clearing antitrust regulatory hurdles in eight jurisdictions cost British Telecommunications PLC an estimated \$100 million in lost efficiencies during each month that the British Telecommunications/MCI Telecommunications Corp. transaction could not be closed. Statement of Tim Cowen, BT Group Legal Services, at the Fordham Corporate Law Institute (Oct. 22 & 23, 1998).

<sup>22</sup> Hawk Submission, at 14. *But see* Presentation by Members of the International Antitrust Law Committee of the Section of International Law and Practice, ICPAC Hearings (April 22, 1999), at 4 [hereinafter Members of ABA Int'l Antitrust L. Comm. Submission](contending that the U.S. merger review system imposes substantial costs both in money and management time, and therefore can and does chill some foreign transactions and cause the structuring of others to exclude U.S. operations). Of course, some deals may exclude U.S. operations because of potential antitrust concerns and vigorous U.S. enforcement.

<sup>23</sup> Statement of Frédéric Jenny, Vice President, Conseil de la Concurrence, ICPAC Hearings (Nov. 2, 1998), at 58; *see also* Testimony of Luis de Guindos Jurado, Director General de Política Económica y Defensa de la Competencia, ICPAC Hearings (Nov. 2, 1998), at 100 ("mega-mergers must be regarded as a logical consequence of a whole range of factors, and, importantly, as a symptom of market dynamism in pursuit of ever greater efficiency. Of course, the competition authorities must be alert to the possible creation or enforcement of dominant positions as a result of such operations, and cooperation between competition authorities must be welcomed as a useful and necessary means to this end. Nevertheless, we must also take care to avoid any kind of intervention that could deter market dynamism or prevent firms from improving their economic efficiency. Otherwise, there is a very real risk that we as competition authorities could actually impair economic growth and damage consumer welfare."); *see also* Byowitz and Gotts Submission, at 3 ("continued globalization through mergers and acquisitions should not be discouraged or inappropriately taxed by national competition review processes. Instead, the merger wave should be encouraged, and the international merger review process simplified and rationalized").

*business.* At the same time, the Advisory Committee is of the view that while antitrust merger control regimes have the potential to create benefits for society, those same notification and review processes also impose significant transaction costs on international transactions. It is therefore important to focus on those *unnecessary* and *burdensome* costs that have little or no relationship to antitrust enforcement goals.

These costs are of particular concern when it is recognized that the majority of the transactions that are reviewed by competition authorities are permitted to proceed with no enforcement action, suggesting that those transactions are efficiency enhancing or competitively benign. Indeed, statistics for several jurisdictions, including the United States, indicate that only a small percentage (generally ranging from 1 to 5 percent) of all notified mergers ultimately are either prohibited or restructured by competition authorities (Box 3-A). This evidence leads the Advisory Committee to conclude that the growing incidence of multijurisdictional merger reviews is imposing unnecessary transaction costs in a large number of transactions that present little, if any, actual competitive concern.

**Box 3-A: Merger Challenge Rate**

**Australia:** In 1997-98 the Australian Competition and Consumer Commission considered 176 mergers and joint ventures of which it objected only to 8 (5 percent). Australian Competition & Consumer Commission Annual Report 1997-98.

**Brazil:** From June of 1998 to September of 1998, only 2 of the 48 notified transactions (4 percent) were not approved outright. From May of 1996 to May of 1998, all but 17 of the 104 notified transactions were approved without any condition. Cade.

**Canada:** During the fiscal year ending March 31, 1999, the Canadian Competition Bureau received notification of 192 transactions (an additional 222 requests were made for advance ruling certificates). Of the examinations concluded during the year, all but 5 were approved outright. Annual Report of the Commissioner of Competition (1999).

**European Commission:** According to the EC, only 14 transactions out of 292 notifications (less than 5 percent) in 1999 were challenged or subjected to a second-phase investigation. In response to concerns expressed by the European Commission, an additional 19 transactions (approximately 6.5 percent) were cleared subject to undertakings accepted during the first phase of investigation.

**Japan:** In 1998, no formal measures were taken against the 3,813 notified mergers and acquisitions, although at least two transactions (less than 1 percent) were revised in response to concerns raised during prenotification consultation (others may have been abandoned or revised during prenotification consultation). Annual Report on Competition Policy in Japan. Notably, the thresholds were revised effective January 1, 1999, and are expected to capture approximately 200 transactions annually.

**Taiwan:** Of the 1,045 notified cases that were concluded in 1999, all but 13 (less than 2 percent) were approved. Taiwan Fair Trade Statistics.

**United Kingdom:** The Office of Fair Trading in the United Kingdom examined 425 transactions in 1998, of which only 8 (less than 2 percent) were referred to the Monopolies and Mergers Commission (MMC) for further investigation. Undertakings were accepted in an additional three (less than 1 percent) in lieu of a reference to the MMC (others may have been abandoned in response to confidential guidance). Director General's Annual Report to the DTI.

**United States:** Of the 4,679 transactions notified during the fiscal year ending September 30, 1999, requests for additional information were issued in 113 (2.4 percent), and only 76 transactions (1.6 percent) resulted in enforcement actions. U.S. DOJ Premerger Office.

To preserve the benefits of merger review while easing unnecessary burdens on international transactions, the Advisory Committee concludes that in the first instance each jurisdiction should take steps to ensure that it casts its merger review “net” only as broadly as necessary to identify potentially problematic transactions. Once a transaction has come under the merger review net of a particular jurisdiction, moreover, the Advisory Committee concludes that jurisdictions should ensure that unnecessary burdens are not imposed on that transaction.

To achieve these goals, the Advisory Committee recommends several “best practices” designed to rationalize the application of merger review procedures.<sup>24</sup> Having considered problematic practices in various jurisdictions around the world, the Advisory Committee recommends the following approaches to remedy those ills, which are discussed later in this chapter:

- C In designing their merger review systems, jurisdictions should seek to review only those transactions that have a nexus to and that pose the threat of appreciable anticompetitive effects within the reviewing jurisdiction. To this end, threshold filing requirements should be designed to screen out mergers that lack a nexus to the reviewing jurisdiction. In addition, notification thresholds should be set at levels designed to screen out transactions unlikely to generate appreciable anticompetitive effects within the jurisdiction. Additional steps that can be taken to eliminate unnecessary burdens on merging parties during this stage include establishing objectively based notification thresholds and ensuring their transparency.
  
- C Once a proposed transaction falls within the merger review system of a given jurisdiction, that jurisdiction should avoid imposing unnecessary costs on the transaction. To this end, premerger notification and review should occur within a two-stage process designed to enable enforcement

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<sup>24</sup> Advisory Committee Member Eleanor M. Fox suggests another approach to facilitate efficient coordination of filings and reduce the burden on parties of multiple notifications. She proposes a common clearinghouse for premerger notification by firms that elect to opt into such a system. One way to achieve this would be to permit the merging parties to file with a disinterested clearinghouse center on the day of the first filing. Alternatively, if the first filing is in a mature antitrust jurisdiction and covers international markets where all or most of the impacts would occur, all interested nations would be bound to accept the first filing as their first and basic information about the merger. The notified center or jurisdiction would announce the filing to member nations (or to interested or potentially interested nations). The recipient agencies would be bound to use the information only for merger review. Any country receiving the announcement that believes its system requires notification of the transaction could request a copy of the notification. A copy of this request would go to the merging parties who could contest the jurisdiction of a requesting country before the filing is sent to that country.

Although other members found merit in the proposal, it was noted that a number of issues needed to be resolved. For example, sufficient information would have to be produced in the initial filing to enable all potentially affected jurisdictions to determine whether a notification obligation is triggered and whether a jurisdiction has an enforcement interest in the transaction. It was noted that this business information is confidential and is not in the public domain. A clearinghouse system would require the broad dissemination of this confidential information to jurisdictions with varying degrees and capabilities of assuring adequate protection.

agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

- C This goal can be accomplished by adopting reasonable deadlines and time frames for review. Jurisdictions should strive to clear nonproblematic transactions within a 30-day or one-month time frame following notification. In addition, jurisdictions should seek to rationalize review periods by harmonizing rules pertaining to when premerger filings can (or must) be made. Finally, merger review periods should not be open ended and more deadlines should be employed during second-stage review processes so as to provide greater certainty to the merging parties.
- C To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the initial notification should require the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Mechanisms also should be established to narrow the legal and factual issues presented by each proposed transaction early in the merger review process.

The Advisory Committee believes that these recommendations represent realistic goals that can reduce costs on international transactions without reducing the efficacy of the enforcement agencies. The Advisory Committee believes it is in the interest of the United States and other jurisdictions to examine their own merger review processes and undertake reform efforts, where necessary, targeted at minimizing the burdens associated with merger review. In particular, one additional area warranting consideration is overlapping decisionmaking power for competition policy within jurisdictions. This feature of merger review systems may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

#### **TARGETED REFORM: CASTING THE MERGER REVIEW NET APPROPRIATELY**

Various jurisdictions that rely on exceedingly low notification thresholds or that require a filing in the absence of any appreciable domestic effects impose significant costs on transactions that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdictions.<sup>25</sup> Thus, international

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<sup>25</sup> In addition to imposing unnecessary transaction costs on proposed transactions premerger notification regimes that rely on thresholds of this nature may violate customary principles of international law. The Advisory Committee requested input from the private bar on whether the extraterritorial extension of jurisdiction in these cases potentially infringes international law. This input suggests that international law requires a nexus between the state and the act, person, or property being regulated. In the context of economic regulation, a significant detrimental effect (on competition, for example) within a state generally will justify the extraterritorial extension of jurisdiction by that state. Because the exercise of jurisdiction in these instances may interfere with the sovereignty of other states, however, the international law principle of proportionality requires that the regulation be necessary to achieve the legitimate goal of

transactions are burdened, but concomitant benefits are not necessarily created. To complicate matters, many jurisdictions' filing requirements are vague, subjective, or difficult to interpret.

### **Using Notification Thresholds to Screen Out Mergers That Are Unlikely to Have Appreciable Anticompetitive Effects Within the Reviewing Jurisdiction**

Several best practices can be employed to rationalize threshold tests for notification to reduce unnecessary transaction costs without significantly reducing the public benefit created by advance notification. First, in establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction. This goal can be accomplished by implementing threshold tests that include an appreciable nexus to the economy of the jurisdiction, such as transaction-related sales or assets in the jurisdiction, and that are set at only as broad as necessary to require the reporting of transactions that may have the potential to cause appreciable anticompetitive effects within the jurisdiction. These thresholds also should be objectively based and transparent.

Because notification thresholds are established by statute in many jurisdictions, revisions would require legislative action. Thus, it is recognized that the proposed reforms pertaining to notification thresholds likely cannot be accomplished in the short run. In the meantime, jurisdictions should ensure that transparency exists, with respect to their merger regimes generally, but should focus particularly on clarifying the manner in which those thresholds should be applied and providing information on how to comply with premerger filing requirements.

#### *Nexus to the Jurisdiction*

*The Advisory Committee recognizes that transactions between firms with international operations can create anticompetitive effects in multiple countries. Thus, the Advisory Committee acknowledges that the reporting of foreign and domestic transactions is necessary and appropriate so long as those transactions possess an appreciable nexus to the reviewing jurisdictions. However, numerous jurisdictions require notification of transactions in the absence of any appreciable domestic effect. In delineating their sphere of application, few (if any) premerger notification regimes rely expressly on the potential for proposed transactions to create anticompetitive effects. Rather, most jurisdictions rely on surrogate criteria such as sales volume, asset values, or market shares to determine the reach of their premerger notification regimes. Reliance on surrogate criteria is understandable, given the subjectivity that*

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the law and further be restricted to means which are least likely to interfere with the sovereignty of other states. *See* Fiebig Submission. As described later, using notification thresholds that require an appreciable (and objectively based) nexus to the economy of the reviewing jurisdiction would encroach less on the sovereignty of the states where the parties are located and reduce uncertainty surrounding the level of local contacts necessary to trigger a notification obligation. This suggests that reliance on worldwide figures or potential effects in themselves is not a sufficient basis of jurisdiction under principles of international law for a state to compel compliance with the premerger control regime.

necessarily is involved in determining whether a proposed transaction poses harm to competition and therefore whether a premerger notification filing is required. The use of these proxies may be problematic, however, when they are not tailored to identify transactions that may cause appreciable anticompetitive effects within a given jurisdiction.

Specifically, several jurisdictions premise their notification threshold tests on worldwide figures, including worldwide sales volumes or worldwide asset values. Reliance by a premerger notification regime on thresholds of this nature creates the possibility that a transaction with no reasonable likelihood of generating any effect within a jurisdiction still may be required to make a premerger filing in that jurisdiction. This possibility exists even if the premerger notification regime requires that a certain volume of sales be made in the territory of that country.

One example of this problematic practice can be found in the “effects test” employed by some jurisdictions, under which any transaction with the potential to generate effects within a jurisdiction may be subject to premerger notification requirements in that jurisdiction. For example, before the implementation of amendments that became effective on January 1, 1999, Germany required premerger notification if a transaction involved one party with annual worldwide sales of more than DM2 billion (approximately \$1.06 billion), or two or more parties with annual worldwide sales of more than DM1 billion (approximately \$530 million), whenever the transaction had any potential effect in Germany.<sup>26</sup>

Under the new German law, notification is not required unless the proposed transaction satisfies requirements with respect to both worldwide and German sales figures. The addition of the German turnover threshold makes it more likely that transactions captured within the merger review regime will have at least some nexus to Germany; the problem is not entirely eliminated, however, because transactions may still be notifiable notwithstanding the fact that one party has no (or *de minimis*) sales in Germany.<sup>27</sup> A number of other jurisdictions still employ variants of the effects test to assert jurisdiction and impose

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<sup>26</sup> Similar rules applied under the Austrian merger statute until the Austrian Supreme Court ruled that Austrian turnover is to be considered. Submission by the American Bar Association Section of Antitrust Law, “Report on Multijurisdictional Merger Review Issues,” ICPAC Hearings (May 17, 1999), at 7-9 [hereinafter ABA Antitrust Section Multijurisdictional Merger Review Submission].

<sup>27</sup> Specifically, a premerger notification filing is required if the merging parties’ aggregate worldwide turnover exceeds DM1 billion (approximately \$530 million) and at least one of the parties has sales in Germany of more than DM50 million (approximately \$26.5 million)(conversion rates as of June 1999). The German FCO issued a notice interpreting the term “domestic effects,” which provides guidance to merging parties. However, uncertainty remains, and a filing still may be triggered in cases where the target has no sales in Germany. For example, the notice provides that domestic effects are assumed to be present if it is *likely* that goods will be supplied to Germany as a result of the merger, the merger will enhance the know-how of a participant undertaking that operates in Germany, industrial property rights will accrue or the financial strength of the participating undertaking that operates in Germany will be strengthened. See notice at <[http://www.bundeskartellamt.de/merkblatt\\_inlandsauswirkung\\_\\_.html](http://www.bundeskartellamt.de/merkblatt_inlandsauswirkung__.html)>.

premerger notification requirements.<sup>28</sup> Box 3-A identifies several jurisdictions that rely on worldwide figures to assert jurisdiction over proposed transactions.<sup>29</sup>

In addition to capturing transactions with no reasonable likelihood of anticompetitive effects, thresholds based on worldwide figures generate significant uncertainty about when contacts in a foreign jurisdiction (particularly in Eastern European jurisdictions) rise to the level of “domestic effects” triggering application of a jurisdiction’s merger control law.<sup>30</sup> Even local counsel remain uncertain as to how to interpret domestic effects in some jurisdictions.<sup>31</sup> Input received from the legal community is that antitrust notifications may be made merely out of an abundance of caution in jurisdictions where arguably there are no (or *de minimis*) local effects.

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<sup>28</sup> See ABA Antitrust Section Multijurisdictional Merger Review Submission, at 8-9; Testimony of Stephen D. Bolerjack, Counsel, Antitrust and Trade Regulation, Ford Motor Company, on behalf of the National Association of Manufacturers, ICPAC Hearings (Apr. 22, 1999), at 2-3 [hereinafter NAM Submission]. In addition, the European Commission asserts jurisdiction under the EC Merger Regulation (ECMR) whether or not a transaction will have an effect on trade in the EU. See Jonathan Faull, Director, Directorate General for Competition (DG IV), European Commission, International Antitrust Takes Flight: a Review of the Jurisdictional and Substantive Law Conflicts in the Boeing/McDonnell Douglas Merger, Outline of remarks before the American Bar Ass’n Int’l Antitrust Committee Spring 1998 Meeting (Apr. 2, 1998), at 8. In his remarks, Director Faull questions whether insistence on notification under the ECMR of a transaction that meets the thresholds but lacks sufficient connection with the EU is contrary to international law.

<sup>29</sup> This list does not purport to be comprehensive nor does it identify those jurisdictions, such as Germany and the EU, where unrelated local sales (of the acquiring parties, for example) are sufficient to trigger a notification obligation. The information contained on this list and other lists or descriptions throughout the chapter regarding the rules and regulations in the various jurisdictions with merger control are based on available information; to determine notification obligations and filing rules and procedures, local counsel should be consulted rather than relying on the summary descriptions contained herein.

<sup>30</sup> See *e.g.*, Submission by Lawrence W. Keeshan, PricewaterhouseCoopers LLP, General Counsel, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Pricewaterhouse/Coopers transaction, at 6-7 (Aug. 20, 1999) [hereinafter Keeshan Submission re the Pricewaterhouse/Coopers transaction] (determining whether notification would be required in any Eastern European country was generally very difficult based in part on the lack of any applicable precedents to determine the scope of the government’s premerger authority under comparatively new regulatory regimes); USCIB Submission, at 5 (“businesses that need to file in multiple jurisdictions find it difficult and frustrating to locate reliable information regarding how and when to file in each jurisdiction”).

<sup>31</sup> Advice of local counsel -- both on the interpretation of newly promulgated laws and regulations and on the proper application of existing laws and regulations -- may be inconsistent from transaction to transaction. Attempting to seek guidance from local competition authorities poses risk, as well. Officials may take months to respond to inquiries, for example. In addition, competition authorities seeking to increase their authority may be reluctant to advise that no filing is required. In some jurisdictions, the staff may not be well trained or well paid, or may receive additional compensation based on the number of filings made. For example, in Romania a government decision established a fund into which a portion of the taxes collected from notifications and other activities under the competition law are contributed and from which employees from the antitrust authority are awarded bonuses. This system creates incentives for officials to take the position that a merger should be notified to and approved by the antitrust authority for reasons unrelated to proper application of the competition law.

To eliminate unnecessary filings, notification should not be required in any jurisdiction based solely on potential domestic effects or local business activity unless such effects or activity exceeds some appreciable standard as measured, for example, by reference to the target's local activities, such as local sales or assets.<sup>32</sup> The Advisory Committee therefore recommends that the international community advocate that each jurisdiction review its notification thresholds to ensure that they incorporate an appreciable and objectively based nexus to the economy of the jurisdiction. This would screen out many transactions where there are no appreciable competitive effects in the jurisdiction and minimize uncertainty regarding the level of local contacts necessary to trigger a notification obligation, especially as to "foreign-to-foreign" transactions.

In revising notification thresholds, jurisdictions can look to those premerger notification regimes that are designed to identify only transactions with an appreciable nexus to the jurisdiction. Positive examples in this regard include:

- C Canada (to trigger a notification obligation the target company must carry on an operating business in Canada coupled with Canadian assets/sales tests);
- C Sweden (statute as interpreted by the Swedish authority requires an "acquisition of a Swedish business" with *non de minimis* sales and a Swedish subsidiary, affiliate, employees or sales organization); and
- C the United States (foreign transaction exemptions based on U.S. assets and/or sales of target).<sup>33</sup>

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<sup>32</sup> Perhaps the most obvious effective alternative (or supplement) to sales volumes as a criterion for delineating the scope of a premerger notification regime is reliance on market shares. However, as described later, market share tests are even more troublesome because of their inherent subjectivity and the uncertainty they generate.

<sup>33</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 9.

