This article first appeared in the *October/November 2001* edition of ***Global Competetion Review***

Best Practices for the Review of International Mergers: a discussion draft*

By ***Janet L McDavid*** of Hogan & Hartson, ***Phillip A Proger*** of Jones Day Reavis & Pogue, ***Michael J Reynolds*** of Allen & Overy and ***J William Rowley QC*** and ***A Neil Campbell*** of McMillan Binch

Objectives, context and principles

The objective of the Best Practices for the Review of International Mergers set out in this article is to promote laws, enforcement practices and actions by merging parties which improve merger review processes while recognising the legitimate interest of all jurisdictions in examining transactions that may have effects on competition within their borders pursuant to their own substantive rules. The adoption of best practices in the design and operation of merger review regimes, as well as by merging parties, should increase the effectiveness as well as significantly reduce the public and private time and cost of multi-jurisdictional merger reviews.

Markets, transactions and merger reviews are globalising at a rapid pace. In 1990, about 10 countries had serious competition laws and enforcement systems in place to deal with mergers. Today at least 60-70 industrialised and developing countries assert such jurisdiction and another 20 have laws in the pipeline. As a result, the number of mergers requiring filings in multiple jurisdictions has increased exponentially. It is now common for the parties to a large international transaction to deal with filing requirements in 20, 30, 40 or more jurisdictions. Many competition law agencies are spending an increasing proportion of their limited resources reviewing trans-border mergers.

Against this backdrop, a consensus has begun to emerge in business, legal and government circles that efforts should be made to increase the effectiveness and efficiency of international merger review processes. The multiplicity of divergent procedural requirements present serious challenges for both private parties and competition agencies. The focus on process-oriented best practices is not intended to detract from efforts to examine substantive issues regardless of substantive law differences or similarities. Most of the procedural differences are not necessitated by substantive elements of particular merger regimes.

Concerns about merger review processes were recognised in the Report of the International Competition Policy Advisory Committee to the US Department of Justice ('the ICPAC Report') in February 2000. It also recommended the formation of a 'Global Competition Initiative' to foster dialogue directed toward greater convergence of competition law and analysis, as well as a shared competition culture. There have been widespread suggestions that merger review process convergence should be a priority subject for what is now being referred to as the 'Global Competition Forum' or 'Global Competition Network'.

In this context, a group of international businesses that have had broad experience with the merger review processes of various jurisdictions has begun an effort to develop concrete, constructive and balanced proposals for improving merger review processes for all stakeholders. The group has asked a project team comprising competition law practitioners from three major jurisdictions to prepare this draft list of Best Practices for the Review of International Mergers, and ultimately to consider methodologies for achieving more commonality in filings.

These best practices are intended to provide a model rather than a formal code. Each on its own would offer incremental benefits and collectively they would also provide a stepping stone towards a common form filing system. It is recognised that no jurisdiction and few if any firms currently meet all the best practices proposed for international merger reviews. In both jurisdictions with well-established merger regimes and those which are new to the field it is hoped that laws, regulations, agency policies and merging parties' practices will evolve towards the best practices wherever possible. Certain best practices may be difficult to achieve in the current legal and political context in individual jurisdictions. Similarly, it is recognised that in particular cases (eg, those that are moving towards adversarial dispute resolution), the best practices recommended for agencies and merging parties may not always be followed in full. However, it would be desirable for both merging parties and their counsel, and competition agencies, to adopt the best practices as their primary mode of operation.

The best practices are based on the following fundamental principles:

- the sovereignty of each jurisdiction to apply its own laws to mergers which have effects in its market and respect for differences resulting from domestic legal systems or other local issues including those particularly applicable in developing countries;
- transparency of merger review regimes;
- non-discrimination based on domestic versus foreign status ('national treatment');
- balance between the fairness, due process and cost interests of private parties and the public interest in the ability of competition agencies to conduct effective and efficient merger reviews; and
- inter-agency coordination in respect of issues with cross-border implications.

It is hoped that this preliminary draft will stimulate and advance the discussion of merger review processes in the international competition policy community. During the autumn of 2001, the draft will be presented to various competition law agencies as well as institutions such as the OECD, UNCTAD and the WTO, circulated in the multinational business community and made available at international competition law conferences. Comments would be welcomed and can be directed to any member of the project team.