**Box 3-B: Notification Obligations Triggered by Worldwide Sales and/or Asset Values**

- Albania** Notification obligation triggered if the assets of one of the parties exceed Leks 50 million (approximately \$363,958) or the combined firms' assets exceed Leks 200 million (approximately \$1.5 million).
- Argentina** Notification obligation triggered if the parties' combined worldwide turnover exceeds Arg. Pesos 2.5 billion (approximately \$2.5 billion).
- Brazil** Notification obligation triggered if any of the parties has total worldwide sales exceeding R\$400 million (approximately \$222.4 million).
- Croatia** Notification obligation triggered by combined worldwide turnover of 700 million Kuna (approximately \$98.3 million) or two or more parties have worldwide turnover of 90 million Kuna (approximately \$12.6 million).
- Estonia** Notification obligation triggered by combined worldwide turnover of 100 million Kroons (approximately \$6.81million).
- Ireland** Notification required in any transaction involving two or more parties with worldwide assets of at least IR<sup>^</sup>10 million (approximately \$13.5 million) or worldwide turnover of at least IR<sup>^</sup>20 million (approximately \$27.06 million) whenever either party carries on business in Ireland.
- Lithuania** Notification obligation triggered by combined turnover in excess of LTL 30 million (approximately \$7.5 million) and two or more parties with turnover in excess of LTL 5 million (approximately \$1.25 million).
- Poland** Notification obligation triggered by combined worldwide turnover of ECU 25 million (approximately \$26.64 million) or worldwide value of the assets acquired of ECU 5 million (approximately \$5.33 million).
- Romania** Notification obligation triggered by combined worldwide turnover of ROL 25 billion (approximately \$1.6 million).
- Slovakia** Notification obligation triggered by combined worldwide turnover of at least 300 million Slovak crowns (approximately \$7.25 million) and at least 2 of the parties each have worldwide turnover of 100 million Slovak crowns (approximately \$2.4 million).
- S. Korea** Notification obligation triggered if parties' combined worldwide turnover or asset value exceeds Korean won 100 billion (approximately \$84.1 million).

Conversion rates are year end average 1999. This list does not include alternative threshold tests. For example, in Brazil if none of the parties have worldwide sales exceeding R\$400 million, a notification obligation still may be triggered if the parties meet the alternative market share test.



*Appreciable Anticompetitive Effects within the Reviewing Jurisdiction*

Numerous premerger notification regimes also cast their merger review nets overbroadly by relying on exceedingly low notification thresholds. As data shown in Box 3-A suggests, the vast majority of mergers reviewed under merger notification regimes are found not to offend the law. The few mergers that are either prohibited or restructured indicate that the establishment of low notification thresholds results in capturing in the merger review net many more transactions than necessary to achieve merger review objectives.

A number of jurisdictions recently have enacted laws with thresholds so low that acquisitions unlikely to have any appreciable effect on competition still must be notified. In other countries with longstanding laws, this problem may be the result of a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. In fact, jurisdictions generally do not index their premerger notification thresholds to inflation rates or stock market indices. Italy is one of the few jurisdictions that does increase its thresholds annually to account for inflation. In countries that do not employ indexing measures, an ever-increasing proportion of mergers becomes reportable.<sup>34</sup>

In the United States, for example, premerger notification thresholds have not been adjusted since enactment of the HSR Act in 1976. Data provided by business groups and the private bar indicate that since 1976, stock market valuations of companies and their assets have increased dramatically; because the reporting thresholds have remained unchanged, an increasing proportion of transactions come under the merger review net. For 1997, the filing thresholds captured transactions that would be valued, in constant 1976 dollars, at approximately \$5 million between parties with total sales and assets of approximately \$35 million and \$3.5 million, respectively. If the filing thresholds had simply kept pace with inflation, the number of filings in 1998 would have equaled their 1990 level, eliminating the nearly 134 percent increase in filings since 1990.<sup>35</sup>

Nor has Canada adjusted its notification thresholds for inflation since the country adopted its modern merger review system in 1986. Using the Consumer Price Index as of May 1998 to adjust the

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<sup>34</sup> See Rowley and Campbell Submission, at 15-16. A survey conducted by Rowley and Campbell reports that the most antitrust merger notifications in 1998 were made to the United States (4,728). Switzerland had the fewest reportable transactions (27). Most agencies were clustered in the 125-320 range. Rowley and Campbell attribute the disparity in the number of notifications in the United States and Switzerland to country size. Two other exceptions -- Poland (1,750) and Germany (1,333) -- appear to result from using broad thresholds that capture more transactions than other jurisdictions.

<sup>35</sup> Submission by U.S. Chamber of Commerce, ICPAC Hearings (Apr. 22, 1999), at 3 [hereinafter U.S. Chamber of Commerce Submission], citing FTC & DOJ Annual Report To Congress Fiscal Year 1998. This conclusion is derived by the U.S. Chamber of Commerce by adjusting the jurisdictional thresholds in the HSR Act in light of the inflation statistics set forth at U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 489 (1998).

thresholds would increase the Cdn\$400 million party-size and Cdn\$35 million target-size thresholds to almost Cdn\$560 million and Cdn\$50 million, respectively. Canadian counsel point out that other legislation in Canada accounts for the effects of inflation: the threshold for a reviewable transaction under Section 14.1 of the Investment Canada Act is adjusted annually to account for inflationary effects.<sup>36</sup>

As these numbers suggest, indexing notification thresholds for inflation would exclude a significant number of transactions from notification and review. Given the significant cost of compliance, it seems reasonable not to subject so many competitively benign transactions to the notification and review process. At the same time, however, the Advisory Committee notes that an automatic indexing method may produce arbitrary results and cautions against raising thresholds to such a level that competition authorities' enforcement missions may be compromised. The trade-off for raising filing thresholds is less comprehensive antitrust enforcement. The ability of competition authorities to detect nonreportable mergers (and the risk that these transactions would go unreviewed), as well as the jurisdictional ability of competition authorities to investigate and challenge nonreportable transactions, must be factored into any decision to adjust notification thresholds.

The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are appropriate or too low. Jurisdictions, of course, should continue to set the precise level, balancing the cost of compliance with notification rules and regulations against the likelihood that notifiable transactions will generate appreciable anticompetitive effects within the jurisdiction. If an automatic indexing mechanism is not employed, the Advisory Committee recommends that the jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.

To better ensure that potentially anticompetitive transactions do not escape scrutiny, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds.<sup>37</sup> Although the federal antitrust enforcement agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.

*Any efforts to revise notification thresholds also must account for the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including federal antitrust agencies in the United States. Ideally, no competition authority should be dependent on filing fees for its budgets, staff salaries, or bonuses. A linkage of this nature may skew incentives to revise notification thresholds because consideration of limitations that may be warranted on the basis of competition-oriented objectives must be weighed against the collateral fiscal effects. Another risk that must*

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<sup>36</sup> Rowley and Campbell Submission, at 16 and n.26.

<sup>37</sup> Of course, this may not apply in all jurisdictions, particularly the EU where transactions that fall below the EC Merger Regulation thresholds are potentially notifiable under member state merger regimes.

be considered is that the ability of competition authorities to fund their law enforcement activities may be compromised when the current merger wave subsides.<sup>38</sup>

To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds. Although linking filing fees to agency budgets clearly is undesirable as a matter of sound public policy, delinking fees or raising thresholds is simply not tenable without offsetting measures.

A variety of measures may be employed to offset any loss of filing fees flowing from the adjustment of notification thresholds. For example, the revision of thresholds could be accompanied by measures to increase filing fees for reportable transactions, or to levy filing fees scaled to the size of the transaction. Similarly, filing fees also could be assessed based on the amount of work performed by the reviewing authorities. In Germany, for example, the size of the filing fee for a transaction depends upon the economic importance and complexity of the case. Filing fees generally range from DM10,000 to DM100,000 (for straightforward cases, it is typically less than DM20,000). In exceptional cases, the fee may amount to as much as DM200,000.<sup>39</sup> Similarly, in Switzerland, no fee is required if a transaction is cleared within the initial review period. A filing fee is imposed if a second-stage investigation is opened and is based on the amount of work performed by the agency. The Advisory Committee notes, however, that when a transaction must be reviewed in several jurisdictions, filing fees will quickly mount.

### **Reducing Uncertainty and Unnecessary Burden Imposed by Notification Thresholds**

Notification thresholds that do not clearly and objectively delineate the circumstances requiring parties to a proposed transaction to notify the competition authorities also impose uncertainty and unnecessary burden on merging parties.

#### *Objectively Based Notification Thresholds*

Imprecise and subjective notification thresholds impose significant transaction costs on parties to international mergers. Perhaps the biggest culprit in this category concerns notification thresholds based on market share tests, which many jurisdictions, although not the United States, currently use.<sup>40</sup> One

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<sup>38</sup> U.S. Chamber of Commerce Submission, at 4-5.

<sup>39</sup> Act Against Restraints of Competition §80(2).

<sup>40</sup> Jurisdictions employing market share tests to determine whether a proposed transaction is subject to notification obligations include, among others, Brazil (20 percent); Bulgaria (20 percent); Czech Republic (30 percent); Estonia (40 percent); Greece (25 percent); Israel (50 percent); Portugal (30 percent); Slovenia (50 percent); Slovakia (20 percent); Spain (25 percent); Taiwan (25 percent); Tunisia (30 percent); and Turkey (25 percent). See ABA Antitrust Section Multijurisdictional Merger Review Submission, at 6-7.

drawback of market share tests arises from the inherent subjectivity of market share calculations: reasonable minds may differ concerning the definition of the relevant markets. Another disadvantage of market share tests concerns their inherent impreciseness: calculation of market shares requires an estimation of the size of the relevant market. In addition, the calculation of market shares may entail a full and substantive analysis of the proposed transaction, which parties should not be required to undertake simply to determine whether premerger notification requirements are met in any given jurisdiction.<sup>41</sup>

The difficulties associated with market share tests are exacerbated by interpretive ambiguities and inconsistencies. Under Greek rules, for example, a filing is required if either party meets the 25 percent market share threshold, regardless of whether there is any horizontal overlap or vertical relationship between the two parties. Until 1999 notification was required in Belgium if the parties (individually or together) had a market share of more than 25 percent in Belgium not only for overlapping products, but also in any “upstream,” “downstream,” or “neighboring” markets. Presumably in recognition of the inherent difficulties associated with market share tests, the Belgian authority abandoned that test and instead adopted a Belgian turnover test.

To spare merging parties significant and unnecessary transaction costs, the Advisory Committee recommends that the international community should promote the elimination of market-share tests in favor of objectively quantifiable and readily accessible information, such as sales or assets. In addition to the Belgian thresholds, positive examples in this regard include Canada (Canadian assets/sales tests); the Netherlands (Dutch turnover); and Switzerland (Swiss turnover).<sup>42</sup>

### *Transparency*

A lack of transparency in many jurisdictions makes it difficult to track and interpret myriad complex notification requirements (particularly in jurisdictions without a long history of merger control).<sup>43</sup> Jurisdictions should ensure that their merger review regimes are transparent generally, but should focus particularly on identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.

Transparency may be facilitated in many ways. In Chapter 2 the Advisory Committee recommended that jurisdictions produce policy statements and annual reports on competition policy, and publish speeches and press releases. These sources also should be used to publicize changes in administrative practices or in the application of merger notification rules and regulations. In addition, competition authorities should issue interpretations of notification threshold tests so that legal counsel can

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Keeshan Submission re the Pricewaterhouse/Coopers transaction, at 6-7; Byowitz and Gotts Submission, at 7.

correctly advise clients on whether premerger notification of a proposed transaction is required. These interpretations of threshold tests should make clear whether they apply to domestic or global assets, revenues, and market shares. This need is particularly acute in developing economies in which the local bar is not experienced in handling complex transactions or competition matters.

The U.S. antitrust agencies have made a substantial effort to increase the transparency of the HSR rules and regulations, and their efforts to facilitate transparency provide a useful model for other jurisdictions. Informal interpretations of whether a transaction is notifiable can be obtained by calling or writing the Premerger Notification Office at the FTC. Informal interpretations from the FTC staff are collected and discussed in the ABA Antitrust Section, Premerger Notification Practice Manual, which is periodically updated. In addition, the U.S. agencies release significant volumes of materials to assist practitioners and businesses in complying with the HSR Act, including a source book that compiles HSR rules and regulations, Federal Register publications, form filing information, formal interpretations, press releases, speeches, an annual report, and merger guidelines.

#### **TARGETED REFORM: REDUCING BURDENS ON TRANSACTIONS IN THE MERGER REVIEW NET**

The Advisory Committee recognizes the inherent difficulty in designing objectively based notification thresholds consistent with enforcement objectives that will identify *only* potentially problematic transactions. Although the recommendations set forth in the preceding section are designed to screen out mergers unlikely to generate appreciable anticompetitive effects within a jurisdiction, to some extent notification of a broad range of transactions is necessary. Therefore, the goal should be to impose the minimum burden necessary on those transactions that fall within the merger review system of a given jurisdiction.

Detailed filing requirements and prolonged delays in merger reviews may impose significant and sometimes unnecessary or unduly burdensome costs on proposed transactions, particularly those that pose no harm to competition. To ensure that each jurisdiction refrains from unduly burdening transactions that trigger a notification obligation, the Advisory Committee recommends that merger review should be conducted in a two-stage process designed to enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously. At each stage of the process, jurisdictions should set reasonable deadlines and time frames for review and craft focused information requests.

#### **Setting Reasonable Deadlines and Time Frames for Review**

ICPAC outreach efforts reveal that heightened uncertainty and prolonged delays in merger reviews result in large part from a lack of strict deadlines and lengthy review periods.<sup>44</sup> To facilitate the expeditious and efficient review of transactions, particularly those that do not raise competitive concerns, the Advisory Committee recommends that the international community should promote the adoption of 30-day or one-month initial review periods and harmonization of rules about when parties are permitted to file premerger notification.<sup>45</sup> For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. One approach to provide greater certainty required for effective transaction planning is the adoption of nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### *Triggering Events*

Rules pertaining to when merging parties are permitted or required to file premerger notification vary across jurisdictions. Some jurisdictions make premerger clearance mandatory, others make postclosing notification mandatory, and some jurisdictions make notification voluntary.

Jurisdictions also differ with respect to which types of events will trigger filing requirements. In a number of jurisdictions with preclosing notification requirements, such as the United States and Canada, a filing may be made as early as an agreement in principle is reached or a (nonbinding) letter of intent or contract has been signed. In a few jurisdictions, such as Germany, a filing may be made whenever the intention of the parties has become sufficiently concrete to establish the structure of the transaction and the schedule for its implementation, or at least when a clear and serious intent to finalize the merger within a

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<sup>44</sup> Hawk Submission, at 13. For example, had the parties in the Seagram/Polygram transaction been prepared to close the acquisition in three months (when EC and U.S. clearance had been granted) rather than six months (when all of the other corporate steps had been taken), serious problems could have arisen because of the amount of time some other national merger review authorities took to reach a decision. The agencies had the information they needed; some of them just took a long time to reach a decision. In addition to the EC and the United States, Australia, Brazil, Canada, Colombia, Mexico, Poland, and Taiwan were formally notified of this proposed merger. Submission by Kenneth R. Logan, Esq., Simpson Thacher & Bartlett, on behalf of himself and Edgar Bronfman, Jr., President and CEO, The Seagram Co., in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Seagram/PolyGram transaction, at 6 (March 26, 1999) [hereinafter Logan Submission re the Seagram/PolyGram transaction].

<sup>45</sup> One of the earliest driving forces behind procedural convergence was the concern that companies could engage in forum shopping and other strategically motivated behavior by using the procedural and substantive differences in various jurisdictions, and particularly differing time frames of review, to their advantage. For example, Seagram, in its acquisition of PolyGram filed first in the United States because Seagram expected the United States to “be on the critical path.” After the FTC cleared the transaction, Seagram filed in Europe where the company thought that the Merger Task Force would give some deference to the U.S. clearance. Logan Submission re the Seagram/PolyGram transaction, at 4-5. With markedly increased cross-border cooperation among antitrust authorities, the advantages that can be obtained from this type of strategic behavior are minimized. Nonetheless, provided mandatory deadlines are eliminated, harmonization of time frames would not prevent parties from staggering notification.

short time has emerged.<sup>46</sup> These systems give the parties with the flexibility of filing early in the transaction planning process (that is, during negotiations), at an intermediate stage (after signing the definitive agreement) or nearer to the end of the transaction process (generally no later than 30 days before the expected closing or completion, or 15 days in the case of cash tender offers).<sup>47</sup>

In several other jurisdictions, however, premerger notification is not permitted until the parties have executed a definitive agreement. For example, antitrust filings to the European Commission can be made only *after* the signing of a definitive merger agreement, acquisition of control, or announcement of a public bid.

Although most jurisdictions that require notification before closing do not impose a notification deadline provided the parties observe any statutory waiting periods before consummating the transaction, other jurisdictions require notification within a specified number of days after the triggering event. The EC technically requires notification one week after the triggering event has occurred, for example, although extensions may be granted. Similar requirements are imposed in Belgium (1 month), Finland (1 week), Greece (10 days), Hungary (8 days), Poland (14 days), and Slovakia (15 days). To the extent that parties must observe mandatory waiting periods following notification, these arbitrary filing deadlines are superfluous.<sup>48</sup>

Preparation of a notification form in regimes that have both definitive agreement requirements *and* filing deadlines may entail a substantial amount of work, making compliance with these notification deadlines generally difficult. (As discussed below, many of these jurisdictions require the submission of detailed information in the initial filing.) Failure to comply with the applicable premerger notification rules can result in significant fines whether or not the transaction has an anticompetitive effect in the jurisdiction.<sup>49</sup> In practice, the enforcement authorities in some of these jurisdictions have shown flexibility in granting extensions of time. However, the EC recently fined a company that did not observe the filing deadline (Samsung was fined ECU33,000 (approximately \$37,000)); it was the first time the EC had imposed such

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<sup>46</sup> In some jurisdictions there is no triggering event. Rather, informal contacts are made with the competition authority to discuss the overall contours of the transaction and address any antitrust concerns.

<sup>47</sup> See Submission by Michael Reynolds, Allen & Overy, “Information Sharing and Procedural Harmonization; EU and US Merger Control Procedures and Cooperation,” ICPAC Hearings (Nov. 3, 1998), at 4 [hereinafter Reynolds Submission].

<sup>48</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 11.

<sup>49</sup> For example, antitrust counsel informs the Advisory Committee of recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for “late” notification.

a fine.<sup>50</sup> Moreover, having to seek waivers from each jurisdiction where a filing is required would be burdensome and increase transaction costs with no corresponding enforcement benefit.<sup>51</sup>

To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation among reviewing authorities, the Advisory Committee recommends that the international community promote harmonization of rules concerning when parties are permitted to file premerger notification. This can be accomplished by targeting reform efforts in those jurisdictions with definitive agreement requirement and postexecution filing deadlines to permit filings to be made at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.

ICPAC hearing participants suggested that this type of reform might encounter some resistance, particularly in the EU, because reviewing a transaction that has not become the subject of a binding agreement would require the use of scarce Merger Task Force (MTF) resources. It was suggested that this concern could be addressed with a “good faith intention to consummate” representation similar to the HSR Act affidavit requirement (although, in jurisdictions with hefty filing fees, the fee alone may be sufficient to infer a good faith intention to consummate the transaction.)<sup>52</sup> Moreover, as discussed in Chapter 2, to the extent that requirements calling for a written opinion for each reviewed transaction are eliminated, additional resources may become available.<sup>53</sup>

### *Initial Review Periods*

In most jurisdictions, the initial review period runs for either 30 days or one month following notification. This is the approach employed in the United States, for example, where the DOJ and FTC smoothly process thousands of transactions each year under the premerger notification system created by the HSR Act. Notably, the U.S. agencies resolve approximately 97 percent of all notified transactions in 30 days or less.<sup>54</sup>

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<sup>50</sup> See Reynolds Submission, at 4. It is important to note, however, that the EC encourages parties to seek informal confidential guidance on procedural and substantive issues prior to notification. See Merger: Best Practices Guidelines at <<http://europa.eu.int/comm/dg04/merger/en/best-practice-gl.htm>>.

<sup>51</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10-11.

<sup>52</sup> For example, Belgium permits filing on the basis of a draft agreement provided the parties state in the notification their intent to conclude an agreement that does not significantly depart from the draft agreement with respect to all elements relevant to the competition analysis.

<sup>53</sup> Reynolds Submission, at 9. Mr. Reynolds also suggests that reducing the extent of the information required for the MTF to review also may free up some resources.

<sup>54</sup> See FTC and DOJ Annual Report to Congress Fiscal Year 1998.

The initial review period in several other jurisdictions, however, substantially exceeds this time frame. These jurisdictions include France (initial review period of 2 months), Greece (3 months), Hungary (90 days), Poland (43 working days), and Taiwan (2 months). Others do not have fixed review periods (or do not strictly abide by them). These jurisdictions include Kenya (no prescribed review period) and the Czech Republic (indefinite review period).<sup>55</sup>

ICPAC hearing testimony suggests that marginal differences in the initial review periods are manageable from a transaction planning standpoint and are therefore inconsequential.<sup>56</sup> The Advisory Committee recommends that jurisdictions with initial review periods that substantially exceed 30 days or one month or are undefined be encouraged to amend their regulations to provide for a maximum initial review period of one month. Jurisdictions that are unable to terminate investigations before the expiration of the initial (or second-stage) review period(s) also should be given authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).