Best practices for the design of merger review regimes

Pre-merger notification thresholds

Jurisdictional nexus - In order to ensure that there is a meaningful jurisdictional connection to justify pre-notification and

review of a transaction, threshold tests should require that the merging parties have a minimum level of business activity as measured by revenue (arguably the most relevant measure) and/or assets (or some other activity measure drawn from standard financial statements) within a particular jurisdiction. (This jurisdictional nexus approach would not preclude use of ancillary thresholds based on worldwide activity of the parties as an additional prerequisite, but international revenues or assets should not be sufficient to trigger pre-merger notification in the absence of a material level of local revenues or assets.)

Overlapping presence - Transactions should not be pre-notifiable unless at least two parties have some local presence in the jurisdiction. Substantive competition concerns are substantially less likely in a jurisdiction where only one or neither of the parties to a merger has local operations.

Relevant affiliates - Thresholds should be structured to focus on the entities or businesses which will be linked by the merger. For asset or share acquisitions, the affiliates of the purchaser may be relevant, but activities of businesses or affiliates of the vendor which are not part of the transaction have no relevance to the analysis and should not be included in pre-merger notification calculations.

Certainty - Market share (or other judgment-based) tests should not be used as the basis for pre-merger notification thresholds because they require up-front analyses of product and geographic markets which are time-consuming and uncertain.

Financial amounts - Thresholds should be expressed in local currency values (not as a cross-reference to other economic measures such as a multiple of the minimum monthly wage) and should be updated periodically if inflation is significant.

Filing pre-requisites, deadlines and fees

Pre-requisites - Execution of a definitive legal agreement should not be a prerequisite to the submission of a filing or an agency's jurisdiction to begin a merger review. There should be no impediment to parties submitting a pre-merger notification filing in respect of a proposed transaction if they have reached the stage of an agreement in principle or letter of intent.

Deadlines - Mandatory filing deadlines create problems for both the agency and merging parties. No-close waiting periods are preferable to filing deadlines. This places responsibility on the merging parties to make filings far enough in advance to ensure that waiting periods expire before the target closing date rather than requiring a filing to be made within an arbitrary time period that may be difficult to achieve in the context of a large multi-jurisdictional transaction. (If a jurisdiction chooses to maintain a mandatory filing deadline, the following standards should be adhered to: (i) the trigger event should be clearly determinable and should be no earlier than the execution of a binding legal agreement to complete the merger transaction; (ii) for international transactions, the filing deadline should be no shorter than 4-6 weeks after the triggering event in order to allow merging parties to deal with the numerous jurisdictions where filings potentially may be required; (iii) the agency should have the ability and willingness to extend the filing deadline where merging parties can demonstrate that there will be no prejudice to the agency having an adequate opportunity to conduct its review; and (iv) penalties imposed for late filings should be reasonable having regard to the transaction context and timing and any lack of certainty or transparency that may exist in the filing rules.)

Fees - Filing fees should be discouraged. Since the primary objective of merger review is to maintain competitive prices and product offerings for customers, the cost of agency review processes is appropriately borne by the public treasury. (If filing fees are levied, they should be used to ensure and enhance a competent and timely review service. They should not be used as a general source of tax revenue.)

Filing requirements

Minimisation of unnecessary burdens - Filing requirements should be designed to avoid excessive burdens while providing agencies with relevant information to facilitate expeditious merger reviews. Two-stage review systems, short form/long form filings or other mechanisms should be considered to differentiate between non-controversial and competitively sensitive transactions. Jurisdictions should also explore opportunities for convergence towards common or similar types of filing requirements to the extent feasible having regard to the substantive provisions of their domestic merger regimes.

Non-controversial transactions - In order to avoid excessive compliance burdens for the majority of transactions which do not raise serious competition concerns, a short and focused initial filing requirement should be available to merging parties. Such a filing should be limited to objective information which does not require substantive legal or economic analysis to be undertaken (eg, lists of products or lines of business, but not definition of relevant competition law markets or market shares).

Competitively sensitive transactions - For those transactions which raise significant issues, the reviewing agency should have the ability to obtain a more comprehensive filing or other additional information including relevant documents and data. The information categories should be defined by statute or regulation as much as possible rather than being left to case-by-case discretion. The agency should also be prepared to articulate the specific issues that it intends to examine in greater detail at the time the additional filing or information is requested.

Irrelevant information - Merging parties should have the option of declining to provide information otherwise required in a filing if they explain and certify under oath why it is clearly not relevant to any substantive competition issues that may arise from their proposed transaction (eg, information about businesses or products which have no horizontal or vertical relationship to the activities of the other merging party).