### *Second-Stage Review Periods*

Transactions that are identified at the initial filing stage as potentially raising serious substantive issues are subjected to more extensive review in all jurisdictions with merger control laws. Most jurisdictions also prohibit parties from going forward with the transaction for an extended period of time while the review is being conducted.<sup>57</sup> In some jurisdictions the extended waiting period is fixed and does not depend on the length of time required to comply with the reviewing authority's request for additional information, as long as that is done in a reasonable period of time. The European Commission has an initial review period of one month and an extended review period of four months, as do Austria and Switzerland. Similarly, Finland and Germany have an initial review period of one month and an extended review period of three months. In others, review periods may be tolled with each information request.

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<sup>55</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10. In some jurisdictions authorities may clear or grant approval of a proposed transaction before the initial (or second-phase) review period expires. For example, in the United States, early termination may be granted for transactions that do not raise competitive concerns. Other jurisdictions (particularly in Europe and Japan) do not permit the reviewing agency to shorten waiting periods. Byowitz and Gotts Submission, at 8.

<sup>56</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 10.

<sup>57</sup> A number of jurisdictions, most notably the United States and the EU, impose an extraterritorial bar on closing pending review of a notified transactions. Other jurisdictions may require the parties to hold separate local subsidiaries or assets or not take irreversible measures until clearance has been obtained. As a result, closings have been delayed pending antitrust approvals from all relevant jurisdictions, and local assets or subsidiaries have been carved out or held separate pending approval. Many in the private bar have suggested that bars on closing should not be imposed extraterritorially but should be limited to local assets and subsidiaries. However this would limit the viability of extraterritorial remedies. In many cases divestiture of foreign-located assets or worldwide assets (such as intellectual property rights or rights to brand names) may be necessary to remedy anticompetitive effects in the reviewing jurisdiction.

The Advisory Committee recognizes the costs associated with lengthy delays in the completion of a transaction and the need for a more expedited time frame for review in many parts of the world. The Advisory Committee concludes that merger review periods should not be open ended and that companies derive value from certainty with respect to transaction planning. More deadlines should be employed to provide greater certainty. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy or open-ended review periods should adopt more expedited time frames for review. The Advisory Committee makes a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### **Refining Information Requests**

To ensure that transactions that trigger notification obligations are not faced with excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that information requests be structured in a two-stage process with focused information requests at each stage. The filing at the initial stage should require the minimum information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option. Alternatively, reviewing authorities may encourage merging parties voluntarily to provide sufficient information either to allow them to resolve any potential antitrust issues during the initial stage or to engage in a focused second-stage inquiry that narrowly targets the antitrust issues.<sup>58</sup>

The Advisory Committee recognizes that initial filing requirements in many jurisdictions may be statutorily imposed and that revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) alleging brief facts explaining why the transaction does not raise competitive concerns.<sup>59</sup>

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<sup>58</sup> The less information the reviewing authority is initially given, the longer it may take the agency to clear the transaction because the agency will be forced to request further information. It was suggested to the Advisory Committee that the types of information that could usefully be submitted voluntarily by the parties include details on the overlapping markets, information sufficient to identify vertical relationships and general background information on the markets at issue, and market share information. The point was raised that counsel may initially resist providing market share information for a variety of reasons, including concerns about prematurely proposing a market definition or providing information that could spark closer investigation in cases that raise non-*de minimis* antitrust issues. Market share information, however, appears essential to conducting an initial review. Hawk Submission, at 8-10. See also information generally provided voluntarily by merging parties in the United States, discussed below.

<sup>59</sup> Jurisdictions also should consider permitting a letter in lieu of notification in cases where the interests of the jurisdiction would be adequately protected by a review conducted by another jurisdiction.

### *Initial Filing Requirements*

The Advisory Committee acknowledges that agencies have a legitimate interest in requiring enough information to enable them to identify competitively sensitive transactions. Some jurisdictions, however, impose substantial and unnecessary burdens through the use of overly detailed initial filing forms. Many of the forms used in various jurisdictions require the submission of extensive information about markets, competitors, customers and suppliers, and entry conditions in each of the markets in which they operate. In some jurisdictions, extensive information is required even for markets in which there is no horizontal overlap or vertical relationship between the parties. Providing this information may require the creation or purchase of information, such as third-party market share reports, and may impose substantial burdens on merging parties that are unwarranted in transactions that do not raise competitive issues.<sup>60</sup>

One commentator observed that “[i]n some overly zealous jurisdictions, particularly in Eastern Europe, the initial form will require a top-to-bottom examination of the two companies involved in a merger, including obtaining and reporting information totally irrelevant to the merger’s competitive effects in that jurisdiction -- such as information regarding market share and sales revenues for each non-overlapping product and services offered by the acquiring company in that jurisdiction, or in some cases, worldwide.”<sup>61</sup>

Some jurisdictions also require translation or certification of documents filed with the initial notification. It is entirely understandable that countries require premerger filings to be submitted in the local language. Some countries go far beyond this, however, and require the translation of all supporting documents, including merger agreements and annual reports.<sup>62</sup> Some require that the entire merger agreement not only be translated, but that the translation be a certified and notarized (or apostille) translation. In addition, several jurisdictions require exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not those entities have any relevance to the competition analysis. Box 3-C identifies several jurisdictions that have overly burdensome initial filing requirements.

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<sup>60</sup> See Ilene Knable Gotts and Sarah E. Strasser, *Notification Rules Are Complex*, NATIONAL L.J., at C11 (May 4, 1998).

<sup>61</sup> Byowitz and Gotts Submission, at 10.

<sup>62</sup> *Id.*

### **Box 3-C: Examples of Burdensome Initial Filing Requirements**

**Belgium** requires essentially the same detailed level of information as is required by the European Commission's Form CO. Depending upon the transaction, parties may have to provide a detailed analysis of the relevant horizontal (if the parties are in the same market), vertical (upstream and downstream), and conglomerate markets (any market in which either party has a market share of 25 percent or more), as well as comprehensive information about the parties, their customers, and their competitors, for each of the Member States involved.

**Brazil** requires detailed information about the parties' worldwide activities and imposes onerous translation and procedural requirements (for example, not only must the entire merger agreement be translated into Portuguese, but it also must be a certified and notarized/apostilled translation).

**Hungary** requires, *inter alia*, a detailed breakdown of controlled entities (including creation of a chart showing "control relationships"); identification of other entities on the boards of which directors of the parties sit; sales for direct *and* indirect participants; a description of acquisitions in the last two years that were not reported; market definitions; parties' sales and shares in such markets; expectations of growth in market share; identification of competitors, customers, and suppliers; description of entry conditions; significance of research and development efforts; supply and demand factors; and horizontal and vertical relationships.

**Mexico** requires exhaustive certifications of the certificates of incorporation of all subsidiaries and affiliates, whether or not they have any relevance to the competition analysis, and otherwise imposes highly formalistic burdens that are not needed for the competition authority to analyze whether the proposed transaction is likely to generate harm to competition.

**Slovakia** requires detailed asset information for the parties and affiliates involved; market definitions; market share calculations; balance sheets and financial statements for the parties, "including undertakings in which the parties have an ownership interest or stock or in which they are directors, officers or otherwise similarly interconnected"; a description of reasons for and effects of the concentration and its competitive impact; and a list of principal suppliers, customers, and competitors of the parties.

**Turkey** requires definitions of relevant markets (product and geographic); contact information regarding competitors and customers; estimated market shares of competitors; a description of entry conditions; submission of "account information" (in addition to that contained in annual reports); and production of business plans, market research, and related studies by the parties or by "third persons." Even if the merger thresholds are not met, the parties may be required to submit detailed information concerning "other agreements, decisions or practices" affecting Turkey, such as distribution agreements by foreign parties with local sales agents.

Source: Submission by the American Bar Association Section of Antitrust Law, "Report on Multijurisdictional Merger Review Issues," ICPAC Hearings (May 17, 1999).

Submissions from ICPAC hearing participants illustrate how some jurisdictions that have more experience with merger control employ varying methods to identify and focus on transactions that raise competitive issues while minimizing filing burdens on nonproblematic transactions.<sup>63</sup> One way is to use a detailed form at the initial filing stage that is administered in a flexible manner. This type of practice has been employed, for example, in the European Union. The EU's Form CO is quite burdensome on its face asking for extensive information about the markets in which either of the merging firms operates, and for each such market, extensive information concerning competitors, market shares, and entry conditions. This information must in theory be provided even for markets in which there is no competitive overlap between the merging parties.<sup>64</sup>

Before filing the form, however, merging parties are encouraged to contact the MTF to describe and provide basic information with respect to the proposed transaction, the merging parties and any competitive overlaps. During or shortly after that discussion, the MTF identifies for the parties the markets for which information will be required and the level of detail in which the information should be presented. In many transactions, the MTF grants derogations that free the parties from the need to provide much of the information that is technically required by the filing form.<sup>65</sup> In practice, these discussions also have

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<sup>63</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 13-20.

<sup>64</sup> *Id.*, at 14, 18. Under the German system, there is no specific filing form. The Act Against Restraints on Competition of 1958, as amended, sets out the minimum information to be filed. In practice, the amount of information required varies from very little in most transactions to far more extensive data in deals that appear to raise competitive issues. The onus is on the merging parties to provide sufficient information to allow for a preliminary assessment by the FCO. This is frequently worked out in informal consultations with the FCO. The German authorities have routinely cleared transactions in a very short time after an initial filing (ten days to two weeks, or even less) when the transaction is uninteresting from a competitive standpoint.

<sup>65</sup> The European Commission is launching "Merger Review 2000," a review of the EC Merger Regulation that includes an assessment of the possibility of revising filing requirements. Options under consideration include reducing the information requirements for classes of typically unproblematic mergers (which would be an extension of the current short form available for certain qualifying joint ventures) and a proposal for a form of block exemption for unproblematic cases. See Götz Drauz and Thalia Lingos, *The Treatment of Trans-border Mergers in the 1990s: A European Perspective*, at 55, 61, in POLICY DIRECTIONS FOR GLOBAL MERGER REVIEW; A SPECIAL REPORT BY THE GLOBAL FORUM FOR COMPETITION AND TRADE POLICY (1999).

enabled the parties to identify issues early on and potentially resolve them within the initial review period.<sup>66</sup>

ICPAC hearing participants note that the EU system has worked fairly well in avoiding the imposition of undue burdens on transactions that do not raise competitive issues but would not recommend the EU model as a suitable international template. It would obviously be burdensome to deal with a dozen or more jurisdictions that use an analogue to the EU initial filing process because that would require separate discussions with each jurisdiction.

In contrast, the systems employed by the United States and Canada can serve as useful templates for the initial filing stage. The United States, for example, requires only limited information in the initial notification form. The limited nature of the form flows from the recognition that the HSR Act thresholds capture a broad universe of transactions, and that the vast majority raise no competitive concerns.<sup>67</sup> This is not to say that no burden is imposed: a company with multiple product lines, subsidiaries or affiliates must expend a fair amount of effort when it first completes the HSR form. The process of collecting the documents submitted with the form can be time consuming as well. The burden is sufficiently manageable, however, and those companies that frequently make acquisitions may choose to keep the nontransaction-specific portions of their HSR form current so that they are able to complete a filing for a new transaction without too much additional effort.

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<sup>66</sup> In contrast, some practitioners have indicated that the clearance process in the United States hinders the ability of the agencies to provide prenotification guidance. In 1995, the federal antitrust enforcement agencies in the United States implemented a number of measures designed to expedite the premerger review process, including the clearance process. One step permits the agencies to provide joint meetings with parties who request the opportunity to provide additional information or analysis before a clearance decision is made. *See* 1995 Joint DOJ/FTC Premerger Program Improvements (Mar. 23, 1995), *reprinted at* 6 Trade Reg. Rep. (CCH) ¶42,751. In addition, when the agencies learn about a possible merger, frequently one agency will request clearance to begin investigating it rather than wait for the parties to submit their notification. If there is no difference of opinion between the agencies, clearance can be granted and a preliminary investigation will be opened. *See* John J. Parisi, U.S. Federal Trade Commission, Enforcement Cooperation Among Antitrust Authorities, before the IBC UK Conferences Sixth Annual London Conference on EC Competition Law (May 19, 1999)(Updated Nov. 1999) [hereinafter Parisi, IBC Address]. However, a number of outreach respondents suggested that the clearance process could benefit from further reform to assure the availability of coordinated joint meetings.

<sup>67</sup> The HSR Form requires fairly basic information, including a description of the transaction, the parties' most recent filings with the Securities and Exchange Commission, lists of certain subsidiaries and affiliates, and SIC Code data (data reported to the census bureau every five years). For example, U.S. sales by 4, 5, and 7-digit Standard Industrial Classification codes and geographic market data for transactions where 4-digit overlaps exist must be provided. Additionally, general information regarding the corporate structure, subsidiaries, minority stock interests, previous acquisitions (if overlap), and any vertical buyer-seller relationship between the parties must be provided. Also filed with the form are copies of all studies, surveys, analyses or reports prepared by or for any officer or director for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product and geographic markets (these latter documents are commonly referred to as 4(c) documents). Item 4(c) documents are frequently the most informative part of an HSR filing.

Several practical techniques also have developed in the United States to focus the legal and factual issues during the initial review stage.<sup>68</sup> Parties voluntarily may choose to supplement the initial notification with a “White Paper” containing a competition analysis of the transaction. The U.S. agencies also may ask the parties to provide additional information voluntarily within the initial 30-day review period. The agencies have been able to use this information to identify and often resolve the antitrust issues within the initial review period.<sup>69</sup> As described more fully below, if, after an initial review, the transaction appears to raise potentially serious competitive concerns, a formal request for additional documents and information may be issued before the end of the initial waiting period.

Canada uses a system that employs two different initial forms, known as the short form and the long form. Both forms require basic information such as a description of the proposed transaction, copies of current drafts of relevant legal documents, descriptions of the principal businesses of the notifying party and its affiliates, certain financial information, certain documents filed with stock exchanges and securities commissions, and any pro forma financials on the combined firm.<sup>70</sup> The short form is designed for transactions that do not raise competitive problems. The long form, used for transactions that may raise competition issues, requires significantly more information concerning affiliates of the notifying party and the products produced, supplied, or distributed by the parties and their affiliates, as well as the filing of all financial or statistical data prepared to assist the board of directors or senior management of the parties in analyzing the proposed transaction. Canada places the onus on the merging parties to select in the first instance which form to file. As a result, parties tend to choose the form most appropriate for their transaction.

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<sup>68</sup> See Ky P. Ewing, Jr., *Some Thoughts and Lessons From Our Twenty Years of Experience with the United States’ Merger Notification Regime*, Before the International Bar Ass’n Antitrust Seminar on The Future of Merger Control in Europe, at 7-8 (Sept. 26, 1997).

<sup>69</sup> This information generally includes a list of products sold by each party, limited by geographic areas and to competitive overlaps; product brochures and promotional materials; recent sales or marketing reports; a general description of overlap or vertical markets, including internal or third-party market studies; a list of each company’s ten largest customers for each designated product, along with a contact person, address, phone number and the dollar value of purchases during the last year; a list of each company’s ten largest competitors for each designated product, along with a contact person, address, phone number and estimates of each party’s and each competitor’s share of the market; weekly price and quantity information such as information purchased from Nielsen, IRI or other market research companies; and copies of antitrust notifications made to other jurisdictions. Staff also may interview customers and competitors and obtain the opinion of economists involved in the investigation.

<sup>70</sup> Under recently enacted amendments to the Canadian Competition Act, the Act’s premerger notification provisions have been revised in a number of ways. The information required by the short form increased slightly, while the information called for by the long form increased substantially. The changes became effective on the issuance of implementing regulations effective on December 27, 1999, by the Canadian Competition Bureau. The short form had a seven-day waiting period extended to 14 days. The long form had a 21-day waiting period extended to 42 days. If the short form is chosen, and the Canadian Competition Bureau determines that it needs more information, then it may require the merging parties to submit the long form, which triggers the running of the longer waiting period, without any credit for the shorter waiting period. ABA Antitrust Section Multijurisdictional Merger Review Submission, at 16-18.

Canada also permits merging parties to apply for an Advance Ruling Certificate (ARC), which is issued at the discretion of the director of the Bureau of Competition Policy. If one is granted, then no premerger notification is required. If one is denied, the parties must file an initial notification form if their transaction is notifiable. Generally, an ARC can be obtained with the submission of less information than is required under either the long or short form. Usually the parties provide a description of their businesses and show that they do not overlap or, if they do, that the market shares are too low to warrant concern under the standards applied in Canada. The Competition Bureau can act on ARC requests in as little as two weeks.

Some efforts have been made at the international level to reduce notification burdens. For example, France, Germany, and the United Kingdom introduced a common merger notification form in September 1997. This form is accepted by all three antitrust authorities for mergers that are notifiable in more than one of these countries. It is a voluntary regime that results from cooperation between the authorities to simplify the procedure for multiple notifications.<sup>71</sup> On another front, the Competition Law and Policy Committee of the OECD undertook a review of OECD members' merger notification practices and released a framework for a merger notification form.<sup>72</sup> The framework seeks to synthesize the common elements of the merger notification forms currently employed by OECD members.

Harmonizing the procedural requirements of different jurisdictions is itself not an easy task; some observers also question whether these efforts will significantly reduce transaction costs. In some cases it might well increase them by imposing more burdensome notification requirements than some jurisdictions currently require. These observers also note that while a standardized form would eliminate or reduce the costs associated with duplicating certain information, the main transaction costs associated with merger control do not result from having to submit similar information to several different agencies. Indeed, the actual incidence of truly duplicative information is somewhat limited, because much of the information is necessarily specific to individual jurisdictions and markets.<sup>73</sup> For these reasons, the recommendations made

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<sup>71</sup> Although laudable, the Common Form may be of relatively limited practical value because the consequences of using it vary from country to country. In the UK, the Common Form does not trigger the statutory timetable provided for in section 75A of the Fair Trading Act 1973 (FTA): a Merger Notice would have to be filed if the parties wished to take advantage of the statutory timetable. Nevertheless, the UK Office of Fair Trading states that it hopes to indicate within one month of receipt of a complete Common Form whether the transaction qualifies for investigation by the Mergers and Monopoly Commission. In France, use of the Common Form will result in the French authorities' endeavoring to indicate within one month of the receipt of a complete Common Form whether a formal notification is advisable. In Germany, the notifying parties using the Common Form will be told within one month if further examination is required. *See* Submission by Mark W. Friend and Antonio F. Bavasso, Allen & Overy, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Federal-Mogul/T&N transaction, at 3 (April 14, 1999); *see also* Comments of the Section of Antitrust Law of the American Bar Association on the Common Form for Mergers in the United Kingdom, in France and in Germany at <<http://www.abanet.org/antitrust/common.html>>.

<sup>72</sup> OECD Competition Law and Policy Committee, *Report on Notification of Transnational Mergers*, DAFNE/CLP (99)2/Final (Feb. 1999).

<sup>73</sup> Hawk Submission, at 5-7; ABA Antitrust Section Multijurisdictional Merger Review Submission, at 18-20.

by the Advisory Committee focus more heavily on limiting the information required in connection with transactions that lack antitrust significance.

Still, there is much that can be gained from multilateral efforts of the type undertaken by the OECD. The United States should continue to support further OECD efforts to develop a framework for notification, including the development of common definitions. The Advisory Committee recommends that the OECD continue to focus its efforts on identifying the minimum information required to make a preliminary determination of whether a transaction raises sufficient competition issues to warrant further review and to specify the categories of data that may be useful to narrow the factual issues to resolve any potential antitrust issues or engage in a focused second-phase inquiry.<sup>74</sup> Areas in which countries usefully could collaborate also could be identified and explored. For example, common approaches to issues such as defining relevant markets, barriers to entry, market power, and efficiencies may be usefully developed.<sup>75</sup>

As part of an OECD effort, the Advisory Committee recommends that consideration also be given to ways to reduce other unnecessary burdens. Included on the agenda should be efforts to reduce translation costs and certification and other procedural requirements. The Advisory Committee finds merit in the suggestion that parties should be able to provide brief summaries of certain foreign language documents or partial translations (limited to translation of closing conditions and other important relevant provisions in the merger agreement) on the condition that full translations, if requested, would be provided within a time certain. The U.S. system, which reduces the translation burden in the initial notification form for foreign language documents, provides a useful model. Merging parties are not required to translate many of the documents requested (such as annual reports, audit statements, balance sheets and studies, surveys, analyses, and reports), but must instead submit English language outlines, summaries or translations that already exist.

### *Second-Stage Investigations*

For proposed transactions that are identified in the initial review stage as potentially raising serious substantive issues, most jurisdictions require the submission of more detailed information. the amount of information and documents that the parties are required to submit in these more thorough investigations

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<sup>74</sup> Multiple and differing data requests can complicate reviewing authorities' attempts to conduct coordinated merger reviews. Even where the analytical approach is similar, if the input data are different, the outcomes will not necessarily coincide. Outreach respondents emphasize that even in parallel proceedings, reviewing authorities may fail to cooperate in requesting and analyzing a single set of data. See Comments of American Airlines, Inc. by Greg A. Sivinski, Senior Attorney, American Airlines (March 15, 1999), submitted for inclusion in the Advisory Committee record.

<sup>75</sup> See Coleman Submission re the Halliburton/Dresser transaction, at 3 ("While it was clear that the [United States and the EC] did talk and share certain data, it was also clear that, ostensibly because of different standards to be applied under the different substantive laws, the two investigating staffs sought data at different levels of abstraction in their efforts to define antitrust markets and appeared to place no particular credence on the definitional work of the other jurisdiction's staff.").

varies from jurisdiction to jurisdiction. With the exception of the United States, this second-stage review process typically is not document intensive. Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide.

The differences in the information requirements of various systems generally are attributable to different legal cultures. In the United States, for example, the agencies do not have the power to block a problematic transaction themselves, but instead must ask a federal court to enjoin the transaction.<sup>76</sup> As a result, the agencies may feel that they need far more extensive information and documents than do their counterparts in jurisdictions like the EU, where the agency itself can block a merger, subject to *ex post* judicial review. As a practical matter, however, few companies can keep their deals together for the many months or years that it takes to seek judicial review in the EU.<sup>77</sup>

Further, when drafting a second request, DOJ and FTC staff are sometimes at a disadvantage because they lack access to information about the industry, the proposed transaction, and other key facts. From the U.S. government officials' perspective, moreover, anything outside the scope of the second request, from a practical standpoint will not be available to the reviewing agencies. Second requests, therefore, are broadly drafted to ensure access to a wide array of potentially relevant information. Notably, data provided by the agencies indicate that most parties comply only partially with second requests and that the transactions are resolved with relatively modest document productions and limited translation requirements.<sup>78</sup> These data largely are explained by the institution of a "quick look" policy in 1995, which

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<sup>76</sup> Some practitioners question the legitimacy of this concern:

The HSR process was designed to give the Agencies sufficient information to determine whether or not to challenge a merger. Preliminary injunction merger cases frequently involve extensive, expedited discovery in which the Agency (as well as the merging parties) can seek to enhance its litigation position. But the United States' Agencies frequently appear to seek far more information and documents than they reasonably require to litigate. There are systems where the Agency has to go to court to stop a transaction, as in the United States, but where the process does not involve the massive document productions that are common in the U.S. process. Canada is an example. The need to be prepared for litigation does not justify the sweeping breadth of Second Requests in the United States.

ABA Antitrust Section Multijurisdictional Merger Review Submission, at 21-23. It is interesting to note that in fiscal year 1998, the DOJ filed only 15 complaints; 10 were settled, four of the transactions were abandoned, and another was abandoned pursuant to a consent decree. Similarly, FTC staff were authorized to seek injunctions in only three transactions; two were abandoned following court decisions, and one resulted in an administrative complaint. FTC and DOJ Annual Report to Congress Fiscal Year 1998. Efforts to address the second-request process are discussed later in this chapter.

<sup>77</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, 21-22.

<sup>78</sup> Letter from Constance K. Robinson, Director of Operations & Merger Enforcement, U.S. Dep't of Justice, Antitrust Division, to James F. Rill and Dr. Paula Stern (July 14, 1999) [hereinafter Robinson Letter]; Letter from William J. Baer,

encourages document production in stages. Using this approach, the agencies focus initially on issues that may be determinative in concluding that the transaction likely does not raise competitive concerns. If the agencies can reach that conclusion based on a quick look, full document production is not required. Nonetheless, as described below, there are notable instances where merging parties have been required to submit hundreds, if not thousands, of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception that second requests are unduly burdensome and “require the production of an enormous volume of materials, many of which are unnecessary for even the most comprehensive merger review.”<sup>79</sup>

While recognizing the many strengths of the U.S. system, the Advisory Committee recommends a number of practices designed to instill more discipline in the U.S. system and to address some of the problems perceived by the business community and private bar. Some of these recommendations are practices designed to narrow the legal and factual issues and resolve antitrust issues expeditiously. Set out below are those that may serve as useful recommendations in other jurisdictions.

Of paramount importance is that there be an open exchange of information between competition authorities and the parties to a proposed transaction. This may require modifications in conduct both by the parties and reviewing authorities. The merging parties should recognize that the process works best when both sides engage in a cooperative dialogue early in the process.

To facilitate this process, the reviewing authority should tell the merging parties (either orally or in writing) at the beginning of a second-stage inquiry why it did not clear the transaction within the initial review period.<sup>80</sup> If the reviewing authority chooses to issue a written statement, the document need not be made public nor researched and written with the rigor of a judicial opinion. Rather, it should be a short and plain statement of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority’s discretion to pursue any new theories of competitive harm if new information comes to light.

This type of reasoned explanation would provide several benefits. First, it would facilitate transparency of agency action, which is still a problem in many parts of the world. While cognizant of the need to refrain from overburdening agencies, the Advisory Committee also believes that it is important to ensure that the reviewing authority possesses a substantively sound and clearly articulated basis for moving forward. Second, an explanation of this type would reduce transaction costs by allowing the parties to

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Director, Bureau of Competition, U.S. Federal Trade Commission, to James F. Rill, Esq. and Dr. Paula Stern (June 15, 1999) [hereinafter Baer June 15, 1999 Letter].

<sup>79</sup> Letter to Casey R. Triggs, Esq., Deputy Assistant Director, U.S. Federal Trade Commission from The Association of the Bar of the City of New York Committee on Antitrust & Trade Regulation, at 2 (June 29, 1999), submitted by the authors for inclusion in the Advisory Committee record [hereinafter New York City Bar Ass’n Committee Submission].

<sup>80</sup> This is the practice in the EU.

focus their efforts on the issues identified as problematic, thereby permitting a resolution to be reached as quickly as possible. Third, delays would be reduced by preventing, or at least discouraging reviewing authorities from opening a second-stage inquiry simply to gain more time to review a proposed transaction.<sup>81</sup>

Agencies around the world also could assess their own performance with respect to those transactions they challenge. One way to do this is an after-the-fact audit of select merger challenges. Audits of this type have been used in transition economies as a condition for receiving assistance from groups such as the OECD. During these audits, the host country's competition authorities permit a group of outside observers to examine in great detail their decisions to prosecute, or to refrain from prosecuting, specific matters. These observers also examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases.<sup>82</sup> Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.

#### **ADVISORY COMMITTEE RECOMMENDATIONS FOR TARGETED REFORM IN THE UNITED STATES**

In the preceding sections the Advisory Committee recommends a number of initiatives designed to rationalize the application of merger review procedures. The Advisory Committee believes that the United States should play a leading role in the effort to implement the reforms proposed herein in the international arena. One of the most effective ways in which the United States can stimulate global reform is through leading by example. It is therefore important that the United States examine its own merger review system in an attempt to identify and correct those aspects of the system that give rise to uncertainty and unnecessary transaction costs.<sup>83</sup> As one ICPAC hearing participant stated:

In light of the proliferation and disparity of filing requirements around the globe, the increasingly complicated regulatory framework, and the associated escalation of transaction costs to meet the demands of the myriad jurisdictions, the United States can serve an important role by establishing a benchmark for the rest of the world. Before the United States can legitimately lay claim to a position of global leadership in the field of merger review,

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<sup>81</sup> See Hawk Submission, at 10-12.

<sup>82</sup> Remarks by William Kovacic, Professor of Law, George Washington University Law School, at ICPAC Committee Meeting (July 14, 1999), Meeting Minutes, at 74-78.

<sup>83</sup> The Advisory Committee focused on best practices that should guide merger review globally and in the United States. The Advisory Committee did not seek to address each aspect of the U.S. merger review system. Indeed, if the Advisory Committee were designing a merger review system, it would not adopt all features of the U.S. system. For example, some members of the Advisory Committee would not recommend the design of a system with dual enforcement of antitrust laws, such as the dual enforcement of the federal antitrust laws by the DOJ and the FTC. Rather, the focus of the Advisory Committee lay in identifying those features of the U.S. system that are either exemplary or problematic and that directly affect international transactions.

however, the U.S. first needs to conduct a balanced, candid assessment of its domestic requirements.<sup>84</sup>

## **Recommendations on Threshold Requirements**

The regime currently in place in the United States requires no change with respect to two of the Advisory Committee's recommendations on premerger notification thresholds. The notification thresholds are objectively based, and the U.S. antitrust agencies ensure the transparency of these thresholds and their application by offering guidance to practitioners and businesses through published rules, regulations, guides, speeches, and press releases, and through the advisory services of the FTC Premerger Office.<sup>85</sup>

The area in which the U.S. notification thresholds fall short is in screening out transactions that are unlikely to generate appreciable anticompetitive effects within the United States. As discussed more fully below, this goal may be accomplished by raising the notification thresholds.

### *Nexus to the Jurisdiction*

The United States has a well-established history of asserting jurisdiction over international mergers.<sup>86</sup> By providing exemptions from reporting requirements for certain transactions involving foreign persons, however, the HSR Act ensures that only parties to transactions with a nexus to the jurisdiction must notify the U.S. antitrust authorities.<sup>87</sup> Notification obligations for foreign transactions (where the acquiring and acquired persons are both foreign) are triggered only if the acquired party possesses more than a *de*

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<sup>84</sup> U.S. Chamber of Commerce Submission, at 2.

<sup>85</sup> The Advisory Committee commends the transparency of the U.S. system and encourages the agencies to continue updating these valuable resources on a regular basis or as new developments occur.

<sup>86</sup> In 1995, the DOJ and the FTC released Antitrust Enforcement Guidelines for International Operations, U.S. DEPARTMENT OF JUSTICE/FEDERAL TRADE COMMISSION, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS §3.14 (1995) *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,107 (1995). These Guidelines set forth the antitrust agencies' policy on international antitrust issues and outline the agencies' position on jurisdiction over different types of international conduct. The guidelines provide several examples regarding both mergers and joint ventures and reaffirm the agencies' intention to assert subject matter jurisdiction over any transaction that would affect either U.S. import trade or U.S. export commerce. The guidelines state that "Section 7 of the Clayton Act applies to mergers and acquisitions between firms that are engaged in commerce or in any activity affecting commerce. The Agencies would apply the same principles regarding their foreign commerce jurisdiction to Clayton Act Section 7 cases as they would apply in Sherman Act cases." The guidelines also make note of the 1986 OECD Recommendation, which requests that OECD countries notify each other during the merger review process when their actions might affect the interests of other countries (subsequently replaced by the 1995 Revised Recommendation).

<sup>87</sup> *See* 16 C.F.R. §802.50-52. It is important to note that even if a proposed transaction involving foreign parties or foreign assets is exempt from premerger notification obligations in the United States, the U.S. agencies have the authority to challenge that transaction if it is likely to substantially lessen competition in the United States.

*minimis* U.S. presence.<sup>88</sup> Further, where both parties are foreign, the rules also provide an exemption if their aggregate annual sales in or into the United States are less than \$110 million and their aggregate total assets in the United States are less than \$110 million. In addition, all acquisitions of foreign assets by a foreign person are exempt from HSR notification requirements regardless of the amount of sales into the United States attributable to those assets.<sup>89</sup>

The HSR Act also exempts from notification obligations certain acquisitions by U.S. persons of foreign assets and shares. An acquisition of foreign assets is exempt from notification requirements if the acquiring person will not hold assets of the acquired person that accounted for \$25 million or more in sales in or into the United States during the preceding year. An acquisition of shares of a foreign issuer is exempt from notification requirements unless the foreign issuer holds \$15 million or more of U.S. assets or generated sales in or into the United States of \$25 million or more during the preceding year.<sup>90</sup>

Despite the exemptions for certain classes of foreign transactions, in fiscal year 1999, the HSR Act captured 849 transactions involving a foreign acquiring person or foreign acquired entity, an increase from 736 the previous year. Of the 849 transactions, preliminary investigations were opened in 111, and second requests were then issued in 21. Enforcement actions were undertaken in only 5 of the 849 transactions.<sup>91</sup> These statistics suggest not only that very few foreign transactions pose the potential for anticompetitive effects significant enough to warrant the intervention of the U.S. antitrust agencies, but also that many more transactions than may be necessary come within the U.S. merger review net. As a result several respondents to ICPAC outreach efforts have called for reform of the foreign person exemptions.<sup>92</sup>

Because of difficulties in obtaining data regarding the nature and extent of filings for transactions with an international aspect, the Advisory Committee believes that it is not in a position to make specific recommendations on exemption amounts for foreign transactions. Given that these levels have not been

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<sup>88</sup> The acquisition by a foreign person of shares in a foreign issuer is exempt if the acquisition does not confer control of either an issuer that holds \$15 million of U.S. assets or a U.S. issuer with annual sales or total assets of \$25 million or more, whether domestic or foreign. By virtue of the definition of control under the HSR Act, all acquisitions by foreign persons of voting securities in foreign issuers are exempt if those shares do not exceed 50 percent of the outstanding voting securities of the foreign issuer. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> U.S. DOJ Premerger Office; *see also* Annex 2-B. For fiscal year 1999, statistics for transactions involving foreign persons -- second requests in 21 of 849 foreign transactions (2.5 percent) and challenges to 5 of 849 foreign transactions (0.6 percent) -- are almost identical to rates for all HSR transactions (2.4 percent and 1.6 percent).

<sup>92</sup> *See, e.g.,* Submission by Michael Sennett, Bell, Boyd & Lloyd, in response to the Advisory Committee Multijurisdictional Merger Review Case Study questionnaire re the Baxter International Inc./Immuno International AG transaction, at 4 (April 9, 1999) [hereinafter Sennett Submission re the Baxter International Inc./Immuno International AG transaction].

adjusted for many years, however, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons and that the U.S. antitrust agencies give serious consideration to the threshold exemptions to ensure that transactions that are not likely to violate the antitrust laws are exempt from premerger reporting classes of transactions.<sup>93</sup>

### *Appreciable Anticompetitive Effects*

More generally, the Advisory Committee recommends that the current notification thresholds be carefully reviewed to ensure that they are only as broad as necessary to identify transactions that may cause an appreciable anticompetitive effect. *While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed by the premerger notification regime are too low and capture too many lawful transactions.* The Advisory Committee believes that the United States will not be well positioned to advocate that other jurisdictions review and revise their own premerger notification thresholds until it has addressed these same issues in its own system.

Enacted in 1914, the Clayton Act prohibits mergers whose effect “may be substantially to lessen competition or tend to create a monopoly.” The Clayton Act incorporates what has been characterized as an “incipiency standard,” thereby empowering the U.S. antitrust agencies to prevent potentially anticompetitive mergers before they result in harm to competition. The premerger notification regime contained in the HSR Act is intended to give the U.S. antitrust enforcement agencies “an effective mechanism to enjoin illegal mergers *before* they occur.”<sup>94</sup> With limited exceptions, the HSR Act requires premerger notification for each acquisition of assets or voting securities that exceeds \$15 million (or that results in control of an acquired party with at least \$25 million in sales or assets) in which one party to the transaction has at least \$100 million in sales or assets and the other has at least \$10 million in sales or assets.<sup>95</sup>

The DOJ and FTC Horizontal Merger Guidelines explain that while challenging potentially anticompetitive mergers, the U.S. antitrust agencies seek to avoid unnecessary interference with the larger universe of mergers that is either competitively beneficial or neutral.<sup>96</sup> As discussed above, however, only a small percentage of transactions captured by the notification thresholds currently in place leads to enforcement action. Indeed, no enforcement action is taken against more than 98 percent of all notified transactions. In addition, the annual level of filings made with the U.S. antitrust agencies has increased

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<sup>93</sup> See 15 U.S.C. §18a(d)(2)(B).

<sup>94</sup> S. Rep. No. 94-803, at 72 (1976).

<sup>95</sup> 15 U.S.C. § 18a.

<sup>96</sup> U.S. Dep’t of Justice and Federal Trade Commission, Horizontal Merger Guidelines at 0.1 (Apr. 1992), as amended (Apr. 8, 1997), *reprinted at* 4 Trade Reg. Rep. (CCH) ¶13,104.

significantly since the HSR Act was enacted. The Advisory Committee believes that this increased level of filings is attributable not only to increased merger activity, but also to the failure to adjust the notification thresholds. They have not been changed since the HSR Act was enacted in 1976.

The most straightforward way to decrease the number of required filings while not materially compromising the agencies' enforcement mission is to increase the size-of-transaction threshold for acquisitions of voting securities and assets. Business groups and others have recommended to the Advisory Committee that the notification thresholds be adjusted to account for inflation and indexed to account for future inflation.<sup>97</sup> Adjusting for inflation using the Consumer Price Index, for example, the \$15 million size-of-transaction threshold in 1976, if measured in 1998 dollars, would now be set at approximately \$43 million. Increasing the threshold commensurate with the gross domestic product deflator, an indicator of inflation in the entire country, translates into an HSR threshold of \$37.8 million when measured in 1998 dollars.<sup>98</sup>

The Advisory Committee acknowledges the benefits of this recommendation but notes that an indexing mechanism may produce arbitrary results. At the same time, the Advisory Committee recognizes that absent an automatic (that is, mandatory) indexing mechanism, there may be no incentive to raise the thresholds. If an indexing method is not used, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.

Enforcement statistics for 1998 suggest that adjusting the notification thresholds to keep up with inflation measured in 1998 dollars should not materially compromise the enforcement mission of the U.S. antitrust agencies. Depending on the base year and deflator used, that calculation would mean increasing the size-of-transaction threshold in the \$33 million to \$43 million range.<sup>99</sup> Although data are not publicly

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<sup>97</sup> U.S. Chamber of Commerce Submission, at 3; NAM Submission, at 4-5 ("The NAM recommends that HSR thresholds be increased automatically on an annual basis commensurate with the gross domestic product deflator."); *see also* USCIB Submission, at 4. It is noteworthy that the fines for violating HSR are indexed to account for inflation, but the dollar values for determining whether a filing is required are not. Specifically, the maximum civil penalty of \$11,000 for each day during which a person fails to comply with the HSR Act is adjusted periodically for inflation. The Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, §31001, 110 Stat. 1321, which amended the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990, requires that civil penalties be adjusted for inflation at least once every four years.

<sup>98</sup> Using 1978 (the year in which the HSR thresholds came into effect) results in a similar jump. Adjusting for inflation using the Consumer Price Index, the \$15 million size-of-transaction threshold would now be about \$37.5 million if measured in 1998 dollars. Increasing the threshold commensurate with the gross domestic product deflator translates into an HSR threshold of \$33 million when measured in 1998 dollars. Data sources: U.S. Dep't of Commerce Bureau of Economic Analysis and U.S. Dep't of Labor Bureau of Labor Statistics.

<sup>99</sup> The GDP deflator offers the most representative inflation series because it covers all economic activity. The CPI deflator pertains to a basket of consumer products and thus is less directly applicable to this analysis. Additionally, the CPI may overstate the annual rate of inflation.

available for that range, HSR statistics show that raising the threshold to \$25 million or \$50 million would have eliminated approximately 25 to 50 percent of transactions notified in fiscal year 1998.<sup>100</sup>

In 1998 transactions valued below \$25 million raised few competitive concerns. In that year, the agencies received filings on 1,235 transactions valued at \$25 million or less. The agencies issued second requests in only 11 (less than 1 percent) of these transactions. Indeed, in 95 percent of the 1,235 transactions, neither agency sought clearance to even contact the parties.<sup>101</sup> The filing fees alone in the 1,224 transactions in which no second request was issued, however, cost the acquiring parties \$55.1 million.<sup>102</sup>

Likewise, only 27, or just over 1 percent, of the 2,398 transactions valued at \$50 million or less received second requests. Although second-request investigations represented only a small percentage of notified transactions valued below \$50 million, almost 9 percent of all investigated transactions involve transactions valued at less than \$25 million and approximately 20 percent of all investigations involve transactions valued at less than \$50 million, indicating that some small transactions raise sufficient antitrust concerns to warrant a more complete investigation.<sup>103</sup>

If a transaction is not captured by the thresholds, however, the agencies have the authority to investigate and take enforcement action, if needed.<sup>104</sup> For example, in each of the last two years the DOJ

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<sup>100</sup> FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

<sup>101</sup> *Id.* Of the 1,235 notified transactions valued at \$25 million or less, 196 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 2 of the 196 transactions; no enforcement action was taken. Of the 2,398 notified transactions valued at \$50 million or less, 344 involved transactions with a foreign acquiring person or foreign acquired entity. A second request was issued in only 5 of the 344 transactions; no enforcement action was taken. *See* Annex 2-B.