Timing

Time limits - Mergers are almost always time-sensitive. Transactions should be allowed to proceed unless blocked or challenged within reasonable statutory waiting periods or time limits:

- for the vast majority of transactions that do not raise serious concerns, a 30-day period after a modest initial filing is an appropriate maximum time frame; and
- for transactions which raise serious competition concerns, an additional four-five months of review which includes an in-depth filing or other information requirements would be a desirable maximum time frame.

Transaction timelines - Where possible having regard to cooperation by merging parties and resource levels, agencies should attempt to complete merger reviews prior to reasonable transaction timelines even if they are shorter than the time limits applicable to the review process.

Stopping the clock - Merging parties should have the option of providing agencies with an extension of time limits or waiting periods if additional time is necessary to complete a review. However, agencies should not employ leverage to obtain extensions.

Early terminations - Enforcement agencies should have the power to grant early terminations of waiting periods or approvals/clearances in advance of statutory time limits. They should be prepared to exercise the discretion to do so as soon as it is clear that there is no basis for challenging or blocking a transaction in their particular jurisdiction.

Confidentiality

Statutory protections - All non-public information obtained from merging parties or other marketplace participants should be subject to comprehensive statutory confidentiality protections. The only exceptions should be: disclosure which is genuinely necessary to allow a competition law agency to discharge its merger review mandate effectively (eg, to litigate a case before a court or other adjudicative tribunal); disclosure to other competition agencies pursuant to a waiver from the party providing the information or to intergovernmental treaties, agreements or protocols where comparable confidentiality protections exist; and disclosure which is required to provide merging parties with adequate due process, rights of defence/procedural fairness prior to adverse decisions being made. Non-confidential summaries, protective orders or similar mechanisms should be used where practical to minimise the amount and impact of commercially sensitive information being disclosed.

Marketplace contacts - Enforcement agencies should be prepared to defer marketplace contacts until a transaction becomes public, provided that there is enough time between public announcement and closing of the transaction for such contacts to be made and the review process to be completed.

Transparency

Competition-related decision-making criteria - Merger reviews should be based on criteria which are clearly identified, consistently applied and related to competition rather than broader political considerations. (If a jurisdiction chooses to maintain a broader 'public interest' or similar test that extends beyond competition-related factors, the additional decision-making criteria and their relationship to the competition-related analysis should be set out clearly in statutes, regulations or official policy statements. Where possible, such decision-making should be undertaken outside the competition agency.)

Publication of rules and policies - All statutes, regulations and agency policies related to pre-merger notification (particularly thresholds, filing requirements and time limits) and merger review (eg, relevant analytical factors, agency guidelines, etc), as well as any written governmental cooperation agreements, should be published and should be available from the domestic agency including electronically on an internet website. Material changes in agency policies, practices and procedures should be communicated promptly. In addition to publication in the local language, translations into other major languages (eg, English, French, German, Spanish) should be considered for key materials such as filing thresholds.

Publication of decisions - Decisions by competition law agencies, tribunals or courts in any case where a merger is blocked or subject to a remedy, and also in significant cases where mergers have been allowed to proceed without challenge or remedy, should be published (with appropriate protection of genuinely confidential information) and should be available from the domestic agency including electronically on an internet website.

Fairness of review processes

Right to be heard - While domestic legal procedures will vary, all merger review systems should employ procedural safeguards which ensure that interested third parties have an opportunity to provide input to the enforcement agency and that merging parties have a meaningful opportunity to respond to issues or concerns raised in respect of a transaction.

Appeals - Agency, tribunal and court decisions in merger cases should be subject to an appeal process or judicial review which is impartial and as expeditious as possible.

Non-discrimination - Foreign-owned firms should be treated no less favourably than domestically-owned firms in all aspects of merger review processes including pre-notification thresholds, (this 'national treatment' protection would not preclude a jurisdiction from employing higher thresholds for cross-border transactions relative to domestic transactions if desired), filing rules, timing, confidentiality/transparency, rights to be heard, appeals and substantive decision-making criteria.

Best practices for merger review agencies

Resources - Competition law agencies should have sufficient financial resources and trained legal, economic and other specialist staff to review on a timely basis the level of transactions resulting from their pre-notification thresholds.

Pre-filing guidance - Agency staff should be willing and available to meet with parties contemplating a merger on a confidential basis to discuss substantive and procedural issues that would arise if a transaction proceeded. Agencies should also be prepared to review filings in draft where requested to do so by the parties.