<sup>102</sup> NAM Submission, at 5-6 (additional costs included attorneys' fees, opportunity costs, and savings lost due to the delay in implementing any efficiencies resulting from the transactions).

<sup>103</sup> FTC and DOJ Annual Report to Congress Fiscal Year 1998, Exhibit A.

<sup>104</sup> The agencies may issue "civil investigative demands" to obtain documents and information necessary to conduct a review of transactions not reportable under the HSR Act, although no bar on closing pending review is imposed. At least one antitrust official in the United States, however, has noted the relative ease with which competition authorities may now monitor pending transactions:

Rarely do the authorities first learn of a merger through the submission of premerger notification. The merger wave of the nineties has been matched by the proliferation of media outlets -- both print and electronic -- that report hints of merger talks. Yet, old reliables, like the Financial Times and the Wall Street Journal, remain good sources of news about potential mergers. The agencies pay attention to these reports and may seek to substantiate them by calls to the companies or to their counselors. The agencies' staffs will also talk to one another on the basis of press reports to make sure that potential reviewing agencies are aware of such reports and can begin to determine whether they will have

opened more than 50 investigations of transactions that were not reportable under the HSR Act.<sup>105</sup> Although the agencies contend they have very little ability to detect nonreportable transactions, the Advisory Committee balances that concern with the recognition that only a small fraction of transactions that fall below notification thresholds will pose the threat of competitive harm. Thus, the Advisory Committee concludes that increasing the filing threshold in the \$33 million to \$43 million range should not materially affect the quality of Clayton Act enforcement efforts. Three Advisory Committee members advocate raising the size of the transaction threshold higher, to \$50 million.

*Any efforts to revise notification thresholds must account for the fact that filing fees currently constitute a significant source of revenue for the U.S. antitrust agencies. To ensure that the DOJ and FTC will be able to pursue their enforcement missions vigorously, it is imperative to provide alternative sources of funding to offset the loss of any funds that may result from revision of HSR thresholds. This goal may be accomplished by delinking the fees from the budget and by direct funding from general revenue. If funds are not directly appropriated, alternative funds may be realized in a variety of ways, including raising the filing fee, adjusting the fee based on the size of the transaction, or assessing the fee based on the complexity of the transaction and the amount of work performed by the reviewing agency, although these alternatives would not accomplish delinking the fees from the budget.*

The existing linkage between filing fees and funding for the DOJ and FTC creates a conflict of interest for the agencies and also exposes them to substantial funding cuts if filings were to decrease, as occurred between 1989 and 1991 when filings dropped more than 40 percent.<sup>106</sup> The Advisory Committee is of the view that filing fees should be delinked from funding for the agencies, but that any efforts to do so must occur in an environment where sufficient funds are assured from other sources. This step would be beneficial both for the United States and for those countries around the world that have followed the U.S. lead in implementing filing fees and have linked them to agency budgets.

## **Recommendations on Deadlines and Time Frames for Review**

The Advisory Committee commends the flexibility of the U.S. premerger notification system, which permits filing at any time after the execution of a letter of intent, contract, agreement in principle, or public bid. In addition, the Advisory Committee commends the U.S. agencies for concluding their initial review

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jurisdiction to review the transaction.

Parisi, IBC Address.

<sup>105</sup> U.S. DOJ Premerger Office. Comparable FTC statistics are not available.

<sup>106</sup> See NAM Submission, at 5; U.S. Chamber of Commerce Submission, at 4-5.

in a maximum of 30 days following notification. Thus, no reform of the U.S. triggering event or initial review period is needed.

More certainty with respect to time frames for the second-stage review process is needed, however. In the United States, the second-stage review process is triggered when a second request is issued prior to the expiration of the initial review period. The merging parties may not consummate the proposed transaction until 20 days (or, in the case of a cash tender offer, 10 days) after they have substantially complied with their respective second requests, which could take several months.<sup>107</sup> The length of the review process thus varies from case to case.

Because the U.S. agencies issue relatively few second requests -- 113 (less than 3 percent of all notified transactions) in fiscal year 1999 -- this discussion pertains to only a minority of all notified transactions. In addition, data submitted to the Advisory Committee by the U.S. agencies indicate that, on average, second-request investigations are resolved in about four months (Box 3-D). For transactions in which second requests were issued but in which the DOJ did not file cases, moreover, the average time to resolution after the issuance of the second request was only two to three months.<sup>108</sup> It is important to note, however, that some second-stage reviews may take up to a year or longer.<sup>109</sup>

Although year-long second-stage review periods constitute a distinct minority of all reviewed transactions, second-stage merger review in the United States is a controversial topic and therefore deserves the attention of both the Advisory Committee and the U.S. antitrust agencies. Among the concerns raised about the second-stage review periods, some parties have suggested the process is open ended and raise concerns about a lack of certainty about when a transaction may be closed. Of course, after a party is in substantial compliance, in all mergers involving unregulated industries (the bulk of all transactions investigated), the agencies are required by statute to complete that investigation in 20 days. That period can only be extended if the parties choose to do so.<sup>110</sup>

<b>Box 3-D: Average Days to Resolution after Issuance of Second Request<sup>1</sup></b>		
<b>Fiscal Year</b>	<b>Department of Justice</b>	<b>Federal Trade Commission</b>

<sup>107</sup> The filing parties may agree voluntarily not to close the transaction for some period of time after the expiration of the waiting period in order to give the parties more time to discuss the competitive significance of the transaction with the agencies or to negotiate a settlement.

<sup>108</sup> Robinson Letter.

<sup>109</sup> In some instances this length results from the parties choosing to delay compliance; in non-HSR transactions it may occur where the additional time does not delay the closing of the transaction.

<sup>110</sup> See e.g., Members of ABA Int'l Antitrust L. Comm. Submission, at 2 (noting that under the U.S. system, "the potential for delay of consummation of a merger is great, and the length of delay is uncertain").

1995	135.88	92.3
1996	125.42	113.3
1997	153.84	152.2 <sup>2</sup>
1998	112.07	122.3
1999 (to June)	57.68	86.0

Source: Robinson Letter; Baer June 15, 1999 Letter.

<sup>1</sup> From the date the second request is issued until closing of investigation or issuance of the proposed consent.

<sup>2</sup> Includes two transactions in which the parties chose not to comply for over two years.

The Advisory Committee is in accord on the need for certainty in merger review periods. Specifically, Advisory Committee members conclude that merger review be conducted within a reasonable time frame and that the review process should not be open ended. Advisory Committee members were not of a shared view on the appropriate mechanisms for addressing these concerns, however.

One avenue for addressing these concerns lies in the use of fixed maximum review periods. In fact, the data provided by the agencies indicate that the majority of transactions are cleared within reasonable time frames, which suggests that the agencies could (or should be able) to conduct their reviews within fixed maximum review periods (for example, five months following notification, along the lines of the EC). There was a divergence of views among Advisory Committee members, however, regarding whether imposing a fixed maximum review period is advisable.

Proponents of fixed maximum review periods contend that such limits are necessary to provide the certainty and discipline in the merger review process. These members believe that strict deadlines are particularly necessary in a two-stage review process to prevent the second stage from becoming a drawn out affair (discussed in detail below). Many practitioners, including some members of the Advisory Committee, believe that the strict time frames used by the European Commission show that fixed time limits for merger reviews are both feasible and beneficial.<sup>111</sup>

The majority of members believe that strict fixed time frames would be fraught with risk and extremely difficult to achieve under the U.S. system.<sup>112</sup> For example, unlike the EU system, in which the

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<sup>111</sup> Rowley and Campbell Submission, at 20.

<sup>112</sup> Advisory Committee Member David B. Yoffie acknowledged the difficulty of fixed time frames in the U.S. systems, but nonetheless advocates that fixed time periods are necessary to prevent the long delays and potential destruction of value that characterize the existing antitrust review process. On this point Professor Yoffie offers the following perspective:

European Commission decides whether a merger should be permitted, the U.S. agencies do not have the power to block a transaction themselves but must ask a federal court to seek a preliminary injunction. It was observed that, in a system with fixed maximum review periods, merging parties could thwart the U.S. agencies' efforts to review a transaction and to prepare for litigation by refusing to comply with a second request. Although the agencies could impose fines for failure to comply, some Advisory Committee members raised concerns that the agencies' enforcement mission nonetheless could be seriously compromised. Thus, it was recognized that if fixed maximum review periods were imposed, a fixed time frame for responding to the agencies' request for additional information also would be needed. This, however, would eliminate much of the flexibility that parties now enjoy in structuring and implementing their transactions.<sup>113</sup> It also would reduce the time available to negotiate reductions in the scope of second requests and hamper the ability of the agencies to conduct "quick look" investigations. Thus, fixed time frames could increase the burden on parties of complying with second requests.

Even disregarding the specific characteristics of the U.S. system, Advisory Committee members expressed concerns generally about fixed maximum review periods. Fixed time limits could result in enforcement errors. An agency may be forced to act because it ran out of time. This may result in too much enforcement, insufficient enforcement, inappropriate enforcement, or ineffective enforcement, and may impose unnecessary burdens on the parties to a transaction, harm consumers, or both.<sup>114</sup> There also was concern that maximum time periods would effectively turn into minimum or standard review periods.

Based on these concerns, the majority of Advisory Committee members eschew strict time frames but recommend instead that alternative steps be taken to provide the greater certainty required for effective

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There is a pattern emerging in large, complicated transactions where antitrust authorities ask for too many documents, and companies procrastinate on delivery or deliver all of the documents (which the antitrust authorities then do not have adequate staff to review). Without a change in process, specifically without a mandate for agencies and merging parties to work on fixed time schedules, it will be difficult to break the current pattern. Particularly in high technology industries, which represent a growing fraction of anti-trust reviews, the current system of open-ended time frames and significant delays are especially problematic. While value can also be destroyed by delays in traditional industries, the long-run implications are potentially even more severe in high technology. Entire product cycle generations in some industries are six-to-nine months. As merger reviews stretch to the length of an entire product generation, and decisions within the merging companies are put on hold pending the merger review, the potential gains from a merger can turn into significant losses, both for consumers and producers.

<sup>113</sup> The FTC informs the Advisory Committee that FTC staff's experience is that parties postpone complying with a second request when it is in their interest to do so, whether to permit resolution of specific antitrust issues or to concentrate on business matters entirely unrelated to antitrust review. The FTC cautions that putting a time limit on investigation would severely restrict the flexibility of the agencies to resolve issues without substantial compliance or to negotiate appropriate relief.

<sup>114</sup> Remarks by Debra Valentine, General Counsel, U.S. Federal Trade Commission, at ICPAC Committee Meeting (Sept. 11, 1998), at 126 and discussions that followed.

transaction planning. One approach to provide the greater certainty required for effective transaction planning is for the agencies to adopt nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. The agencies should strive to meet these administrative deadlines and should publish the results on a regular basis. The Advisory Committee also notes that review periods might well be shortened if its recommendations for limiting the scope of second requests are adopted (see discussion on information requests below).

The Canadian system has adopted a similar approach. The Canadian Competition Bureau uses “service standards” guidelines. These guidelines identify the maximum turnaround times parties can expect for merger review in Canada. Under the guidelines, the Canadian authority will endeavor to clear a notified transaction in 14 days for noncomplex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The five-month review period coincides with the aggregated five-month review period used by the EC for mergers that are subjected to second-phase investigations. The service standards are not binding, and other than the three-year limitation period for challenging a transaction under the Competition Act, there is no legal limit on the length of a Bureau investigation.<sup>115</sup> The Canadian Competition Bureau reports that during the first year in which these service standards were established it met or surpassed the standards in the majority of cases.<sup>116</sup>

Of course, the ability of the agencies to meet such notional timetables will be affected by the conduct of the parties and the time they take to respond to information requests. It is evident that the process may produce opportunities for strategic behavior or gaming on the part of the parties to the transaction that can cause delay. At the same time, the agencies must do what they can to instill discipline and efficiency in the review procedures. As described below, reviewing agencies and merging parties can cooperate in several ways to expedite the process. To this end, it was suggested to the Advisory Committee that agency staff and the merging parties should routinely engage in candid and good-faith exchanges regarding the scope of the second request, compliance with the second request, and projected review periods.<sup>117</sup>

## **Recommendations on Focused Information Requirements**

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<sup>115</sup> However, the review periods start to run only after the Bureau has received the information deemed necessary to complete an investigation, and this may involve substantially more information than prescribed for a filing under the Competition Act. Complex mergers are defined to include transactions between direct or potential competitors as well as mergers between customers and suppliers where there are indications that the transaction may create or enhance market power. Very complex mergers are those which are likely to create or enhance market power and in which Competition Tribunal proceedings are a strong possibility. Rowley and Campbell Submission, at 20; Competition Bureau Fee Charging Policy, CANADA GAZETTE, PART I, VOL. 131, NO. 44, at 3,446 (Nov. 1, 1997).

<sup>116</sup> Annual Report of the Commissioner of Competition for the year ending March 31, 1999, at 19-20, available at <<http://competition.ic.ca>>.

<sup>117</sup> New York City Bar Association Committee Submission, at 5.

The Advisory Committee commends the U.S. agencies for generally striking the right balance between avoiding unduly burdensome initial filing requirements and maintaining their ability to identify competitively sensitive transactions. The Advisory Committee observes, however, that the second-request process could benefit from adjustment.

### *Initial Filing and “One and a Half” Requests*

The Advisory Committee believes that with modest exceptions, the HSR filing form requests only the information the agencies need to identify competitively sensitive transactions. Revisions to the HSR form, however, may enhance the agencies’ ability to identify potentially problematic transactions. The FTC has acknowledged, for example, that it sometimes has difficulty identifying from the form the specific products produced by the filing parties.<sup>118</sup> Transactions also may be missed where the parties have not created 4(c) documents or where the documents that exist do not reveal the competitive overlaps, and where the transaction does not have a high enough profile to attract attention from the press or from competitors or customers who might wish to complain.

The FTC has been contemplating changes to the HSR notification form to eliminate requests for information that are not essential to the substantive antitrust review of a reportable transaction and to focus the form more directly on product overlaps.<sup>119</sup> The Advisory Committee encourages the FTC to implement changes to achieve these objectives. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way is to create a model voluntary submission list that identifies the categories of useful data that merging parties could submit in facially problematic cases.

Data provided by the agencies indicate that the voluntary submission of additional information during the initial waiting period does cut back the number of second requests. In fiscal year 1999, the DOJ issued nearly 15 percent fewer second requests than it had the preceding year. In fiscal year 1998, moreover,

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<sup>118</sup> See Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994). This can occur because SIC codes are often overly broad or ambiguous so that overlaps are not apparent on the face of the form or because the companies may report in the ordinary course of business under different codes.

<sup>119</sup> According to the FTC’s Premerger Notification Office, the FTC is likely to propose implementing many of the changes first proposed in 1994. See Joseph G. Krauss, Assistant Director, Premerger Notification Office, Bureau of Competition, FTC, *New Developments in the Premerger Notification Program*, Before the DC Bar Ass’n Antitrust, Trade Regulation and Consumer Affairs Section Antitrust Committee (Oct. 7, 1998); William Baer, *Reflections on Twenty Years of Merger Enforcement Under the Hart-Scott-Rodino Act*, 65 ANTITRUST L.J. 825, 854 (Spring 1997). Another 1994 proposal of particular interest amends the HSR notification and report form to require a listing of the name(s) of any foreign antitrust or competition authority that has been or will be notified of the proposed acquisition. See Notice of Proposed Rulemaking, 59 Fed. Reg. 30,545 (1994).

the FTC issued the same number of second requests (46) as it had in fiscal year 1994, when half as many filings were received.

The U.S. agencies also could formalize the practice of permitting the merging parties to withdraw and refile the acquiring party's HSR form within 48 hours (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has usefully been employed when the reviewing agency has been unable to clear a transaction within the initial 30-day review period, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refile the HSR notification. In cases in which this mechanism is employed, the agency should endeavor to clear the transaction during the second 30-day period or, if a second request is issued, the second request should be narrowly tailored to those issues identified by the agency as problematic. In addition, publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refile a notification would demonstrate the viability of this option and alleviate concerns that it would only add an additional 30 days to the process.

In several recent multijurisdictional merger investigations, voluntary information provided at the initial filing stage allowed the FTC to focus its investigations more quickly on the potentially problematic portions of the transactions. In The Seagram Company's acquisition of PolyGram, voluntary early cooperation allowed the FTC to clear the transaction within the 30-day initial review period (Box 3-E). Two other notable examples involve transactions that required second requests, but the companies cooperated so fully that the FTC was able to negotiate and propose consent orders very quickly. The first involved two foreign industrial firms in a \$1 billion transaction. FTC staff quickly identified concerns in two relevant markets, involving fairly sophisticated products and technology. A consent order was negotiated and the FTC approved the proposed consent less than 60 days after the second request was issued. A modest amount of documents was submitted by the parties. A second involved a multibillion dollar merger involving two multinational pharmaceutical firms. The staff reviewed several potential overlap markets and identified one with substantial competitive concerns. The parties negotiated a consent, identified an up-front buyer and the FTC voted out the proposed consent less than 45 days after the second request was issued. Again, only a small number of documents were submitted.<sup>120</sup>

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<sup>120</sup> Baer June 15, 1999 Letter.

**Box 3-E: The Seagram Acquisition of PolyGram**

The Seagram acquisition of PolyGram in 1998 was a \$10.4 billion transaction that merged the sixth (Universal) and the fourth (Polygram) largest music companies in the world to create the world's largest music company. According to Seagram, the purpose of the merger was to match Universal's relatively strong U.S. business and less-developed international business with PolyGram's strong international presence and weaker U.S. presence. The merger afforded better opportunities for U.S. artists to export their music internationally and for international artists to reach U.S. consumers. Substantial cost savings were also anticipated (and reportedly achieved). The relevant market for antitrust purposes was prerecorded music, whether sold in the form of compact discs, cassettes, or vinyl records. The geographic market was no smaller than a national market. The transaction resulted in a combined market share of approximately 25 percent (in the United States, Europe, and most other major markets), with the four other "major" record companies (Sony, Warner, EMI, and BMG) each having shares between 10 percent and 23 percent, and independent labels as a group accounting for approximately 15-20 percent of sales.

The seriousness of the antitrust issues raised by the transaction was difficult for Seagram to gauge. The combined market share was moderately high but not clearly a problem. In 1983, however, when Warner had attempted to acquire PolyGram, the FTC had investigated and ultimately blocked the transaction when the Ninth Circuit preliminarily enjoined the merger. The combined shares (and the shares of the remaining competitors) in 1983 were virtually the same as the combined shares in 1998. Moreover, at the time Universal launched its bid for PolyGram, several investigations of horizontal agreements among the major record companies were underway in the United States, Europe, and elsewhere. All of these presented concerns for the merging parties.

As it turned out, clearance proceeded smoothly with very few significant problems. Seagram initially had anticipated a five-to-six month period between the announcement of the transaction and closing, driven in part by the time anticipated to obtain antitrust clearance and in part by the time needed to plan the integration of the two companies. Seagram expected a significant investigation in the United States and not much antitrust resistance in the EU or elsewhere. Because of prior FTC enforcement history, Seagram anticipated a second request. Seagram's strategy was to make its HSR filing first in the United States and then to open discussions with the FTC staff immediately in an effort to narrow the issues and possibly avoid a second request altogether. Seagram, crediting experienced FTC lawyers, found the FTC very responsive. The staff was able to eliminate many issues immediately (or with only minimal additional information) and then devote its resources to the tougher issues. In addition to a fairly large group of 4(c) documents, Seagram voluntarily provided strategic plans and other documents to help the FTC get its bearings at the outset. Seagram then met with the FTC staff, including economists, several times and again voluntarily provided information (approximately three boxes in total). Ultimately, the FTC decided not to issue a second request and cleared the transaction within 30 days.

Source: Logan Submission.