Communication - Agency staff should communicate openly and candidly regarding areas or issues of potential concern so as to enable merging parties to respond.

Translation of documents - Agencies

should be prepared to accept summaries or other methods of reducing the burden of document translations unless and until a merger investigation appears to indicate the need for compilation of comprehensive formal evidence.

Inter-agency coordination - Agencies should identify as early as possible any issues of common interest where coordination is likely to expedite or otherwise benefit their review processes. (Where inter-agency coordination is occurring, it would be desirable for merging parties to be made aware of the areas of common interest so they can respond more effectively (except where one or more review processes are likely to be prejudiced by such disclosure).) Useful types of coordination may include:

- prompt formal notifications and consultations where applicable under bilateral agreements or the OECD Recommendation Concerning Cooperation Between Member States On Anti-Competitive Practices Affecting International Trade;
- informal communications between agency staff subject to compliance with relevant confidentiality rules; and
- collaboration on information requests related to issues of common interest in order to reduce burdens for responding parties while facilitating parallel types of analysis in each jurisdiction.

Confidentiality waivers - Where agencies in two or more jurisdictions identify a possible cross-border geographic market or other issues where collaboration would be relevant, they should consider whether confidentiality waivers from the merging parties would facilitate more effective and efficient reviews. However, there should be no actual or threatened discrimination (eg, slowdown of an investigation) against merging parties who decline such a request for legitimate reasons.

Legal privileges - All legal privileges available to private parties and to competition law agencies in both the sending and receiving jurisdiction should apply when information is exchanged between agencies.

Predictability - Agencies should ensure that enforcement guidelines or policies and precedents from relevant prior cases are applied consistently to all merger transactions.

Remedies - In cases where competition concerns exist, an agency should be prepared to discuss with the merging parties and other affected agencies any cross-border aspects or implications of remedies being considered in their jurisdiction.

Awaiting decisions by other agencies - In the absence of substantive or remedial issues requiring inter-agency collaboration, an agency should not delay its decision once an assessment is completed simply to wait for other agencies whose reviews are continuing.

Peer review - Competition agencies should invite periodic peer reviews of their merger review activities.

Best practices for merging parties

Timing

Cooperation - Merging parties and their advisors should recognise that competition agencies have a legitimate interest in examining the competitive effects of transactions in their local jurisdictions and should approach the review process on a cooperative basis, including prompt and thorough responses to questions and information requests from agency staff.

Communications - Merging parties and their advisors should be prepared to communicate openly and candidly with agencies in order to promote timely merger reviews.

Identification of relevant jurisdictions - To the extent practicable prior to announcement of a transaction, merging parties should attempt to identify the jurisdictions where filings may be required and those where major substantive issues may exist. The list of jurisdictions where filings are required should be made available upon request to each reviewing agency.

Pre-filing contacts - Merging parties should consider contacting competition agencies on a confidential basis regarding substantive, procedural or timing issues which could benefit from discussion with agency staff in advance of a formal pre-notification filing.

Timely submission of filings - Merging parties should retain local counsel, confirm whether pre-notification filings are required and submit such filings promptly after the announcement of the transaction in order to allow reviewing agencies adequate time to examine the effects of the transaction in their jurisdiction.

Voluntary submissions - Merging parties should voluntarily provide agencies with an overview of the competition issues arising in a transaction particularly when seeking to have review timing expedited or when the issues are complex.

Status reports - Merging parties should respond promptly and candidly to requests from agencies regarding transaction timing and the status of review processes in other jurisdictions.

Inter-agency cooperation - Merging parties should be receptive to agency efforts to coordinate and collaborate where issues of common interest exist (eg, market definitions, remedies with cross-border implications, etc.)

Confidentiality waivers - In jurisdictions which provide comprehensive protection for confidential business information (including from other governmental agencies, state enterprises and private plaintiffs, as well as the merging parties' customers, suppliers and competitors), merging parties should be prepared to grant waivers to allow inter-agency information exchanges in areas where the agencies have indicated that collaboration could increase the effectiveness and efficiency of their merger reviews.

Agency decisions - Merging parties should not attempt to use a clearance decision by one agency as leverage in respect of ongoing reviews by agencies in other jurisdictions.

** This article is based on a draft discussion paper presented on September 21, 2001 at the IBA's Fifth Annual Competition Conference in Fiesole, Italy.*