### *The Second-Request Process*

Although the HSR system avoids placing undue burdens on merging parties at the initial filing stage, it is by far the most demanding in the second-stage review process with respect to the information and documents that merging parties are required to provide. The Advisory Committee recognizes, however, the flexibility of the U.S. system that enables the agencies and merging parties to resolve issues in many matters with only limited production of documents and information. Data provided by the U.S. agencies indicate that more than half of all firms complied only partially with the second request and that many transactions were resolved with the submission of 50 or fewer boxes of documents.<sup>121</sup>

Many business groups and practitioners that appeared before the Advisory Committee, however, perceive the second-request process to be “unduly burdensome.”<sup>122</sup> The Advisory Committee too is concerned that the data may not indicate the full extent of the burden. For example, even if parties ultimately did not substantially comply with the second request, they may still have undertaken a full document search to be prepared to comply fully with the second request in the event that settlement negotiations break down.<sup>123</sup> In addition, in a handful of notable instances, merging parties have been required to submit hundreds of boxes of documents, multiple gigabytes of computerized data, and extensive answers to dozens of interrogatory questions. These instances fuel the perception of the unduly burdensome nature of the second-request process.

C In the Halliburton/Dresser transaction, the parties submitted 670 boxes of documents to the Justice Department, whereas they submitted only 4 boxes to the Mexican authorities, 2 to the European

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<sup>121</sup> Data provided by the DOJ indicate that in 1998, merging parties entered into substantial compliance in only 40 percent of the transactions in which second requests were issued. Sixteen percent of second-request transactions were resolved without the production of any second-request documents and 43 percent were resolved with only partial compliance. Robinson Letter. Similarly, during the 15-month period from March 1998 to June 1999, parties to transactions receiving a second request from the FTC entered into substantial compliance in fewer than one in six investigations. Approximately 60 percent of the FTC’s investigations involved document productions of fewer than 20 boxes, and 70 percent involved document productions of fewer than 50 boxes. Baer June 15, 1999 Letter.

<sup>122</sup> ABA Int’l Antitrust Law Committee Members Submission, at 5-6 (“The burdensome nature of the Second Request process is particularly egregious with respect to foreign companies.”); ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22 (“Practitioners and the business community widely perceive Second Requests to be unduly burdensome.”); U.S. Chamber of Commerce Submission, at 5 (“The experience of members of the Chamber has been that the Second Request process as practiced in the United States is extremely burdensome....”).

<sup>123</sup> In other instances, companies have entered into consent decrees because of their desire to avoid the expense and delay generated by the second-request process. See Sennett Submission re the Baxter International Inc./Immuno International AG transaction, at 3. Others allege that “[m]any experienced practitioners believe that the agencies use extensive Second Requests and the delay that they cause to increase their time to build a case and in some cases to create additional leverage to force more divestitures. This is particularly resented by foreigners. The fact is that many experienced practitioners will counsel their clients that if they wish to keep down the amount of assets to be divested, it is important to seize control of the HSR ‘clock’ by substantially complying with Second Requests.” ABA Int’l Antitrust Law Committee Members Submission, at 2.

Commission, 1 box in Canada (where an ARC was granted) and ½ box each in Australia and Brazil.<sup>124</sup> The DOJ's investigation, however, was conducted simultaneously and cooperatively with an investigation by the EC into the merger. The U.S. enforcement action ultimately obviated the need for the EC to challenge the transaction. Rather, the EC relied on Halliburton's commitment to the DOJ to resolve competitive issues that might have arisen for the EC in the drilling fluids business.

- C Materials submitted to the EC during the first phase of its review of the Baxter International Inc./Immuno International AG transaction, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled 1 box and required approximately 4 weeks to prepare. Materials submitted to the FTC through the “quick look” procedure, including detailed factual submissions, documents, and responses to inquiries for data summaries, totaled approximately 30 boxes and required 9 weeks to prepare. Baxter worked with the FTC staff on a modified “quick look” program because Baxter believed the transaction might not survive lengthy procedural delay in the United States. That is, Baxter “could not risk the time and burdens required to respond to a full ‘second request.’” Baxter estimates that if it had completed the entire second-request process, it would have produced in excess of 800 boxes of documents at a cost of \$2 to \$3 million and that the review process would have lasted seven to nine months.<sup>125</sup> According to Baxter, as a result of the staff's cooperation and excellent work, it was able to complete the transaction in a timely manner, but only with a consent order, parts or all of which might have been unnecessary.
- C Boeing and McDonnell Douglas together produced approximately 5,000 boxes of documents containing 5 million pages. The FTC also conducted extensive depositions in the fact-gathering stage of its investigation. In contrast, relatively few documents (numbering only in the thousands) were gathered by the EC, which conducted no depositions or interviews of Boeing or McDonnell Douglas witnesses. Although the parties regarded this as “good news” in a sense, they were concerned that the EC authorities must necessarily have relied more on general industry assumptions than on specific evidence in reaching their conclusion.<sup>126</sup>

The Advisory Committee recognizes that these anecdotes do not necessarily reflect the relationship between information requests and other elements of merger review, including the nature and extent of the potential impact of the transaction in each jurisdiction. Likewise, the volume of documents produced cannot be divorced from the procedures for evaluation, administrative prohibition or litigation, and the

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<sup>124</sup> Coleman Submission re the Halliburton/Dresser transaction.

<sup>125</sup> Sennett Submission re the Baxter International Inc./Immuno International AG transaction.

<sup>126</sup> Submission by Benjamin S. Sharp, Perkins Coie LLP, antitrust counsel for Boeing in the Boeing/McDonnell Douglas transaction, in response to Advisory Committee Multijurisdictional Merger Review Case Study questionnaire (March 30, 1999).

appeal in the various jurisdictions.<sup>127</sup> The Advisory Committee believes, however, that it is important for the U.S. agencies to implement measures to address some of the perceived problems. Whether or not the agencies deem the concerns of the business community to be meritorious, the United States will be ill positioned to advocate reform in other jurisdictions until it attempts to address these issues at home.<sup>128</sup> In some cases, the recommendations that follow require little more than improving the transparency of the merger review process. In other cases, they deal with attempts to institutionalize best practices. More generally, the Advisory Committee supports the project of the American Bar Association Section of Antitrust Law to study second-request issues.<sup>129</sup>

The U.S. agencies can take several measures to address perceptions regarding the second-request process. First, the Advisory Committee recommends that when the agencies issue a second request, they give the merging parties their reasons (either orally or in writing) for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the second request will facilitate transparency in the merger review process and will help the parties to understand that the second request is based on genuine substantive concerns rather than on strategic motivations.<sup>130</sup>

In designing second requests, moreover, the Advisory Committee recommends that the agencies narrowly tailor their requests for additional information to the issues prompting the need for further review. In 1995 the agencies announced that they had addressed concerns about the second-request process by

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<sup>127</sup> Indeed, business and bar association representatives who appeared before the Advisory Committee emphasized that the U.S. review process is “fundamentally sound.” While recognizing some areas may need adjustment, these representatives nonetheless applauded the “efficient and productive work of the Federal Trade Commission and the Antitrust Division of the Department of Justice in the face of a merger wave of unprecedented dimension and duration.” *See, e.g.*, New York City Bar Association Committee Submission, at 1.

<sup>128</sup> *See* U.S. Chamber of Commerce Submission, at 5 (“Until the United States has attained a heightened level of investigative efficiency, it is ill-positioned to guide the world community as to appropriate practices.”); Members of the Antitrust Law Committee of the ABA Section of International Law and Practice testified at ICPAC Hearings that a refusal of U.S. authorities to change the U.S. system may have a chilling effect on efforts to achieve procedural harmonization: “Other countries are unlikely to coalesce behind the U.S. system due to the burdensome nature of the U.S. process in second stage investigations....The U.S. system also has a chilling effect of efficiency enhancing deals. Because Second Requests impose substantial costs in terms of money and management time, they can and do chill some foreign transactions and cause the structuring of others to exclude U.S. operations. It would be desirable from a policy standpoint to avoid creating undue burdens in mergers that ultimately would be found not to raise a substantive problem.” ABA Int’l Antitrust Law Committee Members Submission, at 1, 4.

<sup>129</sup> The project is composed of practitioners from the private bar and the business community, with the active input and participation of staff members of the agencies.

<sup>130</sup> At the DOJ, recommendations by staff to issue second requests are screened through section management, the Director of Merger Enforcement, and, in some cases, the appropriate Deputy Assistant Attorney General. A similar procedure is followed at the FTC. In many instances, this review results either in a narrowing of the second request or in a decision not to issue it. In FY1999, of the 113 second request investigations, enforcement actions were taken in 76 (roughly 70 percent).

adopting a model second request. The predominant view of ICPAC hearing participants, among others, however, is that this reform helped reduce burdens only marginally.<sup>131</sup> An internal after-the-fact audit of several merger challenges could be useful in identifying the appropriate components of an effective model second request. Such an audit could include at least two different levels of analysis. First, it could consider whether the agencies are requesting the right types of information. In other words, do the agencies use the information they request? Second, the audit could consider the types of information subsequently used at trial. Perhaps the answers to these questions will enable the agencies to refine the model second request.

Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary greatly among staff members and merging parties, however, and modification requests sometimes may not be resolved in a timely fashion. To institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating timely modifications to the scope of requests. Success in this endeavor also requires a willingness on the part of merging parties and their advisors.<sup>132</sup>

When modification negotiations break down, parties should be encouraged to use the appeals process.<sup>133</sup> Since its inception in 1995, however, that process has never been used at the FTC and has been used only three times at the DOJ. Practitioners told the Advisory Committee that merging parties were concerned about potential stigma from using the appeals process, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency (even though in the three DOJ appeals, most issues were decided in favor of the merging parties). Because the agencies want the appeals process to be used, the Advisory Committee recommends that the agencies make the procedure more attractive to merging parties. Commentators have suggested this can be achieved by making the appeals process more expeditious and its outcome more transparent.<sup>134</sup> Further, the agencies

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<sup>131</sup> ABA Antitrust Section Multijurisdictional Merger Review Submission, at 22-23.

<sup>132</sup> William J. Kolasky, Jr., and James W. Lowe, *The Merger Review Process at the Federal Trade Commission: Administrative Efficiency and the Rule of Law*, 49 ADMIN. L. REV. 889, 891, 907 (1997), submitted by Mr. Kolasky for inclusion in the Advisory Committee record; *see also* Casey R. Triggs, Deputy Assistant Director, U.S. Federal Trade Commission, *Effectively Negotiating the Scope of Second Requests*, ANTITRUST 36 (Summer 1999).

<sup>133</sup> This is an internal appeal process that parties may use if they believe that they are in compliance with a second request or that compliance would be unduly burdensome, and they have been unable to reach agreement with agency staff on proposed modifications. The procedure allows for a written appeal to the Bureau of Competition director at the FTC and to the deputy assistant attorney general for antitrust at the Department of Justice.

<sup>134</sup> New York City Bar Ass'n Committee Submission, at 5-6.

should actively encourage merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.<sup>135</sup>

The Advisory Committee recommends that the agencies attempt to institutionalize these and other best practices to ensure the integrity and effectiveness of the second-request process. The institutionalization of these best practices is particularly important because at least some of the perceived problems identified by the private bar appear to stem from differences in practices by individual staff attorneys. Thus, the agencies at the highest levels should articulate principles or best practices to guide staff during the second-request process and should ensure that procedures are practiced consistently throughout the agencies.

Another issue that requires attention is the reduction of foreign productions and translation requirements. In companies with foreign operations, second requests call for English translations for all responsive documents. At an average cost of \$40 a page word for word (one box is roughly 2,000 pages, thus \$80,000 a box) or \$10 a page for a summary (\$20,000 a box), translation requirements can impose a significant cost on parties with multinational operations.

Over the past three years, however, the FTC has required translation of documents in only five matters. The burden in these cases was reportedly minimal. The FTC typically requests the parties to provide summaries of the documents and then requests full translations of only those documents particularly relevant to the inquiry. In only one investigation in the last three years did the FTC require translation of more than a handful of documents. Likewise, at the DOJ, parties have provided translated documents in only 13 transactions in the last three years. Usually, when parties have asked to provide summaries of documents rather than full translation of all foreign language documents, staff has allowed the parties to do so.<sup>136</sup>

However, the ICPAC hearings testimony stressed that many staff members are unwilling to modify second requests to cut back on translation requirements unless the parties are willing to concede that the relevant geographic market is limited to the United States or North America. Testimony suggests that many staff members operate from the perspective that if they have to look at producers abroad, then every aspect

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<sup>135</sup> Recently introduced legislation, S. 1854, 106<sup>th</sup> Cong. (1999), provides for a ruling by a federal magistrate on whether a second request is unreasonably cumulative or duplicative; whether it imposes a burden or expense that substantially outweighs any likely benefit in conducting a preliminary review; or whether the appealing party is in substantial compliance with the second request. It is questionable whether this is a workable solution. Some suggest that a standard of review would be difficult to apply, that the mechanism could be gamed by the parties, and that it has resource implications for the agencies, which would be required to litigate these issues in court. *See* ICPAC Full Committee Meeting (Nov. 19, 1999), Meeting Minutes. *But see* Testimony of Donald I. Baker, Baker & Miller PLLC, ICPAC Hearings (April 22, 1999), Hearing Transcripts, at 192 (“I think that the real weakness in the U.S. system is the absolute lack of any independent force in the process in terms of determining substantial compliance or any other question. Give me a federal magistrate or somebody who you can go into and say, look, this is ridiculous.”)

<sup>136</sup> Baer June 15, 1999 Letter; Robinson Letter.

of the competitive situation outside the United States is relevant to their investigation. These hearing participants acknowledged that perspective may be appropriate in some cases, but nonetheless contend that foreign operations often are relevant only because the parties are arguing that a price increase in the United States will be defeated by a supply response from foreign producers.<sup>137</sup>

The ICPAC hearings and meetings with antitrust lawyers produced several suggestions to reduce burdensome translation costs where some or all of the company's records are located outside the United States. One approach would permit the parties to produce responsive documents in the original language. The agency would be responsible for employing staff proficient in the relevant language or retaining outside consultants (such as foreign antitrust lawyers) to review the documents and translate only those significant to the issues in the case. Another approach would still leave the translation task to the agencies but impose a higher fixed filing fee where such government translation is required or set a maximum number of pages that a merging party is required to translate, with the government agency having to do the translation beyond that limit.<sup>138</sup> Such a system in which costs of translation are shifted to the agencies or shared with the merging parties is thought to heighten sensitivities to the burdens of translations and encourage a more balanced assessment of when costs should reasonably be incurred.

Given budgetary constraints and the number of foreign languages that are potentially implicated, it is not realistic for the agencies to hire language-proficient staff. Rather, the agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations only of documents relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

### **Multiple Review of Mergers by Antitrust and Sectoral Regulators**

Overlapping responsibilities for merger review in the United States also warrant consideration, in the Advisory Committee's view. A decision by the DOJ or the FTC in a specific transaction does not preclude subsequent or parallel competition reviews, nor does it determine the outcome of such proceedings. Federal and state legislatures and judicial decisions have empowered a wide array of public and private parties to challenge mergers, acquisitions and joint ventures on competition policy grounds. Because shared power may generate inconsistent policy approaches within a single jurisdiction, it can make efforts at global harmonization and cooperation more difficult. In addition, it imposes additional uncertainty as to timing and outcome and further increases transaction costs. The Advisory Committee heard testimony relating to multiple agency review of mergers during its Fall and Spring hearings and at its Advisory Committee

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<sup>137</sup> ABA Int'l Antitrust Law Committee Members Submission, at 2-3.

<sup>138</sup> *Id.*, at 3-4.

meetings on March 17, 1999 and July 14, 1999. The Committee also invited an expert to prepare a paper addressing this issue in the United States.<sup>139</sup>

The majority of Advisory Committee members believe that the overlapping review in the United States is more often than not a defect of the U.S. system and that a more rational or sensible approach would be to give exclusive federal jurisdiction to determine competition policy and the competitive consequences of mergers in federally regulated industries to the DOJ and FTC. Of course, sectoral regulators would continue to be responsible for other public policy considerations that pertain to the regulation of the sector rather than to assessment of proposed mergers from the perspective of competition policy. Other Advisory Committee members agree that the federal antitrust authorities are better positioned to conduct antitrust merger review. These members, however, recommend creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.<sup>140</sup> At a minimum, this approach would mean that the analyses are properly weighted in merger decisions by sectoral or state regulators. Other feasible approaches advocated for the short run would encourage soft convergence strategies as well as greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

This section first reviews in greater detail the competition policy system in the United States in merger review and considers the impact of this multiplicity on transaction costs as well as global harmonization and cooperation efforts. It next discusses several cases that shed light on these concerns and considers possible approaches to reducing costs and achieving domestic policy harmonization. Finally, the section highlights several issues relating to overlapping agency review that deserve further study.

### *The U.S. Competition Policy System in Merger Review*

In the United States, several entities have power to challenge a transaction. The DOJ and FTC share authority to review mergers and formulate competition policy. The agencies use a clearance process,

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<sup>139</sup> Much of the discussion in this section is drawn from the paper prepared for the Advisory Committee by William E. Kovacic, “The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards,” (March 15, 1999) [hereinafter Kovacic Submission] and the discussions and deliberations by Advisory Committee members that followed.

<sup>140</sup> On this point Advisory Committee Member John T. Dunlop adds: The five federal agencies listed in Annex 3-B to this chapter were not asked to state their views on this issue to the Advisory Committee. Moreover, the estimation of potential efficiencies, market consequences and effects on national policies are matters in which these agencies have been charged with legislative responsibilities. I have not objected to the antitrust enforcement agencies stating their analyses and views to these agencies in a case and these agencies being required to consider and to respond to the analyses in decisions on mergers in their responsibility. Perhaps further study would propose different policies among these agencies in their relations to the antitrust enforcement agencies. Advisory Committee Co-Chair Paula Stern concurs.

based primarily on past experience and expertise, to determine which agency will be responsible for reviewing each proposed transaction.

In several industry sectors, public authorities also are vested with responsibility for formulating and implementing merger policy. Shared authority is most often found in industries that previously have been the subject of comprehensive regulation that governs entry, exit, and rate making. Prominent illustrations are described in Annex 3-B.

State attorneys general also enjoy power to review individual transactions on competition policy grounds. Acting under federal or state antitrust laws (or both), individual states may challenge mergers as anticompetitive. States have participated in several investigations with the DOJ and FTC; entered into settlement agreements along with the DOJ or the FTC or in separate consent decrees following joint federal-state investigations; and investigated and obtained consent decrees in transactions in which neither the DOJ nor the FTC participated.<sup>141</sup>

In addition to public enforcement, private parties also have the power to challenge mergers. Competitors, takeover targets, customers, and suppliers of the merging parties all have lodged formal challenges, although Supreme Court decisions place formidable standing hurdles in the path of competitors and takeover targets. Nonetheless, challenges by rivals remain a possibility, as demonstrated by a number of successful efforts by rivals to enjoin transactions.<sup>142</sup>

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<sup>141</sup> Ilene Knable Gotts and Phillip A. Proger, *Hot Topics in Antitrust Review of Transactions*, THE M&A LAWYER, May 1999 [hereinafter Gotts and Proger]; Fox & Fox, CORPORATE ACQUISITIONS AND MERGERS, Chapter 17 at §17.03 ( Bender 1999)[hereinafter Fox & Fox]. The HSR Act, however, does not provide states with any express role in the federal premerger review process or with rights to HSR Act filing information. In 1985 the United States Courts of Appeals for the Second and Fifth Circuits both held that the HSR Act confidentiality provision prohibited the FTC (and, by extension, the DOJ) from granting state antitrust officials access to HSR Act filings and documents generated by the FTC in connection with two separate oil company mergers. See *Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985); *Mattox v. FTC*, 752 F.2d 116 (5<sup>th</sup> Cir. 1985). Partly in reaction to the *Mattox* and *Lieberman* decisions, state attorneys general began seeking alternative ways of obtaining access to premerger filings. The states and the federal antitrust agencies have developed cooperation agreements that promote cooperation in reviewing transactions of common interest.

<sup>142</sup> See Fox & Fox, Chapters 6, 7A, 21. Successful challenges may be attributable, in part, to intervention-oriented substantive standards developed in Supreme Court cases of the 1960s. Although subsequent Supreme Court decisions dealing with nonmerger antitrust issues have cast doubt upon the continued vitality of the merger jurisprudence of the 1960s, the Supreme Court has never repudiated its earlier merger rulings. As there has been no Supreme Court decision involving substantive merger standards since 1975, the older precedents remain fair game for litigants and may constitute a starting point for analysis by the lower courts. Kovacic Submission, at 2-3, 9-10.

No other legal system in the world distributes decisionmaking power for competition policy issues so widely.<sup>143</sup> Still, overlapping competition policy regimes in other countries pose problems.<sup>144</sup> In other countries conflicts arise between multinational regional competition policy regimes and the antitrust laws of individual member states;<sup>145</sup> the operation of national competition regimes and sectoral regulatory frameworks;<sup>146</sup> decisions by national competition authorities and regional competition policy bodies;<sup>147</sup> and national competition authorities who share power to review mergers.<sup>148</sup> These features may hinder the ability of national governments to establish common policies and procedures within their own borders, and as a result, with their foreign counterparts.

### *Impact of Multiplicity*

The Advisory Committee recognizes that Congress has vested sectoral regulators with competition policy oversight and charged these government agencies with concurrent jurisdiction to pursue different (and perhaps conflicting) goals. Nonetheless, the Advisory Committee believes that the costs resulting from this multiplicity must be considered. From an industry participant's perspective, in theory, such costs might include the uncertainty generated when multiple entities possess the authority to review the competitive effects of a transaction or practice, but reach differing conclusions on this issue; the increased transaction costs flowing from the need to defend a proposed transaction before multiple agencies; and the uncertainty created by the agencies' different time frames for review. From the agencies' perspective, agencies suffer when the duplicative expenditure of resources inherent in concurrent jurisdiction creates an inefficient allocation of scarce resources, particularly when the specialized agency is not bound by the recommendations of the competition agencies with respect to an assessment of competitive effects. Further

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<sup>143</sup> See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 295 (1992) (describing decentralization of prosecutorial power under U.S. antitrust laws).

<sup>144</sup> Kovacic Submission, at 25-26.

<sup>145</sup> See, e.g., Testimony of Karel Van Miert, then-European Competition Commissioner, ICPAC Hearings (Nov. 2, 1998), Hearing Transcripts, at 54-55 (testifying to the problem of review of airline alliances in the EU).

<sup>146</sup> In the past two years, Germany has liberalized its postal services and telecommunications sectors and has created a new institution to perform residual regulatory tasks (such as setting access prices for bottleneck facilities). The legislation creating the new independent regulatory body does not clearly define the respective competition policy roles of the German Federal Cartel Office and the independent regulator. This ambiguity has led to disputes between the FCO and the regulator concerning a variety of competition policy issues. Kovacic submission at 25.

<sup>147</sup> See Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 GEO. WASH. J. INT'L L. 1, 8-10 (1997) (describing broad distribution of decisionmaking power among national and regional competition officials in Ukraine).

<sup>148</sup> See Michael G. Cowie & Cesar Costa Alves de Mattos, *Antitrust Review of Mergers, Acquisitions, and Joint Ventures in Brazil*, 67 ANTITRUST L.J. 113 (1999) (describing difficulties that arise from the distribution of antitrust merger oversight authority across three institutions of the national government in Brazil).

inefficiencies (and perhaps bad policy) can be created when one agency has the ultimate authority to make decisions that fall within another agency's area of comparative advantage.<sup>149</sup>

Shared power for making and implementing competition policy also may impede reform efforts designed to achieve substantive harmonization and convergence. The multiplicity of competition policy agents complicates efforts to establish consistent enforcement policies and procedures within a single country. That is, international discussions about procedural and substantive harmonization often assume that individual nations have harmonized such processes and standards within their own borders. For example, when the Advisory Committee speaks of attaining convergence of initial review periods, it tends to assume that the United States has consistent procedures regarding notification and review among the reviewing agencies.

Multiplicity also may impede effective cooperation in individual transactions. This is evident where two or more independent institutions exercise overlapping authority, but no hierarchy of authority makes the decision of one actor binding on the other institutions. The U.S. federal antitrust authorities can cooperate in an investigation with their antitrust counterparts in other jurisdictions and reach a common settlement with the merging parties but must await the decision of sectoral regulators in the same matter. Whereas the U.S. antitrust enforcement agencies have developed close cooperation with a number of its foreign counterparts, there is no effective mechanism by which foreign competition authorities can share information and views with the sectoral regulators in the same way that they share information and views with their antitrust counterparts.<sup>150</sup> In addition, this circumstance may create the perception that the DOJ and the FTC lack the ability to speak authoritatively to foreign governments about a particular transaction or U.S. competition policy in general because their pronouncements do not bind sectoral regulators, who independently exercise policymaking power over a wide range of business activity.

Distributing competition policy power across multiple gatekeepers who can examine (and challenge) specific conduct also may make the grounds for individual decisions less transparent. The multiplicity of reviewing bodies and the use of different standards for judging mergers makes it difficult for foreign firms

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<sup>149</sup> See James F. Rill, et al., *Institutional Responsibilities Affecting Competition in the Telecommunications Industry*, A Practicing Lawyer's Perspective, European University Institute, 1998 EU Competition Workshop, at 24.

<sup>150</sup> For example, the 1991 U.S.-EC Cooperation Agreement only foresees cooperation with the Department of Justice and the Federal Trade Commission (Article 2B of the agreement defines "competition authorities" as meaning: (I) the European Commission and (ii) the Antitrust Division of the DOJ and FTC). It would therefore appear that other federal agencies, for example, the DOT, which has the ultimate discretion to determine whether an application meets the statutory prerequisites for the granting of antitrust immunity, do not constitute a competition authority within the meaning of the agreement. As a consequence, cooperation may be more limited in the review of, for example, global airline alliances. See Reynolds Submission, at 18. Indeed, Fernando Sanchez Ugarte, President of the Federal Competition Commission in Mexico testified at the ICPAC hearings in November that his agency did not have the opportunity to participate as much as it wanted to; first, before the Department of Justice, and secondly, before the Surface Transportation Board in their review of the Union Pacific/Southern Pacific merger. Testimony of Fernando Sanchez Ugarte, President, Federal Competition Commission, ICPAC Hearings (Nov. 2, 1998), Hearings Transcript, at 209-210.

to understand the merger review process. This may have the cumulative effect of decreasing transparency. This possibility is strongest where sectoral regulators, acting under the mandate of broad “public interest” standards, account for competition policy concerns in exercising their jurisdiction over mergers.<sup>151</sup> Sectoral regulators often have authority to take into account social welfare considerations that extend beyond the traditional focus of antitrust analysis. In many instances it may be difficult to determine whether traditional antitrust concerns or social welfare objectives motivated the sectoral regulators’ decision to intervene.<sup>152</sup>

The United States also may have difficulty encouraging foreign governments to cure imperfections in their competition policy rules and procedures unless it first addresses the institutional complexity of the U.S. system.<sup>153</sup>

### *The Magnitude of the Problem*

The Advisory Committee considered several cases that shed light on these concerns. The costs of multiplicity for merger policy are most apparent in industries undergoing the transition from comprehensive public utility regulation to competition. While this summary does not purport to be a comprehensive review of the agencies’ record, experience in the telecommunications sector provides several illustrations.

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<sup>151</sup> Sectoral regulators, such as the FCC, have not issued guidelines indicating how they perform competition policy analysis under a public interest standard, although the Federal Energy Regulatory Commission has done so for mergers in the electric power sector.

<sup>152</sup> An additional concern is that sectoral regulatory agencies also are vulnerable to capture by industry and generally more susceptible to political influence compared with the DOJ. See Statement of Sen. Bob Kerrey (D-Neb), 141 CONG. REC. S8194 (daily ed. June 12, 1995) (“[The FCC is] vulnerable to political pressure—a lot more vulnerable than the Department of Justice”); see also OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAF/CLP (99)8, 10 (June 24, 1999), reprinted in OECD JOURNAL OF COMP. LAW & POLICY, Vol. 1, No. 3 (Sept. 1999) (“When dividing tasks between competition agencies and sector-specific regulators, attention must also be paid to the potential for each type of institution to fall prey to regulatory capture, and problems inherent in subjecting competing firms to different sector-specific regulation”).

<sup>153</sup> Many of these same issues also arise in overlapping state review of mergers. The states have challenged mergers at thresholds more stringent than those applied by federal authorities, have given decisive effect to concentration data, and used their enforcement power to block business restructurings that would reduce employment within their borders. Indeed, National Association of Attorneys General, *Horizontal Merger Guidelines* (1993), reprinted at 4 Trade Reg. Rep. (CCH) ¶13,406, consider non-competition factors, including the need to protect small local businesses. See Kovacic Submission, at 21-23; see also ABA Int’l Antitrust Law Committee Members Submission, at 7-12 (the policies of the National Association of Attorneys General (NAAG) toward mergers are more restrictive than the policies of the federal antitrust agencies). Further, criticism has been levied that states opting out of the federal-state protocol have issued burdensome information requests calling for all documents provided to other states (that is, all HSR material) plus additional requests. See, e.g., Testimony of Phillip A. Proger, Jones, Day, Reavis & Pogue, ICPAC Hearings (April 22, 1999), Hearings Transcript, at 70.

FCC COMMISSIONER STATEMENTS. At least two members of the Federal Communications Commission (FCC) and other public officials have publicly expressed their concern over the seemingly duplicative jurisdiction of the Antitrust Division and the FCC during telecommunications merger reviews.

- C Commissioner Michael Powell, in a separate statement regarding FCC approval of the WorldCom/MCI transaction, stated that the FCC should focus its efforts on areas of its own expertise and strive to eliminate duplication of work with DOJ.<sup>154</sup>
- C Commissioner Harold Furchtgott-Roth also was concerned about the “cumbersome review process” in the WorldCom/MCI matter. “The heroic efforts of our staff notwithstanding, we have little to add or to subtract from the market analyses or the judgment of this other federal agency but a more detailed public record,” he wrote in a separate statement.<sup>155</sup>
- C In a recent op-ed piece in the *Wall Street Journal*, Commissioner Furchtgott-Roth argued that the FCC’s authority over merger review had become too broad and without the necessary limits and standards.<sup>156</sup>
- C Senator Conrad Burns publicly criticized the analysis the FCC has employed as duplicative of the merger analysis performed by the DOJ.<sup>157</sup> This criticism has been made of the Surface Transportation Board (STB) as well.<sup>158</sup>

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<sup>154</sup> Separate Statement of FCC Commissioner Michael Powell Regarding the Application of WorldCom, Inc. and MCI Telecommunications Corp., CC Dkt. No. 97-211, at 4 (Sept. 14, 1998).

<sup>155</sup> Separate Statement of Commissioner Harold Furchtgott-Roth, Regarding Application of WorldCom, Inc. and MCI Communications Corp., CC Dkt No. 97-211, at 1 (Sept. 14, 1998) (also alleging that overlapping review contributes to the lengthiness of the merger review process).

<sup>156</sup> Harold Furchtgott-Roth, *The FCC Racket*, WSJ INTERACTIVE EDITION (Nov. 5, 1999). *But see* Statement of Commissioner Susan Ness, FCC, on Mergers and Consolidations in the Telecommunications Industry before the Committee on the Judiciary, U.S. House of Representatives (June 24, 1998)(While mindful that having both the FCC and DOJ involved in merger review creates a potential for additional costs and delays, Commissioner Ness nonetheless contends that “the FCC and Justice Department can both play constructive roles, avoid unnecessary duplication and delays, build public confidence, and produce better outcomes.”).

<sup>157</sup> *See Sen. Burns Says FCC is Duplicating DOJ Antitrust Enforcement in Radio Sales*, COMMUNICATION DAILY, Feb. 20, 1997.

<sup>158</sup> *See Frank N. Wilner, Belly of the Beast, Blame the Shermans*, ABI/INFORM, Vol. 21, No. 3, at 72 (Summer 1998)[hereinafter Wilner] (the former chief of staff to Vice Chairman of the Surface Transportation Board argued that the competition analysis performed by the STB inappropriately applies noncompetition standards when evaluating mergers).

CASE SPECIFIC EXAMPLES. During the past several years, several instances also have emerged where the regulatory agency did not follow the DOJ's competitive analysis of a transaction.

- C In the Burlington Northern, Inc./Santa Fe Pacific Corp. merger, the Interstate Commerce Commission decision rejected the comments submitted by the Antitrust Division, warning that if the merger proceeded without necessary conditions, competition would be lessened in several markets.<sup>159</sup>
- C In the merger between Union Pacific Corporation and Southern Pacific Rail Corporation, the DOJ argued that the merger should not go forward because it would result in a monopoly in several markets and create a rail duopoly throughout the West. Despite that vigorous opposition, the Surface Transportation Board approved the merger.<sup>160</sup> Criticism has been levied that the STB failed to take into account the view of the DOJ.<sup>161</sup>
- C The Department of Transportation approved an alliance of Delta Airlines, Swissair, Sabena Airlines, and Austrian Airlines despite concerns expressed by the DOJ about competitive effects in four New York city-pair markets.<sup>162</sup>
- C In 1997, the DOJ allowed the merger of Bell Atlantic and NYNEX to proceed without adjustments.<sup>163</sup> The FCC separately reviewed the merger and imposed various competition-related restrictions in reaching a settlement with the parties. Although the FCC's public interest standard includes social welfare considerations, the tone and content of the FCC's opinion allowing the merger subject to conditions suggests that the FCC reached different conclusions than the DOJ concerning possibilities for actual and potential competition between the companies.<sup>164</sup> The FCC's review of recent transactions involving

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<sup>159</sup> 10 I.C.C. 2d 661 (Aug. 16, 1995).

<sup>160</sup> Remarks by Anne K. Bingaman, then-Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Statement on the Surface Transportation Board's Approval of the Union Pacific and Southern Pacific Merger (July 3, 1996).

<sup>161</sup> See Wilner ("[T]he STB needs to give the [DOJ's] opinion no more weight than they give to a handscrawled letter submitted by bitter widow Jones whose husband died in a train wreck").

<sup>162</sup> See *Joint Application of Delta Airlines, Inc., Swissair, Sabena S.A., Sabena Belgian World Airlines, and Austrian Airlines for Approval of and Antitrust Immunity for Alliance Agreements*, Dep't of Transportation Order 96-6-33 (June 14, 1996).

<sup>163</sup> See U.S. Dep't of Justice Press Release, Antitrust Division Statement Regarding Bell Atlantic/NYNEX Merger (Apr. 24, 1997) (announcing decision not to challenge merger).

<sup>164</sup> See *In the Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 1997 FCC LEXIS 4349, at \*20 (Aug. 14, 1997).

AT&T/TCI, Bell Atlantic/GTE, and SBC/Ameritech also has stimulated a debate about the appropriate division of labor between the FCC and the DOJ.<sup>165</sup>

*Possible Approaches to Reducing Costs and Achieving Domestic Policy Harmonization*

Although the evidence on the record was neither exhaustive nor conclusive, Advisory Committee members think overlapping review in the United States is a serious matter warranting reform. In the course of deliberations, the Advisory Committee considered a variety of proposals for achieving consistency in analytical methods and processes within the United States. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers in federally regulated industries to the DOJ and FTC, to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators in merger review, to imposing timetables and deadlines on the merger review processes, to nonlegislated convergence strategies.

Maintaining the status quo also is, of course, an option.<sup>166</sup> Any proposed solution to the problem of overlapping merger review authority must fully take into account the benefits of the current system. Some have suggested that concurrent review deals with the problems of underenforcement.<sup>167</sup> Another benefit is that review by multiple agencies allows more than just competition issues to be taken into account. Although some individuals consider this feature to be a drawback, the status quo does allow sectoral regulators, who may have more experience dealing with certain industries, to play a leading role in the merger review process and include competition policy in the mix of factors considered.

CLARIFYING THE ROLES OF FEDERAL REGULATORS. One path for legislative change is to simplify the merger review process by clarifying the roles of the DOJ, the FTC and the federal sectoral regulators in merger review. One approach for simplification is to make the DOJ and FTC mere advisors to the sectoral regulators for matters in which the antitrust agencies and the sectoral regulators now share power.<sup>168</sup> This, of course, would be weakening the role of the federal antitrust agencies. Alternatively, and

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<sup>165</sup> See Kovacic Submission, at 24.

<sup>166</sup> Rationales offered in support of multiple agencies with overlapping duties, including multiple federal review of mergers, are interagency competition, diversification, and institutional comparative advantage. See Kovacic Submission, at 10-20.

<sup>167</sup> Remarks by Deputy Assistant Attorney General Douglas Melamed, ICPAC Committee Meeting (Mar. 17, 1999), Meeting Minutes at 39-40.

<sup>168</sup> One expert contends that U.S. experience with entrusting federal merger oversight powers exclusively to sectoral regulators has not been edifying. This expert points to noteworthy examples of seemingly failed experiments with this approach, including DOT's review of airline mergers in the 1980s and the Surface Transportation Board's assessment of railroad mergers in the 1990s. "Sectoral regulators have demonstrated a tendency to overlook important competition policy concerns, partly out of limitations on relevant expertise and partly out of institutional perspectives that de-emphasize competition as a factor for evaluation. There is little evidence in modern U.S. regulatory history that supports

more in line with the view of the Advisory Committee, there is much to be said for removing the competition policy oversight duty from the sectoral regulators and vesting that power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies. This approach would align competition policy assessments of mergers involving previously regulated firms with the same standards that apply to firms in other areas. Another benefit of placing competition policy authority solely in the antitrust agencies is greater transparency. Sectoral regulators would be forced to make clear their reliance on noncompetition factors (such as social and economic policies) when reviewing a proposed transaction.

**CLARIFYING THE ROLES OF STATE REGULATORS.** The topic of state merger enforcement has been the subject of extensive debate in the academic literature and public policy circles. Some commentators contend that federal preemption of competition policymaking by state regulators is appropriate for the same reasons mentioned above for preempting competition policy review by federal sectoral regulators. If such preemption does not take place, it is argued, federal antitrust regulators will be unable to establish unified national merger principles unless they accommodate the preferences of state governments. That would not only add a great deal of uncertainty to merger policy but also place continuing pressure on federal officials to resist measures that would narrow the scope of enforcement activity.<sup>169</sup> Others question the need for such preemption at this time. As a recent analysis describes, state attorneys general have not been regularly investigating and challenging mergers where the markets are national or international in scope (as opposed to mergers involving foreign companies that control significant retailing operations in a reviewing state).<sup>170</sup> Rather, industries that function on a separate “local market” basis have attracted the most state scrutiny.<sup>171</sup>

**IMPOSING DISCIPLINE ON REVIEW PROCESSES.** A number of commentators (as well as public officials) have suggested that strict timetables and deadlines for review by sectoral regulators be implemented and rigorously enforced.

**NONLEGISLATED CONVERGENCE STRATEGIES.** As an alternative to those approaches, all of which would require legislation to implement, public officials could pursue a variety of soft convergence strategies to achieve greater consistency and simplicity in competition policy for mergers. These strategies generally involve encouraging the adoption of common analytical methods. Possibilities include creating working groups of representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions, and

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a measure that would dedicate all merger oversight duties at the federal level to the sectoral regulator.” Kovacic Submission, at 28.

<sup>169</sup> *Id.*, at 29; *see also* ABA Int’l Antitrust Law Committee Members Submission, at 7-12.

<sup>170</sup> ABA Int’l Antitrust Law Committee Members Submission, at 10-11.

<sup>171</sup> Gotts and Proger.

encouraging public bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt FTC-DOJ Guidelines). Identifying differences among reviewing bodies in competition policy methodologies would make existing processes and standards more transparent and could stimulate discussion and adjustments.

This type of approach has been undertaken in the past. For example, in 1994, there was an Interagency Task Force on Bank Competition, chaired by the DOJ and composed of the senior staff from the various banking agencies: Office of the Comptroller of the Currency, Office of Thrift Supervision, Federal Reserve Board, Treasury Department, and the Federal Deposit Insurance Corporation. The mandate of the task force was to identify the common principles of bank competition. The task force met monthly to discuss a highly organized agenda. The end result was a set of interagency bank merger screening guidelines, which were issued in July 1994. The task force also produced a bibliography and an overview of the discussions, which addressed similarities and differences in the agencies' approaches to issues, data, and information in the bank merger process. This pilot study might serve as a useful model for other sectoral task forces. It is also an example of what could be done to get the relevant international agencies together to discuss and agree on common principles and issues and review key aspects of theory, application, or enforcement.

In addition, provided *ex parte* rules are not implicated, many of the recommendations to facilitate cooperation and harmonization among antitrust authorities in the multijurisdictional merger review process also could be applied to agencies with concurrent jurisdiction in the domestic context, including enhanced information sharing and an exchange of staffing resources. A great deal of cooperation already takes place today between the DOJ and FTC and the states pursuant to a Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General. As described more fully in Chapter 2, this protocol sets forth a general framework for the conduct of joint federal-state investigations with the goals of maximizing cooperation between enforcement agencies and minimizing the burden on private parties.<sup>172</sup>

To some extent cooperation also occurs between the federal antitrust enforcement agencies and at least one sectoral regulator, the Department of Defense (DOD). The DOJ works closely with the DOD in reviewing defense mergers, with the DOD playing a unique role as the primary (and often only) U.S. consumer for defense industry products. As one DOJ official noted: "After you make a premerger notification filing, you can expect that Antitrust Division staff [and staff from the Office of the Secretary of Defense] will work closely to review it. When the Antitrust Division learns about a transaction we . . . do not terminate that initial review until the Department of Defense signs off on it. When a more detailed investigation is justified, the two agencies jointly investigate it....The cooperation between antitrust and the

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<sup>172</sup> Protocol For Joint Federal/State Merger Investigations (Mar. 11, 1998), *reprinted at*, 6 Trade Reg. Rep. (CCH) ¶13,420.

[Office of the Secretary of Defense] staffs likely assures that the United States government will speak with one voice on defense mergers.”<sup>173</sup>

*Recommendations and Issues for Further Study*

The Advisory Committee is of the view that the federal antitrust authorities are better positioned to conduct antitrust merger review than federal sectoral regulators.<sup>174</sup> The majority of Advisory Committee members recommend removing the competition policy oversight duty from the sectoral regulators and vesting such power exclusively in the federal antitrust agencies. Under such a regime, the findings of the federal antitrust agency on the competition issues would be reported to and binding upon the specialized agencies.<sup>175</sup> At this juncture, however, some Advisory Committee members recommend instead creating a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings. Additional approaches advocated in the short run consist of encouraging soft convergence strategies including greater cooperation between agencies that exercise concurrent jurisdiction over mergers.

With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits challenging international transactions. For example, appropriate cases may be challenges of transactions that the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties granted waivers of confidentiality.

All of the Advisory Committee members agree that several issues relating to overlapping agency review deserve further study. Among these issues are: How does the specialized agency (and state) process differ from the antitrust agency review process? In what ways do the substantive standards of

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<sup>173</sup> Robert Kramer, Chief, Litigation II Section, Antitrust Division, U.S. Department of Justice, Antitrust Considerations in International Defense Mergers, Presentation before the American Institute of Aeronautics and Astronautics, at 9 (May 4, 1999).

<sup>174</sup> According to one expert, an assessment of the institutional capability of sectoral regulators and the federal antitrust agencies to perform competition policy assessments would show that the sector regulators have a great distance to travel before they approximate the skills of the antitrust agencies. In recent years, both the FCC and FERC have attempted to bolster their analytical capability by hiring highly respected competition policy specialists. Each agency has established bureaus that specialize to a large degree in competition policy issues. Yet the antitrust agencies remain decidedly preeminent in their capacity to examine competition policy questions in the communications and energy sectors. Only significant increases in resources and experience would enable the FCC or FERC to match the skills of DOJ and the FTC in this field. See Kovacic Submission, at 24.

<sup>175</sup> Making the federal antitrust agencies’ conclusion about the likely competitive effects of a proposed transaction binding may not be outcome determinative where such assessment is only one of many factors considered in the decisionmaking process.

review differ (for example, what noncompetition factors are taken into account)? Would a unified solution be appropriate or do the agencies present different challenges or different problems? The Advisory Committee's hearings record includes anecdotal discussions of concerns, but it does not exhaustively review the track records of interactions and conflicts between the relevant agencies. The historical record of agency interaction is crucial to understanding the extent of the problem posed by overlapping merger review authority. To develop this record, postmerger audits could be conducted on those matters where the federal competition agencies came to different conclusions or opposed a transaction that was subsequently approved by another regulator. Such a study should also assess the capacity of those agencies, apart from the DOJ and the FTC, that undertake competition analyses to conduct competition review and whether and to what extent these reviews duplicate the efforts of the DOJ and FTC. A related issue is whether the DOJ and the FTC have the necessary expertise to undertake merger analysis across different industries.

Certainly any proposed solution to the problem of overlapping merger review authority must fully take into account the ramifications of costs and benefits of a change to the status quo. For example, does concurrent review deal with problems of underenforcement? Does a competition analysis by the sectoral regulators temper the use of noncompetition related factors? Should competition policy be part of the mix of factors to consider, or by its elimination, would it be diminished?

Additionally, any solution would have to take into account the position of the other reviewing agencies. Toward this end, a dialogue might usefully take place among the DOJ, the FTC, and other state and federal agencies responsible for merger review in order to learn the views of the agencies and state regulators toward the possible approaches.

Further examination of the experience in other jurisdictions with local and national bodies that set competition policy could prove useful as could further study of the work undertaken by international organizations, such as the OECD, with respect to overlapping merger review authority.<sup>176</sup>

## SUMMARY OF RECOMMENDATIONS

### **Casting the Merger Review Net Appropriately: Notification Thresholds**

1. In establishing its premerger notification thresholds, each jurisdiction should seek to screen out mergers that are unlikely to generate appreciable anticompetitive effects within the reviewing jurisdiction.

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<sup>176</sup> See, e.g., OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Relationship between Regulators and Competition Authorities*, DAFFE/CLP (99)8, 10 (June 24, 1999), reprinted in *OECD JOURNAL OF COMP. LAW & POLICY*, Vol. 1, No. 3 (Sept. 1999).

- C This can be accomplished, first, by implementing threshold tests that include an *appreciable nexus to the jurisdiction*, such as transaction-related sales or target assets in the jurisdiction.
  - C Second, jurisdictions should set notification thresholds *only as broadly as necessary* to ensure the reporting of potentially problematic transactions. The Advisory Committee recommends that each jurisdiction consider whether its notification thresholds are too low and require the reporting of too many nonproblematic transactions. Low notification thresholds may result from a failure to adjust notification thresholds to reflect the effects of inflation or increases in the value of companies as measured by stock market valuation. If an indexing mechanism is not employed, the Advisory Committee recommends that jurisdictions review their notification thresholds periodically (at least every four years) to determine whether they should be adjusted.
2. Additional steps that can be taken at this stage to reduce costs for international mergers include establishing *objectively based notification thresholds*.
  3. Jurisdictions also should ensure their merger regimes are transparent in general. Particular efforts to improve transparency should include identifying notification thresholds, clarifying the manner in which those thresholds should be applied, and providing information on how to comply with premerger filing requirements.
  4. To better ensure that potentially anticompetitive transactions do not escape scrutiny under merger review systems, the Advisory Committee recommends that competition authorities should be given the authority to pursue potentially anticompetitive transactions even if they do not satisfy premerger notification thresholds. Although the federal antitrust agencies in the United States already possess this authority, many existing merger regimes authorize regulators to review transactions only when premerger notification requirements are satisfied.
  5. Any efforts to revise notification thresholds also must consider the fact that filing fees currently constitute a significant source of revenue for numerous competition authorities, including the federal antitrust agencies in the United States. Ideally, no competition agency should be dependant on filing fees for its budget, staff salaries, or bonuses. To ensure that these competition authorities will be able to pursue their enforcement missions vigorously, it is imperative to provide agencies with alternative sources of funding to offset the loss of any funds that may result from revision of notification thresholds or “delinking” filing fees.

<b>Reducing Burdens on Transactions that Come within the Merger Review Net</b>
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To ensure that each jurisdiction refrains from unduly burdening those transactions during the course of the merger review process, merger review should be conducted in a two-stage process designed to

enable enforcement agencies to identify and focus on transactions that raise competitive issues while allowing those that present none to proceed expeditiously.

### **Review Periods and Timing**

1. The first stage should occur within one month or 30 days following notification. ICPAC hearings testimony suggests that marginal differences in the initial review periods are inconsequential because they are manageable from a transaction planning standpoint. Reform efforts should focus, therefore, on jurisdictions in which the initial review period substantially exceeds one month or is undefined. Jurisdictions that are unable to terminate investigations before the expiration of the initial or second-stage review periods also should be given the authority to grant early termination (for example, for transactions that raise no substantive issues or in which the parties are willing to resolve concerns through consent decrees or undertakings).
2. To permit merging parties to coordinate multijurisdictional filings in the most efficient manner and to facilitate cooperation, the international community should promote harmonization of rules pertaining to when parties are permitted to file premerger notification. This can be accomplished by eliminating definitive agreement requirements and postexecution filing deadlines and encouraging all jurisdictions to permit filings at any time after the execution of a letter of intent, contract, agreement in principle, or public bid.
3. For transactions that raise serious competitive issues and require a more in-depth review, the Advisory Committee concludes that merger review should not be an open-ended process and that companies derive value from certainty with respect to merger review periods. The Advisory Committee believes more deadlines should be employed to provide greater certainty and that jurisdictions with lengthy review periods should adopt more expedited time frames for review. The Advisory Committee made a number of suggestions in the U.S. context to address these concerns. One possibility is nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction.

### **Notification Forms and Information Requests**

1. To eliminate excessive information requirements, while at the same time ensuring that competition authorities have sufficient information to identify competitively sensitive transactions, the Advisory Committee recommends that initial information requests seek the minimum amount of information necessary to make a preliminary determination of whether a transaction raises competition issues sufficient to warrant further review.
2. Recognizing that there is a trade-off between the amount of information initially provided and the time frame in which clearance is to be granted, mechanisms also should be established to narrow the legal

and factual issues as early as possible. One way to accomplish this goal would be to provide a short form-long form option, leaving it to the notifying parties to choose in the first instance which form to use. The short form would allow the parties to provide less extensive information in transactions that do not raise competitive problems. The long form would require more information concerning the products produced, supplied, or distributed by the parties and the overlapping or vertical markets in which they operate. Alternatively, reviewing authorities may encourage merging parties to voluntarily provide sufficient information to allow the agencies to resolve any potential antitrust issues or engage in a focused inquiry that narrowly targets the antitrust issues.

3. Initial filing requirements in many jurisdictions may be statutorily imposed, and revising these requirements through legislative action may be time consuming. Until reform efforts can be achieved, the Advisory Committee recommends that jurisdictions consider permitting parties to submit an affidavit or letter (in lieu of a notification) explaining why the transaction does not raise competitive concerns.
4. To facilitate quick resolution of potentially problematic transactions deemed worthy of further investigations and focus the issues as soon as possible, there is no substitute for frank information exchange between competition authorities and the parties to a proposed transaction. To that end, each reviewing authority should articulate to the merging parties at the beginning of a second-stage inquiry the competitive concerns that are driving the investigation. This summary could be conveyed orally or in writing. Written summaries should be short and plain statements of the competitive concerns that led the reviewing authority to continue rather than terminate the investigation. Furthermore, this statement should not limit the reviewing authority's discretion to pursue any new theories of competitive harm if new information comes to light.
5. Competition authorities around the world could assess their own performance with respect to those transactions they challenge. One way to do this is an *after-the-fact audit* of merger challenges to examine decisions to prosecute or to refrain from prosecuting specific matters. The audit also could examine the types of information collected during each investigation. The aim of these audits lies in obtaining an objective and frank assessment of performance in previous investigations, thereby laying the groundwork for improvement in future cases. Audits could be conducted internally in more mature merger regimes or by a group of outside observers in newer regimes.
6. There also is much that can be gained from multilateral efforts at soft procedural harmonization of the type undertaken by the OECD. The United States should continue to support OECD efforts to develop a framework for notification, including the development of common definitions. The OECD should continue to focus its efforts on identifying the minimum information necessary as categories of data that may be useful to resolve potentially problematic transactions. As part of this effort, consideration also should be given to ways to reduce unnecessary burden, including translation costs and overly burdensome certification and other procedural requirements.

**Targeted Reform in the United States: Notification Thresholds**

1. The HSR Act already ensures that only transactions with a nexus to the jurisdiction must be notified to the U.S. authorities by providing exemptions from HSR reporting requirements for certain transactions involving non-U.S. companies (“foreign person exemptions”). The foreign person exemptions, however, have not been adjusted for many years. Thus, the Advisory Committee recommends that the FTC review the scope and level of the HSR exemptions for transactions involving foreign persons to ensure that only transactions with an appreciable nexus to the United States must be notified to the U.S. antitrust authorities.
2. The thresholds currently employed by the premerger notification system in the United States deserve careful review. While recognizing that small transactions are not necessarily competitively benign, the Advisory Committee finds that the notification thresholds currently employed in the United States are too low and capture too many lawful transactions. The most straightforward way to decrease the number of required filings, while not materially compromising the agencies’ enforcement mission, is to increase the size-of-transaction threshold for acquisitions of both voting securities and assets. Depending on the base year and deflator used, increasing the threshold commensurate with inflation translates into an HSR threshold of \$33 to \$43 million when measured in 1998 dollars. The majority of Advisory Committee members suggest raising the thresholds within this range. Three members suggest raising the threshold even higher, to \$50 million.
3. Indexing the size-of-transaction threshold to account for future inflation has many benefits, but an automatic indexing mechanism also may produce arbitrary results. If an indexing mechanism is not employed, the Advisory Committee recommends that Congress and the U.S. antitrust agencies review notification thresholds periodically (at least every four years) to determine whether they should be increased.
4. The Advisory Committee believes that, ideally, filing fees should be delinked from funding for the agencies. However, given that filing fees currently provide 100 percent of the U.S. agencies’ budgets, any effort to delink filing fees or raise thresholds must occur in an environment where sufficient funds are assured from other sources. It is critical to the agencies’ enforcement mission that resources are not reduced. This could be accomplished by direct funding from general revenue. If funds are not directly appropriated, this could be accomplished in a variety of ways including increasing the filing fee or creating a sliding scale fee (although the latter alternatives would not accomplish delinking the budget from fees).

**Targeted Reform in the United States: Review Periods and Timing**

1. A consensus exists among Advisory Committee members on the need for certainty in merger review periods and that merger review should be conducted within reasonable time frames. Advisory Committee members are not of a shared view on the appropriate mechanisms for addressing these concerns, however. Some members of the Advisory Committee believe that fixed maximum review periods are necessary to provide certainty and discipline in the merger review process. Most members of the Advisory Committee feel this would be extremely difficult to achieve under the U.S. system and might result in enforcement errors. There also is concern that maximum time periods would effectively turn into standard or minimum review periods. A majority of Advisory Committee members therefore recommend that alternative steps be taken to provide the greater certainty required for effective transaction planning. For example, the agencies could employ nonbinding but notional time frames for second-stage review that vary in relation to the relative complexity of the transaction. For example, the Canadian Competition Bureau has addressed timing issues with “service standard” guidelines: 14 days for non-complex mergers, 10 weeks for complex mergers, and 5 months for very complex mergers. The 5 month review period employed for very complex mergers coincides with the aggregated five-month review period employed by the EC for mergers that are subjected to second-phase investigations.

**Targeted Reform in the United States: Notification Forms and Information Requests**

1. The Advisory Committee encourages the FTC to implement changes to better focus the HSR form. In addition, the Advisory Committee recommends that the agencies formalize their current practices that encourage merging parties voluntarily to provide additional information at the initial filing stage in an effort to resolve potential issues without the need for a second request. One way to formalize the process is to create an optional long form, along the lines of the Canadian short form-long form filing. Another way lies in creating a model voluntary submission list that identifies the categories of data that merging parties usefully may submit in facially problematic cases.
2. Another useful practice that should be formalized is that of permitting the merging parties voluntarily to withdraw and refile the acquiring person’s HSR form (without having to pay another filing fee) in order to give the agencies additional time to resolve the matter without having to issue a second request. This practice has been useful when the reviewing agency has been unable to clear a transaction within the initial 30-day review, despite the voluntary provision of additional information. In appropriate cases of this nature, the agencies should alert parties to the option of withdrawing and refiling the HSR notification. Publishing statistics on the number of successful (and unsuccessful) attempts to avoid a second request by withdrawing and refiling a notification would demonstrate the viability of this option and could alleviate concerns that doing so would only add an additional 30 days to the process.

3. When they issue a second request, the agencies should provide the merging parties (either in writing or orally) with their reasons for not clearing the transaction within the initial review period. An explanation of the substantive concerns prompting the issuance of the second request will facilitate transparency in the merger review process and will expedite the process by further enabling the merging parties to focus on and respond to the agencies' concerns. Further, it will assist parties in understanding that the second request is based on genuine substantive concerns. In designing second requests, moreover, the agencies should tailor their requests for additional information to the issues prompting the need for further review.
4. In 1995 the agencies announced that they had addressed concerns about the second-request process by adopting a model second request. The predominant view of ICPAC hearings participants, among others, however, is that this reform helped reduce burdens only marginally. In attempting to identify the appropriate components of a useful and effective model second request, an after-the-fact audit of merger challenges could be undertaken. Such an audit could consider whether the agencies are requesting the right types of information and whether this information subsequently was used at trial (or if discovery tools are sufficient). The answers to these questions might enable the agencies to revise the model second request to reduce compliance burdens on businesses.
5. Merging parties and agency staff frequently are able to negotiate modifications to the scope of second requests. The level of willingness to engage in productive negotiations of this nature appears to vary among agency staff members and counsel for merging parties, and modification requests are sometimes not resolved in a timely fashion. In an attempt to institutionalize a willingness to engage in productive modification negotiations, the Advisory Committee recommends that the agencies impress on agency staff the importance of being open to negotiating modifications to the scope of requests and to do so in a timely fashion. Success in this endeavor also requires a willingness to cooperate on the part of merging parties and their advisors.
6. When modification negotiations break down, parties should be encouraged to use the appeals process, which currently is used hardly at all. Concerns raised to the Advisory Committee about the appeals process include potential stigma from using it, the possible delay engendered by the process, and the perception that the decisionmaker is likely to side with the agency. To this end, the Advisory Committee recommends that the agencies implement measures to make the appeals procedure more attractive to merging parties, including making the appeals process more expeditious, its outcome more transparent, and actively encouraging merging parties to use the process as well as to involve direct supervisory officials in the modification negotiation process, when necessary.
7. The Advisory Committee also considered ways to reduce foreign productions and translation requirements. The agencies should continue their current practice of permitting parties, in appropriate cases, to provide summaries of documents and produce full translations of only those documents the

agencies deem particular relevant to the inquiry. However, the parties should not as a matter of course be required to forgo a defensible market definition in order to take advantage of this practice. The Advisory Committee recommends that in appropriate cases, the agencies consider whether the selection of the specifications that apply to foreign offices could be limited to those that are directly relevant to the geographic market or that seek documents that pertain to the specific competitive concern at issue.

### **Targeted Reform in the United States: Multiple Review of Mergers**

1. Shared power has the potential to generate inconsistent policy approaches within a single jurisdiction. As a result, it can make global harmonization efforts and cross-border cooperation more difficult. In addition, it imposes heightened uncertainty as to timing and outcome and further increases transaction costs. In its deliberations, the Advisory Committee identified a number of possible policy approaches to address these issues. These proposals ranged from granting exclusive federal jurisdiction to determine competitive consequences of mergers to the DOJ and FTC to clarifying the roles of the DOJ, the FTC, state, and federal sectoral regulators, to imposing timetables and deadlines on the merger review process, to non-legislated convergence strategies.
2. The Advisory Committee believes that the federal antitrust authorities are best positioned to conduct antitrust merger review. The majority of the Advisory Committee would remove competition policy oversight from the sectoral regulators and vest it exclusively with the federal antitrust enforcement agencies. At this juncture, other members advocate the creation of a presumption in favor of the analyses undertaken by the federal antitrust enforcement agencies in parallel or subsequent proceedings.
3. With respect to overlapping state review, the Advisory Committee encourages the state attorneys general to resist using the antitrust laws to pursue noncompetition objectives. Further, the Advisory Committee recommends that the federal antitrust enforcement agencies file an amicus curiae brief in state court in select private suits. For example, appropriate cases may be challenges to transactions the DOJ or FTC has either cleared or settled where there has been significant cross-border cooperation or the parties agreed to waive confidentiality.
4. Other feasible approaches in the short run consist of soft convergence strategies and greater cooperation between agencies exercising concurrent jurisdiction over mergers to encourage the adoption of common analytical methods. Possibilities include creating working groups or representatives of public institutions that review mergers, holding conferences at which representatives of all private and public sector constituencies address policy consistency questions and encouraging reviewing bodies to issue guidelines that delineate their enforcement intentions (or preferably, adopt the DOJ/FTC Horizontal Merger Guidelines).

5. All Advisory Committee members agree that a number of issues relating to overlapping agency review deserve further study. Further studies should include analyzing the relationship among the DOJ, the FTC, and other federal and state regulators; identifying the differences in review processes with respect to both substantive approaches and procedure; assessing the expertise of the federal antitrust agencies to undertake merger analyses in regulated industries on the one hand, and the capacity of federal sectoral and state regulators to conduct antitrust analyses on the other; assessing the ramifications of a change in the status quo; and gathering the views of the reviewing agencies.